BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Cancellation of the Certificate of Convenience and Necessity Originally Approved in File No. EA-2005-0180 and the LTS Rate Schedule	))))	**File No. ED-2019-0309**

STAFF RECOMMENDATION AND RESPONSE TO CONSUMERS' MOTION FOR HEARING

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through Staff Counsel's Office, and responds to the April 12, 2019, Order Directing Notice, Establishing Time To Intervene, And Directing Staff Recommendation ("Order") ordering Staff to file a recommendation regarding Ameren Missouri's Application no later than June 12, 2019 and the June 5, 2019 Motion For Hearing ("Motion") of the Office of the Public Counsel ("OPC"), Missouri Industrial Energy Consumers ("MIEC") and the Midwest Energy Consumers Group ("MECG") (collectively referred to as the "Consumers"). On June 10, 2019, Staff filed a Motion For Additional Time To File Staff Recommendation to June 17, 2019 and on June 11, 2019, the Commission issued Order Extending Time to File Staff Recommendation. In response to said Order and Motion For Hearing, Staff states as follows respecting its recommendation that the Commission cancel the Certificate of Convenience and Necessity ("CCN") and replace the large transmission service ("LTS") rate tariff schedule and related tariff schedules, and grant a waiver of the sixty (60) day notice requirement of 4 CSR 240-4.017(1):

1. On April 12, 2019, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") filed an Application requesting that the Commission (a) cancel the CCN granted to Ameren Missouri in 2005 applicable to the property formerly occupied by the aluminum smelter owned by Noranda Aluminum, Inc. ("Noranda") and now occupied

by the aluminum smelter owned by Magnitude 7 Metals, LLC ("M7M"), (b) cancel the LTS rate schedule originally applicable to the property formerly occupied by the aluminum smelter owned by Noranda and now occupied by the aluminum smelter owned by M7M, and (c) grant a waiver of the sixty (60) day notice requirement of 4 CSR 240-4.017(1). The request to cancel the LTS rate schedule appears in the 2019 Application in (a) the caption of the case, page 1, (b) paragraph 17, page 5, (c) paragraph 20, page 6, and (d) the **WHEREFORE** paragraph, pages 6-7, where the individual tariff sheets affected are identified, including tariff sheets containing references in the table of contents and the listing of the area of focus as part of Ameren Missouri's service territory.[1]

2. On December 20, 2004, Union Electric Company d/b/a AmerenUE ("AmerenUE")[2] filed in Case No. EA-2005-0180[3] an Application for a CCN, pursuant to Section 393.170, RSMo. 2000, 4 CSR 240-2.060(1) and 4 CSR 240-3.105 for an area consisting of approximately 345 acres, which was the area encompassing Noranda's premises. AmerenUE's 2004 Application in Case No. EA-2005-0180 noted in paragraph

[1] Ameren Missouri's July 23, 2018 Notice Of Case Filing in File No. ED-2019-0017 states that it will file an application to cancel the 2005 CCN and LTS rate schedule explaining that it no longer serves the premises located within the area covered by the 2005 CCN and no customer qualifies for the LTS rate schedule. Ameren Missouri relates in its July 23, 2018 filing that it has had no communications with the Office of the Commission (as defined in 4 CSR 240-4.015(10)) respecting that filing during the 90 days prior to filing said Notice. Since Ameren Missouri took no further action within 180 days of initiating File No. ED-2018-0017, the Commission closed the case/File No. ED-2019-0017 on January 23, 2019, pursuant to CSR 240-4.017(1). In its April 12, 2019 Application, paragraph 20, page 6, Ameren Missouri explains that due to unanticipated delays in completing all documentation needed to support the July 23, 2018 filing, the filing of an application was not made within the 180-day effective period of the July 23, 2018 Notice.

[2] Some orders and pleadings referred to herein use Ameren Missouri's earlier name "AmerenUE" or "UE" before its change to Ameren Missouri. The instant Staff pleading will use the name of the entity at the time of the event or activity.

[3] *Re Union Electric Company d/b/a AmerenUE ("AmerenUE")*, 13 Mo.P.S.C.3d 40, Case No. EO-2005-0180, Order Approving Stipulation And Agreement, (March 10, 2005). Unanimous Stipulation And Agreement filed on February 24, 2005 of the Missouri Energy Group ("MEG"), Missouri Industrial Energy Consumers ("MIEC"), Missouri Joint Municipal Electric Utility Commission ("MJMEUC"), Noranda Aluminum, Inc., ("Noranda"), Office of the Public Counsel ("OPC") and Staff.

14, page 7, the adoption of Section 91.026 RSMo. into law in 2003 granted qualifying aluminum smelting operations (Noranda qualified as such at that time) unique rights, the right to choose the supplier from whom it would obtain electric power and delivery services.

3. AmerenUE explained in its 2004 Application in paragraph 6, page 3 that Noranda's then current electric supply arrangements expired May 31, 2005. Prior to June I, 2003, Noranda received its electric supply from plants operated by Associated Electric Cooperative, Inc. ("AECI")[4] under contracts with AECI and the City of New Madrid. The City of New Madrid has a municipal utility and there is a coal-fired New Madid plant owned in part by the City of New Madrid and operated by AECI. From June 1, 2003 to May 31, 2005, Noranda was served by Brascan Energy Marketing, Inc. a power marketer and an affiliate of Noranda.[5] Noranda requested that AmerenUE supply it with electrical service to meet Noranda's electric power and energy needs for a minimum term of fifteen (15) years commencing June 1, 2005. AmerenUE's filing further stated in paragraph 6, page 3 that since the Noranda aluminum smelting plant facility was not in AmerenUE's service territory: "Therefore, it is necessary for AmerenUE to obtain a certificate of public convenience and necessity for this area."

4. AmerenUE explained in paragraph 7, page 3 that Noranda would take service from AmerenUE from a new Missouri LTS tariff which would have the same rates, terms, and conditions as AmerenUE's existing Missouri large primary service tariff ("LPS")

[4] AECI is a wholesale power supply generation and transmission (and support services) cooperative based in Springfield, MO.

[5] Direct Testimony of George Swogger, Noranda's Manager – Energy Procurement, Exhibit No. 200, pp. 9-10, File No. EA-2005-0180.

except the LTS tariff was designed to reflect (a) there are no AmerenUE distribution facilities and distribution costs to serve Noranda and (b) there are energy line losses on the third-party AECI transmission system to be utilized to deliver the energy to be sold to Noranda. The LTS tariff provided that Noranda would be responsible for any transmission costs or charges that would not otherwise be borne by AmerenUE's bundled rate customers. AmerenUE requested that the Commission approve the LTS tariff in addition to its request for a CCN.

5. AmerenUE stated in paragraph 11, page 5 of the 2004 Application that there are no residents or landowners, other than Noranda within the area sought to be certificated and stated in paragraph 12, pages 5-6, "there is no construction involved with respect to the proposed service to Noranda; there is only one customer in the proposed service area, Noranda, and the rates and charges shall be set pursuant to the LTS tariff that would currently be applicable only in the proposed service area for this one customer."

6. On March 10, 2005, the Commission issued an Order Approving Stipulation And Agreement in which it granted a CCN to AmerenUE for an expansion of its service area in New Madrid County for the purpose of providing LTS service to Noranda and AmerenUE was directed to file proposed tariff sheets to implement the LTS tariff described in the Stipulation And Agreement. The parties had agreed upon an LTS tariff which was modified in certain respects from the LTS rate schedule which had been filed when the EA-2005-0180 case was initiated. The Commission's Order Approving Stipulation And Agreement noted on page 7 that among the provisions from the original LTS Tariff which were continued in the revised LTS Tariff were the fifteen-year term, the

five-year termination notice, the annual renewal provisions and the special credit provisions. Regarding any asserted scope of Section 91.026 respecting the need for a CCN, Staff would note the following language on page 6 of the Commission's March 10, 2005, Order Approving Stipulation And Agreement:

> All of the parties except the Public Counsel took the position that UE and Noranda could proceed under either Section 91.026, RSMo Supp. 2004, or Section 393.170.3, RSMo 2000, as they may elect. Public Counsel originally asserted that the parties may only proceed under Section 91.026, RSMo Supp. 2004, but dropped his opposition to the certificate prior to the hearing on February 22. The parties now unanimously agree that the Commission should grant the requested certificate.

