BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Revenues for Electric Service	)))	Case No. ER-2014-0258

UNITIED FOR MISSOURI'S APPLICATION FOR REHEARING

COMES NOW, UNITED FOR MISSOURI, INC. ("UFM"), by and through its counsel, and pursuant to §386.500.1 RSMo. and 4 CSR 240-2.160, for its Application for Rehearing, states as follows:

Introduction

On April 29, 2015, the Missouri Public Service Commission ("Commission") issued its *Report and Order*[1] in the above referenced case, the Ameren Missouri rate case. There is much in the *Report and Order* to commend itself. In the *Report and Order*, the Commission observed that it, "was created to serve the public interest, and it takes that responsibility very seriously."

> The Commission serves the public interest by establishing just and reasonable rates, and the Commission has endeavored to do so in this report and order.
>
> Many customers are already having a hard time paying their electric bills. Increasing Ameren Missouri's rates may make it harder for some customers to pay their bills. However, a just and reasonable rate does not necessarily mean a lower rate.[2]

UFM commends the Commission for this statement of purpose.

At the same time, the Commission has also asked for input regarding its authority and appropriate approaches to encourage economic development within the state. UFM supports the state's efforts in fostering true economic development, an economic development based on free

[1] *In re Union Electric Company*, File No. ER-2014-0258 (herein after "*Report and Order*" issued April 29, 2015).
[2] *Report and Order*, pp. 14-15.

markets and a system of justice that is based upon the Commission's statement of purpose expressed in the *Report and Order*, as quoted above.

The problem with many efforts that are marketed as economic development is that they are simply schemes to grant a favored entity special rights and privileges at the expense of others. In this *Report and Order*, the Commission has granted special rights in its ruling on the Noranda Rate Proposal. It has adopted a new rate design methodology, one that is designed to allocate a bare minimum of costs, i.e. Ameren Missouri's variable costs in serving that one customer and some arbitrarily selected amount of Ameren Missouri's fixed costs, to one customer in order to ensure that customer's competitive viability, a rate that requires Ameren Missouri to redistribute the remainder of that customer's fully allocated cost to Ameren Missouri's other customers. This does not produce a just and reasonable rate. It is simple injustice, granting preferential treatment to a preferred customer, based upon characteristics of a customer the Commission in its sole judgment finds favorable. Therefore, this *Report and Order* is unjust, unreasonable and unlawful with regard to the Noranda Rate Proposal.

There is significant history behind the Noranda Rate Proposal. The *Report and Order* describes that history as follows:

> For many years, Noranda has come before this Commission in every Ameren Missouri rate case and proclaimed that it needs low cost electricity to remain viable. Sometimes the Commission has made decisions that Noranda would find favorable; sometimes it has not. Most recently, less than a year ago, the Commission denied Noranda's request for a reduced rate in a complaint case decided while this case was pending. The Commission denied that request because Noranda failed to meet its burden of proof to show that its current rate was not just and reasonable. But Noranda continued its quest for a lower rate in this rate case, again asking for a rate that is below Ameren Missouri's fully allocated cost to serve.[3]

The *Report and Order* also describes the difference this time around.

[3] *Report and Order*, p. 130.

> This time the Commission reaches a different result because additional evidence and argument was presented. The additional evidence describes a looming problem for Noranda: it must seek to refinance its existing debt in 2017 and 2019. Noranda presented various scenarios based on the price of aluminum in which it would run out of liquidity (cash and available credit) in the next few years. Those scenarios were criticized a (sic) not the most likely to occur, and indeed, they are not intended to be forecasts of aluminum prices. Rather, they are scenarios of what would happen if aluminum prices, which are volatile, were to drop. They are worst case scenarios, but sometimes the worst happens.[4]

However, in basing its decision on this new evidence, the Commission's *Report and Order* strays from cost of service ratemaking that is just and reasonable into a new ratemaking scheme that is arbitrary, capricious and unlawful.

