BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company for a Certificate of Public Convenience and Necessity authorizing it to construct, install, own, operate, control, manage and maintain electric plant, as defined in § 386.020(14), RSMo, to provide electric service in a portion of New Madrid, County, Missouri, as an extension of its existing certified area.	)))))))	**Case No. EA-2005-0180**

STAFF SUGGESTIONS IN SUPPORT OF
UNANIMOUS STIPULATION AND AGREEMENT

Comes now the Staff of the Missouri Public Service Commission (Staff) in support of the Unanimous Stipulation And Agreement filed on February 24, 2005 and states as follows:

Large Transmission Service (LTS) Tariff

The parties have agreed to an interim solution that is based on the principles that the Staff believes are appropriate for establishing a less transitory / more permanent rate design for a large transmission group of customers at a future date. The Large Transmission Service (LTS) tariff originally proposed by Ameren UE and supported by Noranda was an interim tariff proposal, but to the Staff it appeared to carry with it many aspects of a permanent rate design. The Staff was concerned with agreeing to the need for a separate tariff to serve Noranda without having the benefit of the time necessary to appropriately investigate the cost to serve Noranda. Gathering and processing the data necessary for a customer class cost of service /comprehensive rate design case is very intensive, detailed and time consuming. There simply was insufficient time to perform such a study and meet the schedule demands of this case. In summary, the Staff found itself in a position of looking for a best interim solution – an alternative that would not in either

appearance or in reality commit the Commission to a permanent type answer, before it had a reasonably complete record with the necessary evidence for the determination required.[1]

As a resolution to this situation, the parties have agreed that AmerenUE will file a modification of its originally proposed LTS tariff that will apply to Noranda for an interim period starting June 1, 2005 and extend to a future time when rates for all major customer classes are reviewed and changed by the Commission in AmerenUE's next general rate case or complaint proceeding. In that proceeding, the parties (1) agree to evaluate the cost to serve Noranda as a separate class of service and make recommendations whether or not a separate LTS tariff or special contract is necessary to serve Noranda at its cost of service, and (2) are free to take the position in that proceeding that an LTS tariff is not necessary in order to serve Noranda at its cost of service.

Although the parties have agreed that AmerenUE should be permitted to provide service to Noranda under an LTS tariff on an interim basis, the parties have also agreed that, even on an interim basis, the criteria for customers that might be served under the LTS tariff will be significantly different from what AmerenUE initially proposed in its December 20, 2004 filing. The agreed to interim criteria specifically includes customers that meet the rate application conditions of AmerenUE's Large Primary Service (LPS) rate and no longer specifically require customers to have consumed at least 3 million MWhs in the preceding 12 months, or be able to demonstrate to AmerenUE's satisfaction that they will consume 3 million MWhs in the next 12

[1] The Missouri Supreme Court has stated that the Commission's powers are limited to those conferred by statute, either expressly, or by clear implication as necessary to carry out the powers specifically granted, *State ex rel. City of West Plains v. Public Service Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958). "Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, 'neither convenience, expediency or necessity are proper matters for consideration in the determination of' whether or not an act of the commission is authorized by the statute, *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (banc 1923)." *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

months, if historical data are unavailable. In addition, the load factor[2] level requirement was dropped from 98% to 95% to allow for additional flexibility regarding Noranda's operations. Finally, the language regarding a customer taking transmission service from a third party provider was reworked to attempt to reflect what the condition was meant to address, which is to require a customer that takes third party transmission service to pay for that service separate and apart from the rates included in the LTS tariff.

The interim criteria agreed upon by the parties are as follows:

> 6. **Rate Application.** This rate shall be applicable, at Customer's request, to any Customer that 1) meets the Rate Application conditions of the Large Primary Service rate, 2) can demonstrate to Company'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 Company's distribution system or distribution arrangements that are provided by Company at Company's cost, excepting Company's metering equipment, for service to Customer, and 5) meets all other required terms and conditions of the rate.