7. In its Report And Order entered in File No. ER-2014-0258 on April 29, 2015, the Commission ruled on a joint position of parties considered a Nonunanimous Stipulation And Agreement that designed a further-discounted alternative to the LTS rate tariff, the Industrial Aluminum Smelter ("IAS") rate, that was proposed to remain in place for ten years. The joint position had started as a Nonunanimous Stipulation And Agreement, but several parties filed objections to the Nonunanimous Stipulation And Agreement. The Commission noted that the joint position of the parties to the Nonunanimous Stipulation And Agreement can be approved by it as a joint position if it found that the joint position was supported by competent and substantial evidence. *Re Union Electric Co., d/b/a Ameren Missouri ("Ameren Missouri")*, File No. ER-2014-0258, Report And Order, Slip Opinion, page 120 (April 29, 2015). The Commission in approving the joint position, in part, but creating the new IAS rate class IAS, stated, in part, as follows:

> Since the Commission cannot, and will not, approve the joint position in its entirety, it will need to explain in detail the rate that will be established for service to Noranda:

> 1. For a period of three years, a new class of Ameren Missouri electric service ratepayer is authorized for Industrial Aluminum Smelters (IAS).
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> 2. The existing tariff and rates for the LTS class will remain in effect and will be updated in this and future rate cases. If Noranda is not willing to accept the terms of service for the IAS class, or if it violates the conditions set forth in this order, it shall revert to the LTS class.
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> * * * *
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> 7. The IAS class may retain its existence and rate after the expiration of the three-year term until such time as the Commission establishes a new rate in a general rate proceeding.

Id. at 133-34.

8. Ameren Missouri's next rate increase case, File No. ER 2016-0279, was settled by a Unanimous Stipulation And Agreement filed with the Commission on February 23, 2017. The Commission issued an Order Approving Unanimous Stipulation And Agreement on March 8, 2017. The Unanimous Stipulation And Agreement included on page 9, a Section 4.C. Industrial Aluminum Smelter/Large Transmission Service Rates. In Section 4.C., the signatories agreed that the IAS rate schedule established by the Commission's Report And Order in in File No. ER-2014-0258 should be eliminated and that the New Madrid aluminum smelter should no longer qualify as a LTS customer, meaning its current rate options would be either as a Small Primary Service or Large Primary Service customer. Changes to the LTS rate schedules billing adjustments for various riders were also specified in Section 4.C. Ordered item "4." In the Commission's March 8, 2017, Order Approving Unanimous Stipulation And Agreement directed, "The Industrial Aluminum Smelter (IAS) rate schedule shall be eliminated."

9. In its Application filed April 12, 2019, Ameren Missouri identified in detail at paragraph 9, page 3 that the CCN for the Noranda aluminum smelter is truly unique in various respects:

(a) the CCN certificated a discrete tract of land owned by just one customer, Noranda, which is described in a metes and bounds description developed by Noranda specifically for the CCN application;

(b) the property on which the aluminum smelter is located is not electrically connected to Ameren Missouri's transmission or distribution system. As a consequence, Ameren Missouri delivered power (including Noranda's demand and associated losses) to a delivery point where Ameren Missouri's system interconnected with the transmission system of AECI. AECI then wheeled the power provided by Ameren Missouri to the aluminum smelter under a separate transmission service agreement between Noranda and AECI to which Ameren Missouri was not a party. The power was metered at the aluminum smelter and paid for by Noranda under the Ameren Missouri LTS tariff rate schedule; and

(c) because of the nature of the operations conducted on the certificated service territory, the owner of the operations has rights that no other electric customer in the state has respecting choosing to take electric service from the Commission-certificated provider (AmerenUE in Case No. EO-2005-0180) or to take electric service from another provider of its choice not within the Commission's general rate or service jurisdiction (AECI in the instant case), all as permitted in Section 91.026 RSMo.

10. In early 2016, Noranda filed bankruptcy and ceased aluminum smelting operations. In September 2016 and with the approval of the bankruptcy court, the assets constituting the Noranda aluminum smelter were sold to Magnitude 7 Metals, LLC ("M7M"). "After the Smelter closed, and continuing after its assets were sold to M7M, the property on which the Smelter is located continued to take a small amount of power (e.g., for lighting, heating/cooling of offices to the extent employees still worked at the Smelter) from Ameren Missouri, but smelting operations continued to be shuttered." (Application filed April 12, 2019, page 4, paragraph 11). In a March 13, 2018, letter from M7M to Ameren Missouri, attached as Exhibit A to the April 12, 2019 Application of Ameren Missouri, M7M requested to be disconnected from Ameren Missouri effective

March 19, 2018. (Application filed April 12, 2019, page 4, paragraph 13). Pursuant to details set out in a letter from Ameren Missouri to M7M, attached as Exhibit B to the April 12, 2019 Application of Ameren Missouri, M7M ceased taking electric service from Ameren Missouri on March 19, 2018 at 10:00 a.m., pursuant to Section 91.026 and started taking service from AECI under a multi-year contract.

11. An affidavit of Robert Prusak, the CEO of M7M, the corporate successor to Noranda's land and assets in New Madrid County is attached to Ameren Missouri's 2019 Application, as Exhibit C, and he avers that M7M has no "no objection to issuance of an order by the Missouri Public Service Commission cancelling the certificate of convenience and necessity covering property owned by Magnitude 7 Metals, LLC that was issued to Union Electric Company d/b/a Ameren Missouri, and has no objection to cancellation of the associated tariff." It should be remembered that in Section 4.C., Industrial Aluminum Smelter/Large Transmission Service Rates the signatories of the Unanimous Stipulation And Agreement in File No. ER-2016-0179 agreed that the New Madrid aluminum smelter should no longer qualify as a LTS customer, meaning its current rate options would be either as a Small Primary Service or Large Primary Service customer. There is no indication from M7M, the corporate successor to Noranda's land and assets in New Madrid County, of any interest in Ameren Missouri maintaining a CCN or the LTS tariff for the land and assets in question.

12. At paragraph 18, page 5 of its 2019 Application, Ameren Missouri asserts that the unique circumstances that required in 2005 the granting of the CCN to Ameren Missouri to serve Noranda and the establishment of the LTS rate schedule by Ameren Missouri to serve Noranda, including the desire of Noranda to be served by

Ameren Missouri, no longer exist. Although Ameren Missouri argues that the instant case is not an "abandonment" case, it notes at paragraph 18, page 5 of its Application filed April 12, 2019, that it has been indicated that the standard applied by the Commission in abandonment cases is the converse of that applied in the grant of CCNs: the public convenience and necessity no longer require the operation of the service. *Re Kansas City Power & Light Co.*, 88 P.U.R.4th 390, Case No. HO-86-139, 29 Mo.P.S.C.(N.S.) 232, 247, Report And Order (October 7, 1987).[6] Thus, Ameren Missouri argues that the public convenience and necessity no longer requires the operation of the service by Ameren Missouri authorized by the Commission in File No. EA-2005-0180, and in fact M7M is being served by AECI.

13. In addition to Ameren Missouri citing *Re Kansas City Power & Light Co.*, 88 P.U.R.4th 390, Case No. HO-86-139, 29 Mo.P.S.C.(N.S.) 232, Report And Order (October 7, 1987), the Consumers refer to and quote from this Commission case in their Motion For Hearing filed June 5, 2019. This is one of several cases involving the Kansas City Power & Light Co. ("KCPL") downtown Kansas City steam heat system which KCPL sought to abandon when KCPL brought the Wolf Creek Nuclear Generating Station into commercial operation in 1986. The downtown Kansas City steam heat system is still operating but it is no longer owned or operated by KCPL. As the Commission stated in its Report And Order in Case No. HO-86-139 the Missouri courts have adopted the general rule that a public utility may not abandon service without Commission approval.

14. KCPL's efforts to terminate steam heat service commenced in KCPL's 1985-86 Wolf Creek rate case *Re Kansas City Power & Light Co.*, 75 P.U.R.

[6] In the matter of the investigation of steam service rendered by Kansas City Power & Light Co.

4th 1, 28 Mo.P.S.C.(N.S.) 228, 233, 414-15, 425, Case Nos. EO-85-185 and EO-85-224, Report And Order (April 23, 1986). KCPL's steam heat customers were granted intervention in that case. KCPL had notified its steam customers that contingent upon a five-year interruptible steam heat agreement with its customer National Starch, it was committed to operate the Grand Avenue steam generating facility through 1990. The Commission noted that ""[t]he evidence in this record suggests that KCPL is seriously considering abandoning steam service after 1990." *Id*. at 414. The Commission related that KCPL intended to develop a tentative five-year conversion plan through the use of on-site electric boilers and a central electrode boiler. *Id*. The Commission created an investigatory docket, Case No. HO-86-139, and directed KCPL to impose a moratorium on its electric boiler program until that program and other issues could be addressed in the investigatory docket. *Id*. at 415.