Argument

1. **The *Report and Order* on the Noranda Rate Proposal is unlawful in that it departs from cost of service principles and unduly discriminates between customers.**

The *Report and Order* establishes a new class of Ameren Missouri ratepayers, the Industrial Aluminum Smelter class, at a rate of $36.00 per MWh, with other terms and conditions. The *Report and Order* establishes the new rate based on a new ratemaking methodology, the Commission's determination that such rate should cover the variable costs of Ameren Missouri in providing service to Noranda and contribute to some unquantifiable amount of Ameren Missouri's fixed costs.

> If Noranda pays a rate of $36 per MWh and buys 4 million MWhs per year, it would contribute roughly $32 million per year towards Ameren Missouri's fixed costs. That is $32 million per year that Ameren Missouri's other customers will have to pay if the smelter shuts down. Even if it is assumed that the incremental cost is $31.50 per MWh as estimated by Staff, Noranda would still be contributing $18 million per year to Ameren Missouri's fixed costs at a rate of $36 per MWh. It is true Ameren Missouri's other customers will have to pay extra to make up for the lower rate given to Noranda. But they will have to pay even more if the smelter shuts down and Noranda contributes nothing to Ameren Missouri's fixed costs.[5]

[4] *Id.*
[5] *Report and Order*, p. 132.

While the Commission constrains itself in this new fixed/variable cost analysis for Noranda, it is controlled in its final decision on the amount of the rate by political and economic considerations of Noranda and Ameren Missouri's other customers.

> First, the $34 per MWh rate proposed is too low. The Commission wants to ensure that Noranda remains competitive with other smelters in this country but does not want to require other customers to support a rate for Noranda that would make it the lowest overall cost smelter in the country.

These are arbitrary considerations based on the Commission's desire to benefit one customer at what it considers an appropriate harm to other customers. The entirety of the Commission's decision is based on the Commission's desire to "ensure" Noranda's competitive status in the country and how much cost the Commission believes Ameren Missouri's other ratepayers should bear for Noranda's benefit.

The Commission has previously concluded that the controlling precedent on such matters were *State ex rel. Laundry v. Public service Commission*, 34 S.W.2d 37, 327 Mo. 93 (Mo., 1931) and its own decision in *Civic League of St. Louis*, 4 Mo.P.S.C. 412 (1916).[6] In both cases, the judgment was that distinctions cannot be made between customers in setting and administering rates based on any characteristic of the customer.

---

[6] See *Noranda Aluminum, Inc., et al., v. Union Electric Company*, File No. EC-2014-0224, (August 20, 2014), p. 21. In its *Report and Order* in that complaint case, the Commission cited with approval its own language from *Civil League of St. Louis*:

> The establishment of the truth of such averment (that rates to manufacturers were below the cost of service) would reveal not only unquestionably unjust discrimination, but also an unreasonable low rate to this class (the manufacturers), and intolerable oppression upon the general metered water users in that they would be compelled to pay in part for water and service furnished to the favored class. The exercise of power crystallized into legislation that unjustly discriminates between users of water in this manner, in effect deprives those discriminated against of the use of their property without adequate compensation or due process of law, and turns it over to the favored class. It is in essence a species of taxation which takes the private property of the general or public metered water users for the private use of metered water users engaged in manufacturing. This is an abuse of power.

The *Report and Order* in this case now attempts to distance itself from those prior findings by claiming that the *Laundry* decision was dicta. "The *Laundry* decision merely decides that in the facts described in that case, the laundries should have qualified for the industrial rate."[7] The ruling is clearly not dicta because it speaks to the equality of all customer under a utility company's rate structure, which was the point of contention in that case. The question in the *Laundry* case was who has access to a preferential rate. The Complainants wanted a certain preferential rate, a rate "put into effect to induce the Wagner Electric Manufacturing Company and the Fulton Iron Works Company to locate their plants in St. Louis County and take water from the Company, with the idea that the manufacturer employs hundreds of men and would bring sufficient business with it."[8] The gist and gravamen of the complaint was unjust and unreasonable rate discrimination.[9] The holding was that only service differences justify a different rate. Distinctions made for the pecuniary advantage of the utility company are unjust and unfair discrimination. The holding is directly on point in that case, and it is directly on point in this case. The Commission cannot so easily disregard these precedents.