There continues to be an Annual Contribution Factor (ACF). But now it shall be calculated so as to provide AmerenUE 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 fifteen-year term, five-year termination notice and annual renewal provisions of the original LTS tariff continue in the revised LTS tariff of the Unanimous Stipulation And

[2] Load factor shows the variability in a customer's usage over a specific period of time expressed as a ratio of the customer's average usage over that period to its peak hour usage during that period. A "high load factor" means the customer's usage is relatively constant over the entire period.

Agreement. Also, the special credit provisions of the original LTS tariff desired by AmerenUE are retained in the revised LTS tariff of the Unanimous Stipulation And Agreement.

The Staff believes that the changes made to the AmerenUE proposed LTS tariff were necessary in order to develop an interim tariff that is just and reasonable and not unduly discriminatory or preferential. In addition, the Stipulation And Agreement makes it clear that no party has agreed to confer just and reasonable status on the separate rate components in the LTS tariff, apart from the 3.25 cents per kilowatt-hour ($0.0325/kWh) floor resulting from the application of the ACF.

Section 91.026 RSMo Cum. Supp. 2004

In the hearing that occurred on February 22, 2005 before a settlement was reached by the parties, Commissioner Steve Gaw posed a number of legal questions that the parties attempted to address. He also asked a few questions for which he was seeking information which are not legal questions. One focus of his inquiry appeared to be the question: What is the advantage of the approach taken by AmerenUE and Noranda? Commissioner Gaw appeared to pose this question at pages 59 and 63 of the rough draft of the transcript of the February 22, 2005 hearing, a partial copy of which transcript was obtained by Staff counsel and provided to all parties, after obtaining the Regulatory Law Judge's approval to contact the court reporting company, Midwest Litigation Services:

> [W]hat advantage is gained by adding this territory in to Ameren service territory, as opposed to just serving under a contract pursuant to the intervening statute?
>
> [P]lease clarify for me what the specific advantages are to Noranda in getting into the service territory that you would not be able to achieve through a contract. And I need - - I need Ameren to do that for me as well, why that's in Ameren's best interests, and and try to stay - - I mean, to the extent that that has to do with with anything beyond that 15 years and that obligation to serve, that that to me is an issue that plays that that mix but not necessarily in a positive way for Ameren.

So I need to understand from Ameren's standpoint, how is that - - how is it a good thing to put them in the service territory?

The Staff believes that Noranda may proceed by either Section 91.026 and obtain power from a supplier as a non-retail electric service customer, or seek service from AmerenUE as a retail electric customer of AmerenUE, through extension of the AmerenUE retail electric service territory. Among the Staff's concerns, which were addressed in the rebuttal testimony of Staff witness Michael S. Proctor, is the risk to existing AmerenUE customers of higher costs if and when Noranda leaves the AmerenUE system. These higher costs principally are in the cost of incremental capacity to serve the very large Noranda load, which will not be needed by AmerenUE to serve existing non-Noranda load until after the non-Noranda load grows into the need for additional capacity that serves the Noranda load. In addition, Dr. Proctor addressed the benefits that may accrue to AmerenUE's existing Missouri retail electric customers, with AmerenUE facing substantial potential cost increases from investments in environmental upgrades to its existing fleet of generation plants. Noranda would support a portion of those increased costs through its fair share of any rate increases that may occur because of what now appears to be in excess of one billion dollars in upgrade costs over the next ten years.

The advantage to AmerenUE, as a retail electric supplier in a non-retail competition state, of its proposal to serve Noranda, as a retail electric customer, is that if Noranda leaves the AmerenUE retail electric system, AmerenUE potentially will recover any stranded investment relating to Noranda from its remaining retail electric customers. In the course of Staff depositions of AmerenUE witnesses, AmerenUE witness Craig D. Nelson related that AmerenUE and Noranda discussed proceeding by Section 91.026, but AmerenUE is not willing to serve Noranda under Section 91.026 because of the regulatory uncertainty presented by Section 91.026. AmerenUE is willing to serve Noranda as a retail electric customer through

extension of the AmerenUE service territory. Under the proposal for Noranda to become a Missouri retail electric customer of AmerenUE, Noranda will be subject to rate increases as are all other Missouri retail electric customers of AmerenUE, and the remaining base of retail electric customers will be available for cost recovery if Noranda, for some reason, leaves the AmerenUE retail electric system.