15. In paragraph 3, pages 2-3 of their Motion For Hearing, the Consumers fail to point out that the Commission noted in its Report And Order in the KCPL steam case, Case No. HO-86-139, which they discuss that KCPL's steam system was serving approximately 130 customers at the time KCPL was seeking to abandon steam service and various of these customers sought and were granted intervention in the case. 29 Mo.P.S.C.(N.S.) at 236. The Consumers also fail to note that Ameren Missouri is serving no customer for the LTS rate tariff sheets, which were originally developed as a result of the promulgation of Section 91.026 and were part of the filing that comprised the EA-2005-0180 case.

16. Regarding the balancing test language, the Consumers cite in paragraph 3 of their Motion For Hearing, there is no reason to apply the balancing test because there

are no consumers seeking service for the service area in question and, as previously noted hereinabove, the most recent customer in the service area in question, M7M, ceased taking electric service from Ameren Missouri on March 19, 2018 at 10:00 a.m., and started taking service from AECI under a multi-year contract, pursuant to Section 91.026. The Consumers state in footnote 4 to their Motion For Hearing that they do not necessarily agree that the KCPL case they cite completely recognizes all of the appropriate factors for considering a utility abandonment of service and that the Commission should consider "public interest" as it does in the *Tartan* standard. In the last pages of this pleading, Staff further addresses Commission cases on the balancing test matter, in reviewing Commission passenger train abandonment cases, which speak to factors to be considered in looking at "public convenience and necessity" and the definition of the term "public," which term the Consumers do not address other than referring to the *Tartan* public interest standard.

17. In paragraph 4, page 3 of its Motion For Hearing, the Consumers argue that Section 386.430 mandates a hearing. They state that "Ameren seeks to 'set aside' the Commission's previous determination that the M7M certificate is 'necessary or convenient for the public service.'" There is only one customer comprising the 345 acres comprising the CCN and that customer has chosen an alternative supplier as it may do pursuant to Section 91.026. Also in response to Staff Data Request No. 0001, Ameren Missouri has stated that it did not at any time own any physical assets dedicated to serving the aluminum smelter which in effect comprised the maximum one customer at a time, if any customer, for the CCN in question.

18. Cancellation of the CCN for the area/territory covering the 435 acres now comprising the M7M smelter facility as requested by Ameren Missouri is not detrimental to the public interest nor otherwise unlawful. The area/territory in question is being served under a multi-year contract by the electric supplier AECI pursuant to Section 91.026 RSMo. 2016. The Staff's position is addressed/supported by the accompanying Staff Recommendation of Sarah Lange.

19. Nowhere in their Motion For Hearing do the Consumers address Section 91.026, let alone mention Section 91.026.

20. Nowhere in their Motion For Hearing do the Consumers address Ameren Missouri's request to cancel the LTS rate schedule and argue that a hearing is required for this element of Ameren Missouri's Application filed on April 12, 2019. Staff would note that Section 393.140(11) RSMo. 2016 permits the Commission to allow a tariff schedule to go into effect without suspension and without a hearing:

> . . . Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. [Emphasis added.]

In the converse situation of cancelling a rate schedule in this situation in particular, there is no one on the LTS rate schedule to provide notice to and there has only been one customer ever on the LTS rate schedule at one location and the present customer at that location is taking service under a multi-year contract from AECI pursuant to

Section 91.026. The Commission sent certified copies, electronically or by paper service, of its April 12, 2019, Order Directing Notice, Establishing Time To Intervene, And Directing Staff Recommendation to potentially interested parties and set a date for intervention of May 2, 2019. The interested parties served were the signatory parties to the Unanimous Stipulation And Agreement in File No. ER-2016-079, plus Magnitude 7 Metals, Inc.

21. Some of the terms of the LTS tariff schedule should be recalled regarding the likelihood of a new customer(s) anywhere in a service area for which Ameren Missouri has a CCN: fifteen-year term, five-year termination notice, annual renewal provisions and the special credit provisions. Staff's Memorandum Recommendation states Staff is not aware of any Ameren Missouri customer/customer facility that currently has obtained the referenced RTO/Midcontinent Independent System Operator, Inc. ("MISO") approval, or that currently operates at or above a 95% load factor and meets all other stated criteria necessary to qualify for the LTS tariff schedule.

22. A paraphrase of Section 393.150.1 RSMo. 2016 for purposes of the issue respecting when is a hearing required is: whenever an electrical corporation files with the Commission a schedule stating a new rate or charge, or any new form of contract or agreement, the Commission has the authority upon reasonable notice to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement and pending such hearing and the decision thereon the Commission may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, but not for a longer period than of one hundred twenty days beyond the time when such rate, charge, form of contract or agreement would otherwise go into effect.

Finally, Section 393.150.2 RSMo. 2016 provides, within the Commission's discretion, a last suspension period not exceeding six months, if the hearing provided for in Section 393.150.1 RSMo cannot be concluded within the one hundred twenty day suspension period provided for under Section 393.150.1. The Consumers note "burden of proof" language in Section 386.430 in making their argument in their Motion For Hearing page 3, paragraph 4 that a hearing is required for the Commission to cancel the CCN requested by Ameren Missouri. There is burden of proof language in Section 393.150.2:

> . . . At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

23. In *State ex rel. Office of Public Counsel v. Public Serv. Comm'n*, 409 S.W.3d 522, 527 (Mo.App. W.D. 2013), the Western District Court of Appeals explained the composition of the eleven month period that results in reaching the "operation of law date" when rate schedules go into effect if the Commission does not render a decision by the conclusion of the maximum eleven months (included within the eleven month timeframe must be a period for the filing of applications for rehearing if there is a Commission decision on the case after an evidentiary hearing), or alternatively the applicant may authorize the extension of the effective date on the tariff schedules beyond the maximum eleven month statutory period end date. The Court of Appeals described the eleven month statutory period as comprised of three statutory components. The first component is Section 393.140(11) already noted: "the thirty-day period before a filed tariff would otherwise automatically become effective absent action by the PSC, § 393.140(11).

. ." *Id*. at 527. There is no requirement that the Commission schedule a hearing for a filed tariff under the language quoted in paragraph – above respecting Section 393.140(11).

24. Again addressing Section 393.140(11), the Western District Court of Appeals in *State ex rel Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 566 (Mo.App. W.D. 1976) said the decision whether to order a suspension rests in the sound discretion of the Commission:

> The 'file and suspend' provisions of the statutory sections quoted above lead inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate to go into effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion. [Emphasis added.]

25. Administrative Procedure and Review Chapter, Section 536.010(4) defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 393.140(11) does not require a hearing. Section 536.063 addresses the formal, substantive proceedings and procedures required by a contested case under the Administrative Procedure and Review Chapter. They do not apply in this proceeding unless a hearing is required by law.

26. *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344 (Mo.App. W.D. 2006)("*Public Counsel I*") should not be avoided in addressing the issues in this case merely because it is a Commission telecommunications case. *Public Counsel I* involved three tariff requests filed by Sprint Missouri, Inc. ("Sprint") for a rebalancing of

its tariffs for intrastate access service and for basic local service. *Id*. at 347. OPC opposed the proposed rebalancing but the Commission approved without a hearing and OPC appealed. The previously when the case appeared before the Western District Court of Appeals as *State ex rel. Coffman v Public Serv. Comm'n*, 121 S.W.3d 534 (Mo.App. W.D. 2003)("*Coffman*"), the Court decided that the Missouri telecommunications price cap statute did not expressly require the Commission to grant a hearing in response to a rebalancing tariff request. 210 S.W.3d at 349. The Court reversed and remanded the case to the Commission because the Court held the Commission did not make adequate findings of fact regarding the rebalancing. *Id*. at 348. However, in the *Public Counsel I* decision, the Court held that to the extent its prior decision (*Coffman*) required the Commission to make findings of fact in a noncontested case, its prior decision should not be followed. *Id*. at 355. Thus the Court held:

> . . . review in a noncontested [case] typically probes only the lawfulness of an agency's order without consideration of its reasonableness and without need for review of competent and substantial evidence. Thus, as is the case in MO. CONST. art. V, Section 18, the "competent and substantial evidence" would not apply to the commission's cases in which a hearing was not required by law.

Id. at 354.

* * * *

> Because this is a noncontested case, we will judge only whether or not the commission abused its discretion in denying a hearing and whether or not the commission's order was lawful. . . .

Id. at 355.

