

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

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

STAFF'S REPLY

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Reply*, filed in compliance with the Commission's *Order Directing Reply* of February 18, 2016, states as follows:

STAFF'S PETITION:

1. In its *Report and Order* in Case No. ER-2014-0258, issued on April 29, 2015, the Commission established for a period of three years a new electric service rate class for Ameren Missouri customers, the IAS (Industrial Aluminum Smelters) Class.
2. The Commission expressly provided that Noranda Aluminum would be eligible to take service under the IAS Class so long, and only for so long, as it complied with certain conditions.
3. One of these conditions related to a particular specified level of full-time equivalent employees at the New Madrid smelter. That level was set at 850.
4. The Commission's *Report and Order* in Case No. ER-2014-0258 provided that Staff or any other party "may file a petition asking the Commission to determine whether the IAS customer has failed materially to comply with any term or condition required to access the reduced rate structure."
5. On February 3, 2016, Staff filed its *Petition* commencing this action, citing a newspaper article published in the *Southeast Missourian* on February 3, 2016, stating

that Noranda had laid-off a total of 475 employees, thereby evidently materially defaulting on the condition referred to in Paragraph 2, above, that Noranda maintain no fewer than 850 full-time equivalent employees.

NORANDA'S RESPONSE:

6. Pursuant to the Commission's *Order Directing Response* of February 4, 2016, Noranda filed its *Response* on February 9, 2016. Therein, Noranda stated that it "has been forced recently to reduce its Smelter workforce below the levels provided in the Report & Order. However, this reduction alone does not mean that Noranda has failed to comply with the Report & Order. The employee-count requirement was subject to an exception for *force majeure* or other events considered by the Commission to be outside of Noranda's control."¹

7. Noranda went on to explain that, in fact, three events beyond its control had resulted in the admitted workforce reduction, to-wit:

- A. On January 7, 2016, "an electrical supply circuit failure" put two of three pot lines out of action for at least "several months or more[.]"²
- B. The price of aluminum on the London Metals Exchange has "fallen to levels beyond even the worst case scenarios envisioned in Case No. ER-2014-0258 . . . At the current price, Noranda loses money on each pound of primary aluminum it produces"³
- C. On August 5, 2015, "a molten metal explosion occurred at the cast

¹ *Noranda's Response*, ¶ 2.

² *Id.*, ¶ 3.

³ *Id.*

house of the Smelter facility.”⁴ The result was “major structural and production equipment damage” and the cessation for an unknown and unpredictable interval of the production of one of Noranda’s highest margin products.⁵

8. In its *Response*, Noranda also noted that on February 8, 2016, it had sought protection from its creditors under Title 11 of the United States Code, pertaining to Bankruptcy, Chapter 11, Reorganization.

STAFF’S REPLY:

9. The Commission’s *Order Directing Reply* of February 18, 2016, does not specify what Staff’s *Reply* must contain or address. The *Report and Order* in Case No. ER-2014-0258 provides that “[u]pon the filing of such a petition, the Commission shall hold a hearing or make a determination based on verified pleading within 30 days of the filing of the petition.”⁶ It is not instructive in the matter of a reply. In civil practice, one role of a reply is to answer the defending party’s asserted counter claims, affirmative defenses and avoidances.⁷ Noranda’s assertion of *force majeure* in its *Response* is an avoidance.⁸ Noranda’s assertion depends on facts that Staff has no knowledge of and, given the expedited nature of this action, cannot discover. Due process, therefore,

⁴ *Id.*

⁵ *Id.*

⁶ Set out at length at ¶ 8 of *Noranda’s Response*.

⁷ J. Devine, *Missouri Civil Pleading and Practice*, § 15.7 (1986): The purpose of a reply is to respond to new matters raised in the answer.

⁸ *Force majeure*, “[a]n event or effect that can be neither anticipated nor controlled,” *Black’s Law Dictionary*, 718 (2009).

demands that Noranda be put to its proof.⁹

10. In the present situation, Noranda is in possession of all of the facts; Staff has no facts and has no time to seek them out.¹⁰ Staff's *Petition* was based on mere rumor in the form of a report in the popular press; as it happens, Noranda has now admitted that the rumor is true. All Staff can say in reply to Noranda's claim that its admitted default is excused because of circumstances beyond its control is that Staff is not in possession of sufficient facts to permit it to either admit or deny Noranda's assertion and, consequently, can only deny it.¹¹

11. Staff states that the Commission should require Noranda, the only party in possession of the material facts, to adduce competent and substantial evidence supporting a determination by the Commission that Noranda's default is excused. And, pursuant to the *Report and Order* in Case No. ER-2014-0258, whether or not that default is excused as being the result of *force majeure* is for the Commission to determine.

WHEREFORE, Staff prays that the Commission will convene an evidentiary hearing and require Noranda to show why its admitted default should be excused; and grant such other and further relief as the Commission deems just in the circumstances.

⁹ The notion of constitutional due process encompasses the "fundamental fairness" required of administrative proceedings such as this one. See, e.g., *Jones v. State Dep't of Public Health and Welfare*, 354 S.W.2d 37 (Mo. App. 1962).

¹⁰ Pursuant to the *Report and Order* issued in Case No. ER-2014-0258, the Commission must make its decision within 30 days of the filing of the petition.

¹¹ See Mo. R. Civ. Pro. 55.07. A permitted response to an averment is that the pleader lacks sufficient knowledge to either admit or deny; such a response has the effect of a denial.

Respectfully submitted,

/s/ Kevin A. Thompson

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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 Case No. ER-2014-0258 by the Data Center of the Missouri Public Service Commission, on this 23rd day of February, 2016.

/s/ Kevin A. Thompson