Noranda wants very reliable power pursuant to a long-term power contract at a cost based price, and AmerenUE wants regulatory clarity and certainty regarding cost recovery if Noranda should leave the AmerenUE retail electric system pursuant to Section 91.026 or on some other basis. If Noranda were to leave the AmerenUE system, AmerenUE wants to be able to recover, from the remaining retail electric ratepayers, the costs that it will have incurred to serve the Noranda load to the extent that such costs were not mitigated. Proceeding solely under Section 91.026, would certainly leave AmerenUE open to not being able to recover such costs. AmerenUE may accomplish the recovery of such costs, if Noranda is, for some period, a retail electric customer of AmerenUE, but it is questionable whether AmerenUE can accomplish such cost recovery if AmerenUE and Noranda proceed solely by Section 91.026 and Noranda is never a retail electric customer of AmerenUE.

According to Dr. Proctor, the risk of higher costs actually occurring to existing AmerenUE customers from Noranda being a retail electric customer of AmerenUE is mitigated because of the Agreement/tariff condition that Noranda must give five years notice before it can leave the AmerenUE system pursuant to Section 91.026. This condition gives AmerenUE five-years to grow into the capacity required to serve the Noranda load of 475 MWs. In circumstances where Noranda would choose to leave the AmerenUE system, five years notice is appropriate given AmerenUE's load growth of approximately 100 MW per year and the size of

the Noranda load. In order to implement a phase out of capacity to serve the Noranda load, AmerenUE could negotiate short-term contracts for reserve capacity, which would terminate at the time that Noranda leaves the AmerenUE system. In addition, if Noranda, for example, closed down, without the intervention of the five-year notice provision, the risk of other Missouri retail electricity customers paying more is mitigated by AmerenUE's opportunity to sell the energy represented by the Noranda load into the off-system market for electricity. The extent to which this mitigation would prove to be viable would depend greatly on a number of factors.

The Staff believes that the fact that Section 91.026 offers Noranda an out from retail electric service is the reason in particular that AmerenUE asked for a prudence determination for ratemaking purposes in its Application. As previously noted by the Staff, the December 20, 2004 AmerenUE Application And Motion For Expedited Treatment (Application) requests in subparagraph "a." of the "Wherefore" clause that the Commission make a "finding further that the extended service territory and the service to Noranda to be provided pursuant to said certificate and the accompanying tariff is prudent for ratemaking purposes." The Staff raised questions as to the meaning of this language in several of its pleadings to the Commission. When the Staff sought clarification of this language in one of its depositions of AmerenUE witnesses, the AmerenUE witness directed Staff counsel to AmerenUE's counsel for an answer. AmerenUE sought to clarify in its prehearing brief, at pages 22-23, what it is seeking by this request for a prudence determination for ratemaking purposes.

This matter of a prudence determination for ratemaking purposes is now addressed in the Unanimous Stipulation And Agreement in paragraphs 5 and 6. Paragraph 6 states in relevant part: "The Parties are entering into this Stipulation and Agreement with an understanding of the unique circumstances presented by AmerenUE's Application, and a Party's agreement to the

terms of this Stipulation and Agreement regarding prudence shall not create any precedent that a Party would agree to any kind of prudence finding in any future proceeding." The parties have been explicit in the language that appears in the Unanimous Stipulation And Agreement in an effort to eliminate any future misunderstandings.

Finally, the Staff would note Case No. EO-97-491, In the Matter of the Consideration of a Competitive Market Research Project and Pilot Open Access Program for The Empire District Electric Company, which involved two proposed tariffs that were originally part of the The Empire District Electric Company (Empire) rate increase case, Case No. ER-97-81, 6 Mo.P.S.C.3d 510 (1997). One of the proposed tariffs was an open access transmission tariff /pilot open access service tariff (POAS) jointly developed by Empire and Praxair, Inc. and ICI Explosives USA, Inc. (Praxair/ICI) as a proposed experiment to allow eligible customers the opportunity to study the operation and effects of direct access in a form reasonably similar to that which would be expected in a competitive market. Eligible customers participating in the project were to be large users with relatively large, stable load factors that would remain on the Empire distribution system but purchase their power competitively. Customer participants would be required to pay a monthly administrative fee and a margin charge.