27. The Western District Court of Appeals addressed these issues again in a subsequent Commission telecommunications case *State ex rel. Public Counsel v. Public Serv. Comm'n*, 259 S.W.3d 23 (Mo.App. W.D. 2008) ("*Public Counsel II*") in which AT&T Communications of the Southwest, Inc. ("AT&T"), Sprint Communications

Company, L.P. (“Sprint”), MCI WorldCom Communications, Inc. (“MCI”), and Teleconnect Long Distance Services and Systems Company (“Teleconnect”) filed tariffs with the Commission seeking to implement or increase instate access recovery surcharges for long distance toll service for certain customers in Missouri. OPC opposed the proposed tariffs but the Commission approved the tariffs without a hearing. OPC appealed contending that the Commission erred in concluding that (1) it was unnecessary to determine whether the instate access recovery surcharges were just and reasonable pursuant to Section 392.200.1, RSMo.; (2) the instate access recovery surcharges were lawful and reasonable and not discriminatory under Sections 386.200.2 and 386.200.3, RSMo., and (3) the instate access recovery surcharges were lawful and reasonable and not a violation of the Federal Telecommunications Act of 1996. Public Counsel also asserted that the Commission's Report And Order approving the tariffs contained insufficient findings of fact and conclusions of law to allow for meaningful judicial review.

28. The Western District Court of Appeals first quoted from its *Public Counsel I* opinion:

> “In a noncontested case ..., the administrative body acts on discretion or on evidence not formally adduced and preserved.” *Phipps v. School District of Kansas City,* 645 S.W.2d 91, 94–95 (Mo.App.1982). Given the nature of a noncontested case, requiring a showing that an agency's decision is supported by competent and substantial evidence would be “inherently contradictory.” I MO. ADMINISTRATIVE LAW, *Public Service Commission,* Section 12.30 (Mo. Bar 3rd ed.2000). This is because, in noncontested cases, “there is no record from the administrative body.” *State ex rel. Fortney v. Joiner,* 797 S.W.2d 848, 852 (Mo.App.1990).

259 S.W.3d at 29

The Court then went on to say:

> . . . The Commission, therefore, in a noncontested case is not required to make findings of fact to allow for meaningful judicial review.

Id.

> . . . Pursuant to section 392.500, the Commission's decision not to review the rate charges by these competitive telecommunications companies under the "just and reasonable" provision of section 392.200.1 was lawful.

Id. at 32.

> We conclude that the instate access recovery surcharges are not unduly or unreasonably discriminatory pursuant to sections 392.200.2 and .3. The Commission's Report and Order approving the tariffs, therefore, is not unlawful.
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> * * * *
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> The rates at issue in this case apply to intrastate service alone and have no application to interstate services. Section 254(g) of the Federal Telecommunications Act of 1996 is, therefore, not applicable to this case.

Id. at 34.

29. The Staff Recommendation of Sarah Lange accompanying this pleading states among other things at page 6:

> Staff is not aware of any facility or customer of Ameren Missouri that *currently* has obtained the referenced RTO approval, or that *currently* operates at or above a 95% load factor and meets all other stated criteria. However, other customers *could* make transmission-related arrangements and operate in a manner such that one or more customers *could* satisfy all requirements for service on the LTS rate schedule, but Staff is not aware of any such facility or customer.
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> On the basis of the matters addressed above, Staff is not aware of any reason for the Commission to not permit Ameren Missouri to remove the LTS rate schedule from its tariff at this time. . . .

It is not unlawful for Ameren Missouri to cancel its LTS tariff.

30. At page 3, paragraph 4 of its Motion For Hearing, the Consumers invoke Section 386.430 RSMo. as if Ameren Missouri was seeking now on appeal to overturn

the Commission's March 10, 2005 Order Approving Stipulation And Agreement, CCN decision in Case No. EA-2005-0180. The statutory section of the Public Service Commission Law applicable to authorizing the Commission to grant an electrical corporation a CCN to serve a specific area/territory is Section 393.170.2 RSMo. 2016. There is no specific statutory section of the Public Service Commission Law addressing the Commission granting an electrical corporation's request that the Commission cancel the electrical corporation's CCN to serve that specific area/territory. There was a customer in the area/territory for which Ameren Missouri filed an Application to serve in 2004-2005. There is now, no customer in the area/territory for which Ameren Missouri filed an Application to cancel its CCN to serve. The Commission is not being requested by Ameren Missouri's Application filed on April 12, 2019 to set aside the determinations, decisions, or findings of fact and conclusions of law it made in Case No. EA-2005-0180 on the basis that they were unreasonable/unjust or unlawful. There were no Applications For Rehearing respecting the Commission's March 10, 2005, Order Approving Stipulation And Agreement and no judicial review otherwise sought of said Commission Order Approving Stipulation And Agreement. Also, the Commission is not bound by *stare decisis*. *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003).

31. In *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 30 (Mo.banc 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), the County of Jackson ("Jackson County") and the City of Kansas City ("Kansas City"), among other things, argued that by the Commission processing a rate increase request of the Missouri Public Service Company by the "file and suspend" method as provided in

Section 393.140(11), Jackson County and Kansas City (and OPC) were deprived of their property without either due process or equal protection contrary to accepted constitutional principles respecting each. The Court stated that it found no provision in the Missouri statutory scheme for granting customers a vested right to any particular rate. *Id*. at 31-32. The Court found the Missouri statutory approaches to have a rationale basis that do not deny either due process or equal protection. *Id*. at 32-33.

32. The one other case that Ameren Missouri cites for substantive basis in its April 12, 2019 Application And Request For Waiver is *In Re Cancellation of CCN and Tariff of Southwest Village Water Co*., Case No. WD-2007-0300 (April 5, 2007) ("*Southwest Village"*). In Case No. WD-2007-0300, on February 7, 2007, Staff filed a Motion To Open Case And Cancel Certificate Of Convenience And Necessity And Tariff ("2007 Motion To Cancel"). In Staff's 2007 Motion To Cancel, Staff said that Southwest Village Water Co. evidently had stopped providing water service to the area for which it had been granted a CCN in Case No. 18,418 (20 Mo.P.S.C.(N.S.) 439) in December 1975. The property used by Southwest Village Water Co. in providing water service to its certificated area had not been transferred, but had been abandoned. Staff contacted counsel for Southwest Village Water Co., who said Southwest Village Water Co. had stopped providing water service and indicated that Southwest Village no longer wished to maintain its CCN.

33. Staff explained in paragraph 7, page 2 of its 2007 Motion To Cancel that the Board of Public Utilities of the City of Springfield was then serving the area that Southwest Village had been authorized to serve by the Commission. Staff further commented regarding cancellation of CCNs at pages 3-4 of its 2007 Motion To Cancel as follows:

10. Although the Commission's authority to cancel a water or sewer certificate is not specifically set out in Chapter 393 of the Missouri statutes, the Commission has previously allowed regulated entities to discontinue operations in cases where cancellation was sought by the service provider and also where the service provider had ceased to exist.[1] The Commission's authority to cancel certificates of convenience and necessity has been limited by the Missouri Supreme Court, where cancellation of one certificated entity's authority is sought by another, potentially competing certificated entity (and against the will of the entity whose certificate is to be cancelled). *State ex rel. City of Sikeston v. Pub. Serv. Comm'n*, 82 S .W.2d 105 (Mo. 1935). The Sikeston court stated that "no provision was or ever has been made by the Legislature for the commission to eliminate competition between private companies already in existence and doing business in the same territory" other than through purchase. *Id* at 110. In this case, however, the certificated entity has no objection to the cancellation of its certificate.

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[1] See 16 Mo. P.S.C. (N.S.) 142, *Burma Builders*; also see *In the Matter of Ozark Shores Water Company's Application for an Order Canceling the Certificate of Public Convenience and Necessity*, Case No. WD-2001-701; *In the Matter of the Cancellation of the Certificate of Convenience and Necessity and Tariff of the Lake Hannibal Sewer Corporation*, Case No. SD-2004-0144; *In the Matter of the Cancellation of the Certificate of Service Authority of Woodland Heights Utilities, Inc*., Case No. WD-2006-0393.

34. *State ex rel. City of Sikeston v. Public Serv. Comm'n*, 82 S .W.2d 105 (Mo. 1935)("*Sikeston*") is the principal case cited for authority that the Commission has no authority to cancel CCNs. However, as is usually the situation, one should engage in a close and careful reading of the asserted/cited case to review the facts and law and the nuances that might not otherwise be revealed if one does not do so. The purported holding(s) of, or in, the asserted/cited case may take on a different cast, and not be as broad as, or even stand for what it has been represented to be, once closely reviewed.

35. *Sikeston* was an appeal of a Commission decision affirmed by a circuit court denying an Application of the City of Sikeston ("Sikeston") alleging that Missouri Utilities Company was maintaining an electric light and power distribution system in Sikeston after the power company's franchise with the city had expired; it had refused to remove poles and wires after it had been instructed to do so by resolution of the city council; and the

city owned and maintained a municipal electric light and power distribution system, which was sufficient to meet the needs of its citizens and industries.[7] The relief sought by Sikeston from the Commission and then on judicial review was that the:

> (1) CCN granted to Public Service Company of Missouri on February 24, 1925 be set aside and held for naught.
>
> (2) Commission make a finding of fact that there now exists no public necessity for the maintenance of an electric power and light distribution system by Missouri Utilities Co. in Sikeston.
>
> (3) Missouri Utilities Co. be ordered to vacate the streets and public ways of Sikeston (not covered by Motion For Rehearing and Sikeston acknowledged the Commission had no power to order (this item abandoned by Sikeston)).