The *Report and Order* violates the very simple rule that differences in rates must be justified based on differences in service. The *Report and Order* attempts to soften this requirement in the *Laundry* case. According to the *Report and Order*, the *Laundry* principle is that, "the Commission may set preferential rates as long as the preference is reasonably related to the cost of service and is not unduly or unreasonably preferential." The Missouri Supreme Court was not so vague in its holding. The Court twice in its opinion reiterated the following words:

> There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even

[7] *Report and Order*, p. 128.
[8] *Laundry*, 34 S.W.2d 41.
[9] Id.

> when based upon difference of service, must have **some reasonable relation to the amount of difference**, and cannot be so great as to produce an unjust discrimination. [emphasis added][10]

The Commission may not establish two distinct rate setting methodologies, a fully allocated cost of service method and a preferential variable/fixed ratemaking method, and then parcel them out as it desires. The Commission must be consistent in its ratemaking methodology, and all differences must be justified based on difference in the service. The Commission's *Report and Order* is not consistent with this simple rule. The *Report and Order* does not justify the difference in the charge based on the difference in the service but on the political and economic situation of the customer and how much expense the Commission wants to impose on Ameren Missouri's other customers. This is a departure from cost of service principles for one customer's benefit and undue discrimination.

Commissioner Stoll's dissent in this case has it right.

> The Order lowers the rates of a single customer, Noranda, in a single class, Large Transmission Service, to a level less than the cost of providing service that constitutes 10 percent of the Utility's total load under the pretense that the loss of this single LTS customer would detrimentally affect all other customers of this utility. Therefore, this order would in effect raise the rates of all customers in all classes to subsidize rates of the largest customer to avoid presumably even higher costs should Noranda fail.
>
> It is here that the Order creates a confiscatory dilemma from which it cannot escape: If the losses resulting from the below-service-cost rates approved for Noranda are not spread across other customer classes - residential, commercial and industrial - the Order unlawfully confiscates the value of the service from the Utility; if the Utility is made whole by spreading the subsidized costs of Noranda's below-cost rate to other ratepayers, the money of the customers in all the other classes is being unlawfully confiscated because they are forced to pay costs *higher* than those actually necessary to provide utility service to them.

2. The *Report and Order* on the Noranda Rate Proposal in unlawful in that it unduly discriminates between Ameren Missouri customers in violation of section 393.130 of the Revised Statutes of Missouri.

[10] *Laundry*, 34 S.W.2d 45.

Section 393.130.2 RSMo (Cum. Supp. 2013) provides that,

> "No gas corporation, electrical corporation, water corporation or sewer corporation shall . . . charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any **service** rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a **like and contemporaneous service** with respect thereto under the **same or substantially similar circumstances** or conditions." [emphasis added]

Subsection 3 of that same section provides that,

> No . . . electrical corporation . . . shall make or grant any **undue or unreasonable preference or advantage** to any **person, corporation or locality**, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [emphasis added]

Both subsections speak in terms of the cost of the service and prohibit distinctions based on the conditions of the customer.

The *Report and Order* is partially right when it makes the following findings,

> F. The evidence in this case shows that Noranda is a unique customer because it uses much more electricity than any other Ameren Missouri customer. It uses that electricity at a very high load factor. It is so unique that it has had its own rate classification for many years. G. Under these circumstances, a rate for Noranda that is less than its fully allocated cost, but more than its incremental cost is just and reasonable within the meaning of Section 393.130, RSMo (Cum. Supp. 2013), and is not unduly or unreasonably preferential. [citation omitted]

F is correct. G is wrong. If the Commission had followed through on its finding in F and based its decision on the characteristics of service, such as load factor and the fully allocated cost of service, the distinction would have been lawful in that it would have been based on the characteristics of service. However, the Commission got distracted in determining who could receive less than a "fully allocated cost" based upon the characteristics of the customer, and such distinctions are unlawful.