The Staff and Public Counsel opposed the tariff for, among other reasons, they asserted that the POAS tariff would violate the change of customer/anti-flip-flop statute, Section 393.106. Praxair/ICI argued that the POAS tariff did not provide for a change of supplier because Empire would remain the sole source of distribution of electrical energy for all Empire customers.

The Commission found the proposed POAS tariff to violate Section 393.106 and thus rejected the proposed POAS tariff:

> The statute was intended to prevent a utility from investing capital to provide permanent service only to lose the customer to a competing utility. One purpose

> of this law is to prevent destructive competition. While EDE will be reimbursed, at least theoretically, for its capital investment in distribution facilities and will remain as the distribution company, EDE will not be reimbursed for its generation facilities and cannot compete for generation for at least four years. The utility will be unable to recover through rates the capital previously invested in physical plant (stranded investment), and the ongoing costs to generate the power and to supply customers no longer on the system (stranded costs) spread fairly over all of the ratepayers whose anticipated continued use of the system caused the investment and ongoing costs. Further, the ratepayers remaining on the system, many of whom are captive and inelastic, may be forced to make up the difference in revenue to the utility through higher rates. This creates exactly the situation that the anti-flip/flop statute seeks to avoid.

6 Mo.P.S.C.3d at 513-14.

Empire also filed a tariff for a residential and small commercial competitive market research project designed to evaluate the potential effects of retail competition. Empire anticipated out of pocket expenditures of $100,000 or less for this project. The Staff, although not opposed to the concept of the project, was opposed to the costs of the project being recovered from ratepayers. The Commission found that no Commission action was necessary in order for Empire to proceed with the project. The Commission took no action respecting the proposed project, noting that Empire could proceed with the project at its own discretion. 6 Mo.P.S.C.3d at 511-12.

Obligation to Serve And Other Commissioner Questions

In the hearing that occurred on February 22, 2005 before a settlement was reached by the parties, Commissioner Gaw raised a number of questions that the parties attempted to address. This section of the Staff's Suggestions In Support will endeavor to address those questions, in the limited time available to counsel for the Staff to prepare this document. After paraphrasing Commission Gaw's questions, the Staff's discussion will start with material that first appeared in the January 18, 2005 Staff Legal Memorandum In Response To January 4, 2005 Commission

Order Directing Filing, but then move on to new material and material addressed by Staff counsel at the hearing on February 22, 2005.

In short, Commissioner Gaw asked the following questions, to which the Staff's brief answer to each question follows, which may be expanded upon further below:

> (1) *Is there any supplier of electricity that presently has an obligation to serve Noranda?* Currently, Noranda is not served by a public utility with an obligation to serve. Given that Noranda has the ability to enter into a contract of choice, this question could be restated as follows: Is there a default provider or provider of last resort? Missouri has not instituted a system for default providers as has been done in states with retail choice.
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> (2) *Does a territorial agreement create an obligation to serve?* Arguably, yes.
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> (3) *Is Noranda in or out of the city limits of the City of New Madrid?* Noranda is outside the city limits of the City of New Madrid.
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> (4) *What is AmerenUE's obligation to serve once Noranda is included in its service territory?* Once Noranda is included in AmerenUE's service territory, AmerenUE has a Public Service Commission Law obligation to serve. If there is a contract or agreement for the provision of service by AmerenUE, AmerenUE may have only a contractual obligation to serve Noranda rather than a Public Service Commission Law obligation to serve.
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> (5) *What is AmerenUE's obligation to serve if (a) Noranda gives five-years notice in the tenth year of service, pursuant to tariff and Agreement that service will be provided to Noranda for a period of fifteen years, (b) AmerenUE terminates service at the conclusion of the fifteenth year, (c) the Commission leaves in place the certificate of convenience and necessity specifically covering the Noranda facilities, and (d) Noranda subsequently, after having left the AmerenUE system as a retail customer, notifies AmerenUE that it wants to commence retail electric service from AmerenUE again?* As long as the certificate of convenience and necessity remains in place, AmerenUE generally would have an obligation to serve Noranda, including being able to provide or obtain the capacity needed to serve Noranda. Therefore, it would seem reasonable for AmerenUE to request that the Commission cancel the applicable certificate of convenience and necessity if Noranda leaves the AmerenUE system as a retail electric customer. Should Noranda return to the AmerenUE system as a retail electric customer after having left the AmerenUE system as a retail electric customer, the price at which AmerenUE must provide service would seemingly be an open question.
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> (6) *Can the Commission issue a certificate of convenience and necessity with a sunset provision, i.e., the certificate of convenience and necessity terminates after*