82 S.W.2d at 106.

36. It should not be lost sight of that among the differences between the Sikeston case and the instant case before the Commission is that in *Sikeston*, the public utility did not want its CCN to be cancelled and in the instant case before the Commission, Ameren Missouri wants its CCN and related tariff schedules cancelled.

37. *Sikeston* was preceded by *State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co*., 53 S.W.2d 394 (Mo.banc 1932), where Sikeston proceeded in the manner of *quo warranto* by seeking to require Missouri Utilities Co. to show by what authority it was (a) furnishing electric light and power within Sikeston and (b) occupying the streets, avenues, and alleys of said city with its poles, wires, and other electrical equipment, and thereby oust Missouri Utilities Co. from continuing to do so. It was

[7] Sikeston granted a 20-year franchise to the Sikeston Electric Light Co. ("Sikeston Electric") on November 17, 1902. Sikeston Electric sold out to another company before the franchise expired on November 17, 1922, and although this electric company in 1923 entered into negotiations with Sikeston for another 20-year franchise, no agreement was reached. This power company continued to operate in Sikeston in 1923 and 1924 paying all taxes. In the latter part of 1924 this power company sold its Sikeston system to what was then called Public Service Company of Missouri, later Missouri Utilities Company ("Missouri Utilities Co."). 82 S.W.2d at 106.

asserted that the franchise granted to Sikeston Electric had long since expired; Missouri Utilities Co. refused to remove poles and wires after it was instructed to do so by resolution of the city council on July 15, 1931; and there now existed no public necessity for service from the Missouri Utilities Co. for service within the limits of Sikeston because of the operation of a municipally owned electric light and power plant and distribution system. *Id*. at 395-96.

38. The Missouri Supreme Court held that in the circumstances that it set out in detail, and which are related in part below, the doctrines of laches and equitable estoppel applied, and Sikeston would not be heard to say that Missouri Utilities Co. was without right and or authority to engage in the electric business in Sikeston and have reasonable use of the streets, avenues and alleys in connection therewith. 53 S.W.2d at 400. In the nine (9) years from the date in 1922 of the expiration of the twenty (20) year franchise granted by Sikeston until the date in 1931 of the passage of the city council resolution directing the power company to vacate the city streets, avenues and alleys, and discontinue the electric business in Sikeston, the power company and its predecessor constructed and maintained necessary electrical equipment and furnished electrical service in Sikeston without objection from Sikeston and during that nine (9) years Sikeston levied, assessed and collected property and license taxes on said power company, and issued a license or permit to allow said entity to engage in the electric business in Sikeston. The Court also commented that Sikeston appeared and was represented at the Commission when Missouri Utilities Co. requested and received the Commission's approval to (a) purchase said electric facilities from its predecessor in interest and (b) issue stocks, bonds, and other forms of indebtedness to finance its

purchase and operations. *Id*. The Missouri Supreme Court denied ouster and dismissed the proceeding. *Id*. at 401.

39. In the subsequent *Sikeston* case brought before the Commission by Sikeston, the Missouri Supreme Court noted that the Commission at the time it was organized there were several instances in the state of where two or more utilities were occupying the same field and engaging in competitive services. The Court related that the Commission took the view that if the Legislature had intended that the Commission could terminate the authority of either of such utilities, it would have conferred appropriate powers on the Commission, provided it had constitutional authority for such an act, it would have done so, but the Legislature made no such provision. The Court held the Commission was correct in its conclusions. *Id.* at 109. The Court went on to state:

> . . . But, as the commission holds, no provision was or ever has been made by the Legislature for the commission to eliminate competition between private companies already in existence and doing business in the same territory, at the time the Public Service Commission Law was passed, except to permit one company to buy the capital stock, franchises, and property of another. Sections 5194, 5195, R. S. 1929 (Mo. St. Ann. ss 5194, 5195, p. 6618). Nor is there any provision to prevent or eliminate competition between such companies and cities, which were engaged in or might enter the electric light and power business. To hold that any such power is implied, as is now contended, would be contrary to all prior interpretation of the Public Service Commission Law.

Id. at 110. The Court concluded by relating:

> . . . When a private company's franchise to operate expires and the time comes for a city to give its consent to its extension, it may then obtain a monopoly for its own plant by refusing it. We hold that, before such time, it cannot do so except by purchase or by the voluntary withdrawal of the company.

Id. at 111.

40. Staff would note *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 416 S.W.2d 109 (Mo.banc 1967)(*Bellflower*) where the issue was the propriety of an order of the Commission that directed Southwestern Bell Telephone Co. ("SWBT") to provide telephone service to an area requested for SWBT service by one-hundred fifty-two (152) residents to which SWBT did not want to provide telephone service, and to which the Commission denied requests for CCNs by two independent telephone companies in separate cases, because the Commission directed SWBT instead to provide service to the area which SWBT did not profess to serve. After the one-hundred fifty-two (152) residents of the area in question filed petitions requesting the Commission authorize SWBT to provide service to the area, SWBT filed an answer stating its opposition to providing service to the area. The residents amended their petitions requesting that the Commission require SWBT to serve the area. 416 S.W.2d at 111-12. The Missouri Supreme Court reversed the Commission on the basis that SWBT could not be required to provide services in an area which it had not offered, professed or undertaken to serve. *Id*. at 113. The Court stated:

> . . . The Public Service Commission Law . . . . does not give the Commission authority to compel relator to serve a territory not embraced within its profession of service. Such compulsion would be tantamount to an appropriation of relator's property to a public service to which it has not dedicated it – a taking of private property for public use without just compensation. Atchison, T. & S.F. Ry. Co. v. Railroad Comm. (of California), 173 Cal. 577, 160 Pac. 828, 2 A.L.R. 975. . . .

Id.

41. In *Re Kansas Gas and Electric Co.*, 3 Mo.P.S.C.(N.S.) 170, Report And Order, Case No. 12,071, (March 23, 1951)[8] at the time of the Application in 1950, KG&E

[8] In the matter of the Application of Kansas Gas and Electric Co., for authority to cease all electric utility operations and dispose of facilities and surrender certificates of public convenience and necessity.

was a corporation organized and existing under the laws of West Virginia with its principal operating office in Wichita, Kansas, and duly qualified to do business in Missouri as a foreign corporation holding CCNs to operate as a public utility in Barton and Jasper Counties, Missouri. 3 Mo.P.S.C.(N.S.) at 171. KG&E filed an Application to discontinue all of its electric service in the State of Missouri and dismantle, remove, and dispose of its physical property located in Missouri. *Id*. at 170. Evidently the original purpose of KG&E extending its lines into Missouri was primarily for serving brick companies and coal strip-mines located along the Kansas-Missouri State line with incidental service to residents in the vicinity of these industrial customers. Apparently a large portion of the residential customers were employees of the brick companies and strip-mines. *Id*. at 174.

42. The Commission noted in its Report And Order that the closing down and moving of these industries has also resulted in the residents moving away, which condition was leaving KG&E's facilities without purpose.[9] The Commission commented that although KG&E did not make application before abandoning certain facilities, which

[9] Eight (8) residential customers purchased their service lines extending from their residences to the State Line so as to not to be deprived of service. Although these residential customers were located in Missouri, they were located at the eastern edge of the village of Opolis, Kansas. After these residential customers purchased their service lines located in Missouri over which they obtained their electric service, KG&E moved their meters to the Kansas side of the line. The source of these customers power originated in Kansas. The Commission received a Waiver of Notice of Application and Hearing from the eight (8) residents explained that the undersigned had no objection to the disposition of KG&E's facilities in Missouri and the discontinuance of electric service. The Commission also received eight copies of an "Agreement For Electric Service" purportedly signed by the eight (8) residents and an officer of KG&E. The individually signed requests for KG&E to provide electric service at the schedule of rates published for the class of service for which application is made and agrees to conform to all rules and regulations governing service now on file with the utility regulatory body of the State of Kansas as the same may be modified and changed with the approval of said regulatory body from time to time. The Agreement further states that it is understood that the point of the delivery of service is at the customer's meter which is located in the village of Opolis, Kansas. *Id*. at 171 – 72.

it operated under Commission issued CCNs, and was derelict in not doing so, the public had not been inconvenienced by abandoning those operations and KG&E's Missouri customers have apparently acquiesced in the discontinuance of electric service by it in Missouri. The Commission stated had KG&E timely applied for authority to abandon its facilities in accordance with Section 393.190, RSMo. 1949, the Commission in all probability would have granted KG&E's request on the basis that the facilities were not used or useful in the performance of its duties to the public. The Commission further stated that KG&E's action has not deprived anyone of service and constitutes a complete cessation of operation by KG&E in the State of Missouri, therefore all CCNs heretofore issued to KG&E should be cancelled and would be cancelled in orders to follow. *Id*. at 174 – 75.