It is clear that the Commission could not adopt the "less than its fully allocated cost," across the board for all rate classes. Rates which are not sufficient to yield a reasonable return on the value of property used in service are confiscatory.[11] Therefore, if one customer receives a rate at less that the fully allocated cost, others must receive a rate that is higher than the fully allocated cost in order to make the utility company whole. According to the *Report and Order*, rates will be calculated one way for unique customers, preferred customers, permitting them to only compensate the utility for its variable costs and some portion of its fixed cost, and the unrecovered portion of the fully allocated cost to serve such customers will be allocated to other customers. In essence, the Commission has rejected the traditional standard of cost of service based rate design entirely upon its customer preference. It is picking winners and losers. Such distinctions are unduly preferential and unlawful because they violate section 393.130 of the Revised Statutes of Missouri.

3. **The *Report and Order* on the Noranda Rate Proposal is not reasonable in that it is not based on substantial and competent evidence because it is based on the speculation of the future financial conditions of an unregulated customer of Ameren Missouri.**

Decisions of this Commission must not only be lawful; they must be reasonable. They must be based on facts which constitute competent and substantial evidence. *Friendship Village of South County v. Public Service Com'n of Missouri*, 907 S.W.2d 339 (Mo. App.W.D., 1995).

> "Substantial evidence" is competent evidence which, if true, has a probative force on the issues. *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949). If the PSC's decision is based on purely factual issues, we may not substitute its judgment for that of the PSC. *Office of the Pub. Counsel,* 938 S.W.2d at 342.[12]

[11] *Bluefield Water Works v. Public Service Comm'n.*, 262 U.S. 679, 690 (1923)
[12] *MGUA v. PSC*, 976 S.W.2d 485 (Mo. App., 1998).

However, the *Report and Order's* findings on the Noranda Rate Proposal issue constitute speculation and not competent and substantial evidence. A recitation of a few of the factual findings in the *Report and Order* should suffice to make the point.

> 13. . . . The future viability of the smelter, and thus the likelihood Ameren Missouri would retain Noranda load, is largely dependent on the price of aluminum on the world market.[13]
>
> 15. The price of aluminum is highly volatile.[14]
>
> 16. Demand for aluminum tends to be cyclical following the general business cycle and is concentrated in industrial sectors that experience large swings in demand.[15]
>
> 18. . . . As a result, forecasts of future aluminum prices can be unreliable. There is little ability to predict the timing of an aluminum cycle beyond a year or two, and even a short-term prediction can be significantly wrong.[16]

The Commission's entire justification for granting Noranda a special rate is based on its desire to keep Noranda competitive. "The Commission wants to ensure that Noranda remains competitive with other smelters in this country but does not want to require other customers to support a rate for Noranda that would make it the lowest overall cost smelter in the country."[17] But this assurance of competitiveness is entirely speculative. These are projections of future economic conditions in the aluminum industry, projections that are speculative for the expert and beyond this Commission's expertise. Such speculations do not constitute competent and substantial evidence.

---

[13] *Report and Order*, p. 122.
[14] Id.
[15] Id.
[16] *Report and Order*, p. 123.
[17] *Report and Order*, p. 133.

Conclusion

UFM supports true economic development when it is done in a just and equitable manner as described in the Commission's purpose statement quoted in the Introduction of this Application and as set forth in the *Laundry* case. UFM does not support unlawful an inequitable economic development when used to ensure a competitive advantage of one citizen or group of citizens at the expense of others. The Commission's *Report and Order*, for the most part, executes the proper role of this Commission in ensuring just and reasonable rates for all customers. However, it fails to do so on the Noranda Rate Proposal. Therefore, UFM requests that the Commission grant this Application for Rehearing on the Noranda Rate Proposal.

Respectfully submitted,

By /s/ David C. Linton

David C. Linton, MBE #32198
314 Romaine Spring View
Fenton, MO 63026
314-341-5769
jdlinton@reagan.com

Attorney for United for Missouri, Inc.

Dated: May 11, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email to all parties by their attorneys of record as provided by the Secretary of the Commission on the 11th day of May, 2015.

/s/ David C. Linton
David C. Linton