a specified number of years? Seemingly "yes," but this is an area which if the Commission ventured into at all, it would likely want to do so only very cautiously. Proceeding in the manner indicated may only be practical in a very few unique situations when, for example, the number of customers / prospective customers included in a new service territory is very limited and the matter of investment in facilities is recognized and initially addressed at the time the certificate of public convenience and necessity is sought. As noted at the February 22, 2005 hearing by Public Counsel, Section 393.170.3 states in part that "[t]he commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void."

(7) *What would be the procedure regarding AmerenUE's Application to extend its service territory to provide retail electric service to Noranda, if there were no Section 91.026, and Noranda was still being served by AECI and the City of New Madrid?* Even if AECI, the City of New Madrid, Noranda and AmerenUE were in agreement regarding AmerenUE commencing the provision of retail electric service to Noranda, the change of electric suppliers from AECI and the City of New Madrid to AmerenUE would have to be for some basis/bases other than a rate differential and AmerenUE would still have to file for a certificate of convenience and necessity to include the Noranda facilities in its certificated service territory.

(8) *Are the Missouri statutes that apply to territorial agreements and the Missouri statutes that apply to change in electric service providers the same statutes?* No. See below.

The Staff would note that Section 394.312 RSMo 2000 is the territorial agreement statute for rural electric cooperatives, municipal utilities and investor owned utilities; Section 394.315 RSMo 2000 is the change of electric supplier/anti-flip-flop statute for rural electric cooperatives (customer change from being supplied by a rural electric cooperative to an investor owned utility or a municipal utility); Section 91.025 RSMo 2000 is the change of electric supplier/anti-flip-flop statute for municipal utilities (customer change from being supplied by a municipal utility to an investor owned utility or a rural electric cooperative); Section 393.106 RSMo 2000 is the change of electric supplier/anti-flip-flop statute for investor owned utilities (customer change from being supplied by an investor owned utility to a rural electric cooperative or a municipal

utility). Section 386.800 RSMo 2000 addresses municipal annexation of areas served by investor owned utilities or rural electric cooperatives.

Once the Commission grants to AmerenUE the certificate of convenience and necessity that AmerenUE is seeking by its Application, AmerenUE will have an obligation to serve Noranda. *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177, 181 (Mo.App. 1960) ("*Harline*") provides, in relevant part, as follows regarding a public utility's obligation to serve in its certificated service territory:

> . . . The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve. State ex rel. Ozark Power & Water Co. v. Public Service Commission, 287 Mo. 522, 229 S.W. 782; State ex rel. Kansas City Power & Light Co. v. Public Service Commission of Missouri et al., 335 Mo. 1248, 76 S.W.2d 343; State ex rel. Federal Reserve Bank of Kansas City v. Public Service Commission, 239 Mo.App. 531, 191 S.W.2d 307; and May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41.