43. Sections 393.106.2 RSMo. 2016, 394.315.2 RSMo. 2016, and 91.025.2 permit a Commission order of a change of electric suppliers upon application made by a customer:

> Section 393.106.2:
> . . . The public service commission, upon application made by an affected party, may order a change of [electric] suppliers on the basis that it is in the public interest for a reason other than a rate differential. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction. . . . [Emphasis added.]
>
> Section 394.315.2
> . . . The public service commission, upon application made by an affected party, may order a change of [electric] suppliers on the basis that it is in the public interest for a reason other than a rate differential, and the commission is hereby given jurisdiction over rural electric cooperatives to accomplish the purpose of this section. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction. . . . [Emphasis added.]

> Section 91.025.2
> . . . The public service commission, upon application made by a customer, may order a change of [electric] suppliers on the basis that it is in the public interest for a reason other than a rate differential, and the commission is hereby given jurisdiction over municipally owned or operated electric systems to accomplish the purpose of this section. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction. . . . [Emphasis added.]

There is only one electric customer in the 435 acre CCN that Ameren Missouri seeks to cancel and the entity is not a customer of Ameren Missouri, pursuant to Section 91.026.

44. Chapter 393 is not the only Missouri Statutory Chapter that refers to a "certificate of convenience and necessity issued by the commission."[10] Section 394.312 RSMo 2016 in the Chapter on Rural Electric Cooperatives is the territorial agreement statute for rural electric cooperatives, municipal utilities and investor owned utilities which provides for competition to provide retail electric service being displaced by written territorial agreements. There are subsections of Section 394.312 that provide for hearings before and complaints to the Commission in the service of the aforenoted purpose. Ameren Missouri is not indicating that it is trying to address competition with its Application to cancel its CCN for the 435 acres in question.

45. In its Application at page 5, paragraph 19 Ameren Missouri cites to the *Southwest Village* case and states that "[t]he Commission has recognized that its power to cancel a CCN is necessarily implied by the powers granted it in Chapters 386 and 393, RSMo.," Staff notes there are two statutory provisions applicable to the Commission that have necessary and proper grants of authority to the Commission. Pursuant to

[10] Section 393.170.3 RSMo. 2016

Section 386.040 the Commission is vested with and possessed of all powers and duties necessary or proper to enable it to carry out fully and effectually all the purposes of the Public Service Commission Law:

> Section 386.040: A "Public Service Commission" is hereby created and established, which said public service commission shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter.

Pursuant to Section 386.250(7) the powers and duties of the Commission extend under the Public Service Commission Law to such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly:

> Section 386.250: The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:
>
> * * * *
>
> (7) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

46. Finally, Staff would note a case from the era when the Commission had jurisdiction over railroad corporations: *Re Missouri-Kansas-Texas Railroad Co*., Report And Order, Case No. 13,769, 8 Mo.P.S.C.(N.S.) 68 (April 8, 1958).[11] the Missouri-Kansas-Texas Railroad Co. ("MKT") requested authority to discontinue operation of its local passenger Trains 5 and 6 between St. Louis and the Missouri-Kansas State Line (Parsons, Kansas). *Id*. at 69. Staff would note it is using the term "discontinue" rather than term "abandonment" because that is the term that the Commission uses in its

[11] In the Matter of the Application of Missouri-Kansas-Texas Railroad Company for authority to discontinue operation of its interstate passenger trains Nos. 5 and 6 between Saint Louis, Missouri, and the Missouri-Kansas State Line.

Report And Order. The Commission states the issue is cessation of operations, subject to restoration after a hearing showing a renewed public need for passenger service:

> It should be understood that our orders respecting service whether they require service to meet an existing public necessity or permit a discontinuance of service for the lack thereof do not foreclose future inquiries or issues respecting the same matter which may subsequently develop because of changes in community needs to which the questions of service or the lack thereof are always subject to the jurisdiction of the Commission in any future hearings.
>
> If there is a public need in the future, the Applicant may be required to reinstate a passenger service to meet the public convenience and necessity. It is not thought accurate to say that what the Applicant seeks is a complete abandonment of the train service in controversy but a cessation of operations, subject to restoration, after a hearing showing a public need for passenger service. The obligation to render passenger service merely remains dormant so long as there is a lack of public need for the service.

The Commission noted that the language of Chapter 389 regarding the Commission's authority respecting railroads is permissive and gives the railroad the option to engage in the transportation of passengers but does not command that it do so. The Commission stated that only when the service so inaugurated is, or becomes, unreasonable, unsafe, improper or inadequate that the Commission may assert jurisdiction, and the Commission cannot enter an order to require a railroad to operate passenger trains until after a hearing. *Id*. at 83.

47. Passenger Trains 5 and 6 were operating at a loss and the MKT railroad system as a whole was operating at a loss. *Id*. at 78. The Commission stated that even though the furnishing of adequate service may only be able to be provided at a pecuniary loss that alone does not obviate the requirement of the provision of that service. The duty to provide such service is dependent upon the character of the service required and the public need for the service. *Id*. at 79.

48. The Commission in *MKT* proceeded into a discussion regarding the definition of the term “public convenience and necessity” and the factors to be used in determining whether a given train service is to be required to satisfy the “public convenience and necessity:”

> . . . The term "public convenience and necessity" is elusive and difficult to define but there are certain factors which can be used to determine what is necessary to ascertain the extent of service required to satisfy the needs of the public. Some jurisdictions have used such controlling factors as (1) the character and population of the territory served, (2) public patronage or lack of it, (3) the facilities remaining, (4) the expense of operation as compared with the revenue from the same, and (5) the operations of the carriers as a whole. Others have stated the factors should be phrased in the following language: (1) cost of providing the service, (2) use made by the public of the service, (3) availability and adequacy of other transportation facilities, (4) loss from operation of trains and relation of loss to the carrier's operation as a whole, (5) use of the service by the public and future prospects of use, (6) balancing of loss against the hardship of the public, (7) size of the places served, (8) extent of the demand for transportation, (9) cost of furnishing accommodations, (10) efficiency of management and (11) all other facts which have a bearing upon the question of convenience and cost. The few decisions of Missouri courts in cases of this nature have not clearly defined the factors to be considered as have other jurisdictions.

Id. at 79-80.

49. The Commission in *MKT* also engaged in a discussion of the word “public” as used in the term “public convenience and necessity:”

> . . . The term "public" refers to the entire public and not to just a few individuals. It includes, but is not limited to, the Protestant, the Applicant herein, its shippers and consignees, its stockholders and employees. The needs or convenience of a small segment of the population may not be allowed to dictate adversely to the interests of the majority of the people. As to whether it is a public necessity for the continuation of these trains depends to a great extent to what use the public makes of them. The convenience and necessity required to support an Order of the Commission is that of public need rather than that of the interests and conveniences of a few individuals. The carriage of a few individual passengers does not establish the existence of a public convenience and necessity. The showing of a small number of passengers traveling on Trains 5 and 6 from a few stations on a few days per month does not establish a showing of public

> need for the continued operation of these trains. There is very little need for the passenger service.

Id. at 80. The Commission authorized MKT to discontinue the operation of its passenger Trains 5 and 6 between St. Louis, Missouri and the Missouri Kansas State Line (Parsons, Kansas). *Id*. at 84.

WHEREFORE Staff recommends to the Commission that:

(1) It enter an order canceling the CCN covering area/territory encompassing the 345 acres comprising the M7M New Madrid aluminum smelter as not detrimental to the public interest;

(2) It include in its order as lawful direction for Ameren Missouri to submit revised tariff sheets replacing the text currently comprising the LTS rate schedule on Tariff Sheets Mo. PSC Schedule No. 6, 3rd Revised Sheet No. 62, 1st Revised Sheet Nos. 62.1 and 62.2 and Original Sheet Nos. 62.3 and 62.4 to state that the sheets are intentionally blank,

(3) It include in its order as lawful direction for Ameren Missouri to submit revised tariff sheets removing references to the LTS rate schedule from its Table of Contents and to remove the area/territory covering the 345 acres comprising the M7M New Madrid aluminum smelter from its Listing of Service Territory, and to make other changes necessary to reflect repagination associated with these changes,

(4) Staff has no objection to the granting of Ameren Missouri's request for a waiver of the 60 day notice requirement for good cause shown under 4 CSR 240-4.017(1).

Respectfully submitted,

/s/ Steven Dottheim
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Staff Response To Commission Order Directing Filing has been transmitted electronically to all counsel of record this 17th day of June, 2019.

/s/ Steven Dottheim

M E M O R A N D U M

TO: Missouri Public Service Commission Official Case File
Case No. EO-2019-0309
The Empire District Electric Company

FROM: Sarah L.K. Lange, Regulatory Economist III

/s/ Robin Kliethermes 06/17/2019 /s/ Steve Dottheim 06/17/2019
Energy Resources Department / Date Staff Counsel Department / Date

SUBJECT: Recommendation to Cancel the CCN granted in File No. EA-2005-0180 and to Direct the Filing of Tariff Sheets to Cancel the LTS Rate Schedule and Remove References in Table of Contents and Listing of Service Territory

DATE: June 17, 2019

Requested Relief

On April 12, 2019, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri")[1] filed an application asking the Commission (1) to cancel the Certificate of Convenience and Necessity ("CCN") granted in 2005 in File No. EA-2005-0180 applicable to the property formerly occupied by the aluminum smelter owned by Noranda and now occupied by the aluminum smelter owned by Magnitude 7 Metals, LLC ("M7M"), (2) to cancel its Large Transmission Service ("LTS") rate schedule, (3) for authority to make other necessary conforming changes to its tariff including removing references in the table of contents and the listing of the area in question as part of its service territory, and (4) waiver of the 60 day notice requirement of 4 CSR 240-4.017(1).

On June 5, 2019, Midwest Energy Consumers Group, Missouri Industrial Energy Consumers and the Office of the Public Counsel filed a "Motion for Hearing". Included in the cover pleading attached hereto, Staff Counsel provides its legal analysis related to that motion.

Summary of Recommendations

(1) Staff recommends the Commission enter an order canceling the CCN granted in File No. EA-2005-0180,

(2) Staff recommends the Commission include in its order direction for Ameren Missouri to submit revised tariff sheets replacing the text currently comprising the LTS rate schedule on Tariff Sheets Mo. PSC Schedule No. 6, 3rd Revised Sheet No. 62, 1st Revised Sheet Nos. 62.1 and 62.2 and Original Sheet Nos. 62.3 and 62.4 to state that the sheets are intentionally blank,

[1] Some orders and pleadings referred to herein use Ameren Missouri's earlier name "AmerenUE" or "UE" before its change to Ameren Missouri. The instant Staff recommendation will use the name of the entity at the time of the event or activity.

(3) Staff recommends the Commission include in its order direction for Ameren Missouri to submit revised tariff sheets removing references to the LTS rate schedule from its Table of Contents and to remove the area authorized in File No. EA-2005-0180 from its Listing of Service Territory, and to make other changes necessary to reflect repagination associated with these changes,

(4) Staff has no objection to the requested waiver of the 60 day notice requirement for good cause shown.

Background Regarding Ameren Missouri Smelter CCN

On December 20, 2004, AmerenUE filed its "Application and Motion for Expedited Treatment" in File No. EA-2005-0180, wherein it stated, *inter alia*,

- That "[t]he area sought to be certificated by AmerenUE encompasses the aluminum smelting plant facility owned by Noranda Aluminum, Inc. ("Noranda");"[2]

- That "[t]here are no residents or landowners, other than Noranda, within the area sought to be certificated;"[3] and

- That "no construction of any new distribution system is necessary to allow AmerenUE to serve Noranda, and the Company will require no financing in connection with this addition to its service area."[4]

In its "Order Approving Stipulation and Agreement" entered in Case No. EA-2005-0180 on March 10, 2005, the Commission stated, *inter alia:*

- That "[t]he service area extension sought by UE encompasses Noranda's premises and Noranda is the sole landowner in the area for which certification is sought;" [5] and

- That "[s]ome of the facilities that UE would use to deliver power to Noranda belong to a third party with whom UE already has an Interchange Agreement permitting such use." [6]

In its Application in File No. ED-2019-0309, Ameren Missouri states "[a]t the request of M7M, M7M ceased taking electric service from Ameren Missouri effective March 19, 2018." [7] Exhibit C to the Application in File No. ED-2019-0309 is an affidavit of Robert Prusak, indicating that he is the

[2] *Application and Motion for Expedited Treatment* in File No. EA-2005-0180, page 2.
[3] *Application and Motion for Expedited Treatment* in File No. EA-2005-0180, page 5.
[4] *Application and Motion for Expedited Treatment* in File No. EA-2005-0180, page 4.
[5] *Order Approving Stipulation and Agreement* in Case No. EA-2019-0180, page 3.
[6] *Order Approving Stipulation and Agreement* in Case No. EA-2019-0180, page 3.
[7] *Application and Request for Waiver* in File No. ED-2019-0309, page 4, Exhibit A, and Exhibit B.

CEO of M7M, owner of the land and assets formerly operated by Noranda in New Madrid County, and indicating that M7M has no objection to cancellation of the relevant CCN and associated LTS rate schedule.

In response to a Staff Data Request, Ameren Missouri has indicated that it did not at any point in time own physical assets dedicated to serving the smelter.[8]

Only one entity continues to physically occupy and own the land that comprises the CCN which was the subject of Case No. EA-2005-0180. There has been and continues to be only one customer for the CCN which was the subject of Case No. EA-2005-0180. Since that entity which is owner of and customer in the total area comprising the CCN has lawfully switched electric suppliers through a multi-year contract and represents that it has no objection to the cancellation of the Ameren Missouri CCN, and no assets, expenses, or other agreements are in place that comprise utility investment or ongoing expenses or revenues related to service within the CCN area by Ameren Missouri, Staff recommends the Commission determine that cancellation of the CCN is not detrimental to the public interest.

Background Regarding LTS Rate Schedule

On December 20, 2004, AmerenUE filed its "Application and Motion for Expedited Treatment" in File No. EA-2005-0180, wherein it stated, *inter alia*,

- That "Noranda would take service from AmerenUE under a new Missouri large transmission service ('LTS') tariff. The LTS tariff would have the same rates, terms and conditions as AmerenUE's existing Missouri large primary service ('LPS') tariff (The LPS tariff on file with the Commission is referred to as Service Classification No. 11(M) – Large Primary Service, MPSC Tariff Sheet Nos. 67.1-67.3), except as otherwise provided for in the proposed LTS tariff,"[9] and

- That "the LTS tariff is designed to charge Noranda the same rates that currently apply to AmerenUE's LPS customers, except that the LTS tariff is designed to take into account the fact that there are no AmerenUE distribution facilities (and thus no distribution costs) needed to serve Noranda and is further designed to account for energy line losses on the third-party Associated Electric Cooperative, Inc. ('AECI') transmission system to be utilized to deliver the energy to be sold to Noranda."[10]

In its "Order Approving Stipulation and Agreement" entered in Case No. EA-2005-0180 on March 10, 2005, the Commission stated, *inter alia:*

[8] *Response to Data Request MPSC 0001*, attached as Appendix A.
[9] *Application and Motion for Expedited Treatment* in File No. EA-2005-0180, page 3.
[10] *Application and Motion for Expedited Treatment* in File No. EA-2005-0180, page 3.

- That "UE and Noranda propose to enter into a 15 year power supply agreement whereby UE would supply power to Noranda over existing facilities pursuant to a proposed new LTS tariff that is generally similar to UE's existing Large Primary Service ('LPS') tariff;"[11] and

- That the form of the LTS tariff appended to the Nonunanimous Stipulation and Agreement approved by the Order "was modified in several respects. The service criteria, which as originally drafted only Noranda could satisfy, are now the same as the LPS Tariff. The load factor has been reduced from 98 percent to 95 percent. The tariff provides that transmission service from a third-party provider will be paid for separately. The Annual Contribution Factor ('ACF') will now be calculated to provide UE an annual net bundled kilowatt-hour realization of 'not less than' $0.0325/kWh (3.25 cents per kilowatt-hour), after appropriate Rider C adjustments. Thus, $0.0325/kWh is now only a floor and not also a ceiling for the LTS Tariff rate. The former proposed language that the ACF shall be eliminated effective upon a Commission order in a complaint case, rate case or any other regulatory proceeding where AmerenUE's rates for its bundled service classification are changed, has been dropped. The special credit provisions of the original proposed LTS Tariff are retained in the revised LTS tariff. The fifteen-year term, five-year termination notice and annual renewal provisions of the original LTS Tariff also continue in the revised LTS Tariff." [12]

In its Report and Order entered in Case No. ER-2014-0258 on April 29, 2015, the Commission considered an objected-to nonunanimous stipulation and agreement, which became a joint position, under Commission Rule 4 CSR 240-2.115(2)(D)[13] that designed a further-discounted alternative to the LTS rate, the IAS rate. The Commission stated, *inter alia*, in its decision on the Noranda issue:

> Since the Commission cannot, and will not, approve the joint position in its entirety, it will need to explain in detail the rate that will be established for service to Noranda:
>
> > 1. For a period of three years, a new class of Ameren Missouri electric service ratepayer is authorized for Industrial Aluminum Smelters (IAS).
> >
> > 2. The existing tariff and rates for the LTS class will remain in effect and will be updated in this and future rate cases. If Noranda is not willing to accept the terms of service for the IAS class, or if it violates the conditions set forth in this order, it shall revert to the LTS class.
> >
> > ***
> >
> > 7. The IAS class may retain its existence and rate after the expiration of the three-year term until such time as the Commission establishes a new rate in a general rate proceeding.