AmerenUE's Application merely states that AmerenUE is seeking a certificate of convenience and necessity pursuant to Section 393.170 RSMo. 2000 and 4 CSR 240-2.060(1) and 4 CSR 240-3.105. Clearly, AmerenUE is seeking an area certificate of convenience and necessity and not a line certificate of convenience and necessity. The Court in the *Harline* case distinguished between the two types of certificates of convenience and necessity, identifying Section 393.170.1 with line certificates of convenience and necessity and Section 393.170.2 with area certificates of convenience and necessity:

> Certificate "authority" is of two kinds and emanates from two classified sources. Sub-section 1 requires "authority" to construct an electric plant. Sub-section 2 requires "authority" for an established company to serve a territory by means of an existing plant. Peoples Telephone Exchange v. Public Service Comm., 239 Mo.App. 166, 186 S.W.2d 531.

> We have no concern here with Sub-section 1 "authority". The 1938 certificate permitted the grantee to serve a territory – not to build a plant. Sub-section 2 "authority" governs our determination.

343 S.W.2d at 185. This distinction more clearly appears in the Western District Court of Appeals' decision in *State ex rel. Union Electric Co. v. Public Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo.App. 1989):

> . . . Two types of certificate authority are contemplated in Missouri statutes. Section 393.170.1, RSMo 1986 sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate and is what Union Electric held in the instant case. Subsection 2 sets out the requirement for authority to serve a territory which is known as an area certificate. § 393.170.2, RSMo 1986. . . .
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> . . . .
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> On its face, line certificate authority described under subsection 1 of section 393.170 carries no obligation to serve the public generally along the path of the line. The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority. That difference is reflected in the distinct rules for each promulgated by the Commission at 4 CSR 240-2.060(2) [*See* 4 CSR 240-3.105(1)(A) and (B)]. Union Electric now argues that the distinction has been so blurred that the two types of authority should be considered interchangeable.
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> It is understandable that the distinction between an area and line certificate has been unclear given the historical development of utility law in Missouri and the Commission's guiding purpose, among others, of avoiding duplication of electrical distribution facilities. . . .

On January 7, 2005, in Case No. EO-2005-0122, In the Matter of the Application of Gascosage Electric Cooperative and Three Rivers Electric Cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier within Camden, Cole, Franklin, Gasconade, Maries, Miller, Moniteau, Osage, Phelps & Pulaski Counties, Missouri, counsel for Three Rivers Electric Cooperative and Gascosage Electric Cooperative, Victor Scott, delivered an opening statement in which, among things, he stated as

follows, at pages 10-15 of Volume 1 of the transcript, regarding rural electric cooperative service areas:

> This is a Territorial Agreement between two electric [distribution] cooperatives . . . .
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> This is only the second one that I know of between electric cooperatives. And there's a reason for that. And the reason for that is, is historically electric cooperatives have what they deem as their quote/unquote traditional service areas. And those traditional service areas have been set out on maps and provided to the public. . .
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> [T]hose traditional service boundaries were set up when the electric cooperatives were first organized in the late thirties and early forties. Normally those boundary lines were established because of some natural feature and/or some community relations between the actual incorporators. And so there wasn't a whole lot of competition between electric cooperatives when they were first established. So you have some defined boundary lines.
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> . . . .
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> Now, the interesting part of this Territorial Agreement is that Gascosage is a member of Show-Me Electric Cooperative, its transmission and power supplier, which is located down in Marshfield, Missouri. And they serve the southeastern part of the state as the GNT [generation and transmission company]. Three Rivers' GNT is Central, which is located here in Jeff City.
>
> Because those two cooperatives are members of different GNTs, even though they have quote/unquote traditional service boundaries, they are not what you would call part of their own GNT family. So there's not as much communication between the two entities regarding what they believe their traditional service territories are, even though they have lines that you can see from the road, etc., etc. . . .
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> And what we have found is, is the cooperatives that neighbor other cooperatives who are members of other GNTs, we are noticing more and more competition along those boundary lines as people from the city move out to more rural America.
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> . . . .
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> But the most beneficial thing of a Territorial Agreement, which we have learned actually from history, is the third part of the Territorial Agreement. And that is, is establishing a large enough area to eliminate future competition in what the cooperative believes its traditional service area.
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> . . . .