[11] *Order Approving Stipulation and Agreement* in Case No. EA-2005-0180, page 3.
[12] *Order Approving Stipulation and Agreement* in Case No. EA-2005-0180, pages 6-7.
[13] *Non-Unanimous Stipulation and Agreement Regarding Economic Development, Class Cost of Service, Revenue Allocation and Rate Design*, March 10, 2015 .

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> 18. As a term of the IAS tariff, if the IAS customer should materially fail – as determined by the Commission – to comply with any term or condition required to access the reduced rate provided by this order, the IAS customer shall no longer have access to the rate structure outlined herein, and the customer's rate structure shall revert to the rate structure set for the LTS class at that time, with the resulting difference in retail revenue to be allocated to the benefit of the remaining customer classes in equal proportion to their then-current contribution to retail revenue less the LTS class. Since Ameren Missouri's rates to other customers cannot be changed except through a general rate case, Ameren Missouri shall retain the extra payments collected from Noranda in that event in a regulatory liability to be returned to customers with interest in Ameren Missouri's next general rate case.

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> In future rate cases, the Commission will once again assess whether Noranda should be allowed to continue to receive a reduced load retention rate, and may continue this rate and these conditions as it finds appropriate based on the competent and substantial evidence presented in such cases, including the economic conditions at the time of that case. In such future rate case, the Commission would consider extending the term of the special rate with additional conditions and consumer protections, including a possible price trigger based on aluminum prices on the London Metals Exchange.[14]

The LTS rate schedule requires that a customer taking service under the schedule receive "approval from the appropriate Regional Transmission Organization ("RTO") to incorporate customer's load within Company's Network Integration Transmission Service agreement without the obligation or requirement that Company construct, upgrade, or improve any existing or new transmission plant or facilities," and that the customer "shall be responsible for securing firm transmission service throughout the Contract Term outside of Company's control area at no cost or charge to Company (except for Energy Line Losses), if necessary, and customer agrees to indemnify and hold Company harmless from all such costs or charges imposed or billed."[15] Credit requirements are also imposed, specifically, that the customer agree that the company may require "a security deposit in the form of cash, letter of credit or surety bond, equal to two times (2x) the highest monthly utility bill from the prior 12-month period, upon the occurrence of any of the following: a) an assignment to customer or customer's parent of a long-term public debt rating by Moody's that falls below the rating of Baa3; b) an assignment to customer or customer's parent of a long-term public debt rating by Standard & Poor's that falls below the rating of BBB-; c) a significant change in ownership, as determined by Company, including but not limited to a change in ownership or possession of the assets of customer; d) the assessment of two (2) late payment charges within any 12 month rolling period; or e) customer makes an assignment for the benefit of creditors, or otherwise becomes bankrupt or insolvent (however evidenced), in which

[14] *Report and Order* in Case No. ER-2014-0258, pages 133-139.
[15] LTS rate schedule, tariff sheet, 62.1.

case Company may pursue other remedies available in law or equity, including a declaration that the agreement is in default." [16]

Upon satisfaction of the above stated requirements, the LTS rate is available to any customer that 1) meets the Rate Application conditions of the Large Primary Service rate, 2) can demonstrate to Ameren Missouri's satisfaction that such energy was routinely consumed at a load factor of 95% or higher or that customer will, in the ordinary course of its operations, operate at a similar load factor, 3) if necessary, arranges and pays for transmission service for the delivery of electricity over the transmission facilities of a third party, 4) does not require use of Ameren Missouri's distribution system or distribution arrangements that are provided by Ameren Missouri at Ameren Missouri's cost, excepting Ameren Missouri's metering equipment, for service to customer, and 5) meets all other required terms and conditions of the rate.[17]

In the Commission-approved Unanimous Stipulation and Agreement in Case No. ER-2016-0179, the signatories agreed "that the Industrial Aluminum Smelter ('IAS') rate schedule shall be eliminated and that the New Madrid aluminum smelter no longer qualifies as a Large Transmission Service ('LTS') customer, meaning its current rate options are either as a Small Primary Service or Large Primary Service customer." [18] Changes to the LTS rate schedules billing adjustments for various riders were also specified. [19]

In its "Order Approving Unanimous Stipulation and Agreement" entered in Case No. ER-2016-0179 on March 8, 2017, the Commission ordered that the IAS rate schedule shall be eliminated.[20]

Staff is not aware of any facility or customer of Ameren Missouri that *currently* has obtained the referenced RTO approval, or that *currently* operates at or above a 95% load factor and meets all other stated criteria. However, other customers *could* make transmission-related arrangements and operate in a manner such that one or more customers *could* satisfy all requirements for service on the LTS rate schedule, but Staff is not aware of any such facility or customer.

On the basis of the matters addressed above, Staff is not aware of any reason for the Commission to not permit Ameren Missouri to remove the LTS rate schedule from its tariff at this time. Staff recommends that in lieu of cancelling the rate schedule as literally requested in Ameren Missouri's Application, which involves stamping the word "Cancelled" on the named tariff sheets and leaving them in place, that the Commission include in its order the direction for Ameren Missouri to submit revised tariff sheets replacing the text on Tariff Sheets Mo. PSC Schedule No. 6, 3rd Revised Sheet No. 62, 1st Revised Sheet Nos. 62.1 and 62.2 and Original Sheet Nos. 62.3 and 62.4 and state on each replacement tariff sheet that the sheet is being left intentionally blank.

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[16] LTS rate schedule, tariff sheet, 62.1.
[17] LTS rate schedule, tariff sheet, 62.2.
[18] "Unanimous Stipulation and Agreement" in Case No. ER-2016-0179, page 9.
[19] "Unanimous Stipulation and Agreement" in Case No. ER-2016-0179, page 9.
[20] *Order Approving Unanimous Stipulation and Agreement* in Case No. ER-2016-0179, page 3.

Recommendation

Staff recommends the Commission enter an order canceling the CCN granted in File No. EA-2005-0180, and include in its order direction for Ameren Missouri to submit revised tariff sheets replacing the text on Tariff Sheets Mo. PSC Schedule No. 6, 3rd Revised Sheet No. 62, 1st Revised Sheet Nos. 62.1 and 62.2 and Original Sheet Nos. 62.3 and 62.4 to state that each individual sheet is being left intentionally blank, and include direction for Ameren Missouri to submit revised tariff sheets removing references to the LTS rate schedule from its Table of Contents and to remove the area authorized in File No. EA-2005-0180 from its Listing of Service Territory, and to make other changes necessary to reflect repagination associated with these changes.

Staff has verified that Ameren Missouri has filed its annual report and is not delinquent on any assessment. Staff is not aware of any other matter before the Commission that affects or is affected by this filing.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Cancellation of the Certificate of Convenience and Necessity Originally Approved in File No. EA-2005-0180 And the LTS Rate Schedule	))))	**File No. ED-2019-0309**

AFFIDAVIT OF SARAH L.K. LANGE

State of Missouri)
) ss.
County of Cole)

COMES NOW Sarah L.K. Lange and on her oath declares that she is of sound mind and lawful age; that she contributed to the attached *Staff Recommendation in memorandum form*; and that the same is true and correct according to her best knowledge and belief.

Further the Affiant sayeth not.

Sarah L.K. Lange

Sarah L.K. Lange

JURAT

Subscribed and sworn before me, a duly constituted and authorized Notary Public, in and for the County of Cole, State of Missouri, at my office in Jefferson City, on this 14th day of June, 2019.

Dianna L. Vaught

NOTARY PUBLIC

DIANNA L. VAUGHT
Notary Public - Notary Seal
State of Missouri
Commissioned for Cole County
My Commission Expires: June 28, 2019
Commission Number: 15207377