> But it's clear under Missouri law a rural electric cooperative can serve in any rural area. . . .
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> . . . .
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> That is one reason why Moniteau and Franklin County and some of these outlying counties are part of this agreement is to benefit Three Rivers so that Gascosage doesn't hop over one county to begin serving a large commercial load if the price is right and take away the benefit of what Three Rivers believes it getting from the Territorial Agreement. And the same for Gascosage.

Regarding the obligation to serve of rural electric cooperatives, there is relevant discussion in *State ex rel. Howard Electric Cooperative v. Riney*, 490 S.W.2d 1 (Mo. 1973) (*Howard Electric Cooperative*), which involved an action in prohibition by five named rural electric distribution cooperative companies, representative of the thirty-five other Missouri rural electric distribution cooperative companies, against the State Tax Commission to prohibit it from assessing the distribution lines and other facilities of rural electric cooperative companies. A preliminary writ in prohibition was issued but the circuit court quashed the preliminary writ and entered judgment against the rural electric cooperatives. The agreed statement of facts in the circuit court included the following facts:

> 23. The distribution cooperatives do not have exclusive service territories defined and limited by corporate charter, provisions of law, or a governmental agency. The distribution lines of the rural electric cooperatives extend into and traverse all counties in the state except St. Louis County and the City of St. Louis. . . . Although the distribution cooperatives do not have service territories established by law, each cooperative in many instances does have an established service area, some of which overlap adjoining territories.
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> . . . .
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> 26. That service is provided by Relators in the following ways. Unserved persons desiring electric service make application for membership and pay a set membership fee which for most cooperatives is Five Dollars ($5.00). In some instances a deposit may be required as a guarantee for payment for electric service. Applications are subject to approval or disapproval by the board of directors of the respective cooperative, and consumers become members upon complying with reasonable requirements for receiving electrical service as provided by statutes and the by-laws of the corporation. When approved persons have applied for service in sufficient numbers to make it feasible for the

> respective cooperative to extend its lines, its board of directors directs that an application be made to the Rural Electrification Administration for an allotment of funds to build the number of miles of electric lines deemed necessary to serve all such new members, and such application for a loan is then made. Upon the approval of the loan application by the Rural Electrification Administration, the respective cooperative builds the necessary lines or extends existing lines to serve all such new members whose premises are wired for service.

490 S.W.2d at 4-5.

The *Howard Electric Cooperative* decision contains extensive discussion of whether rural electric cooperatives are "public utilities" for purposes of the assessment jurisdiction of the State Tax Commission, including case law in other states. Thus, the Court notes that in some states "[t]he limitation of authority of electric cooperatives to serve only their members has been held to exclude such companies from regulation as public utilities under statutory regulatory schemes applicable to public utilities," but not so in other states. 490 S.W.2d at 10. The Court discussed the import of the terms of the loan agreements of the rural electric cooperatives with the Rural Electrification Administration:

> The respondents also argue that by the terms of loan agreements with the Rural Electrification Administration, the cooperatives are required to 'make diligent effort to extend electric service to all unserved persons within the service area of the (cooperative) who (a) desire such service and (b) meet all reasonable requirements established by the (cooperative) as a condition of such service.' In the case of San Miguel Power Association v. Public Service Commission, supra, the court did not consider that such requirement imposed a duty of providing service to the public generally. The court there concluded that the fact that membership was easily obtained did not alter the fact that members only were entitled to obtain service. On the other hand, in Dairyland Power Cooperative v. Brennan, 248 Minn. 556, 82 N.W.2d 56, in an attack upon the right of a generating and transmission cooperative to exercise the power of eminent domain, the court considered the requirements of the R.E.A. loan contract that service be extended on an area coverage basis a significant factor in concluding that the cooperative was 'in the fabric of its organization and in the functions it performs, a public utility in fact.'

490 S.W.2d at 11.

The Missouri Supreme Court in *Howard Electric Cooperative* ultimately stated that the rural electric cooperatives limitation of service to members is not a meaningless restriction and is inconsistent with the generally accepted theory that a public utility is required to serve all who seek its service. 490 S.W.2d at 12. Thus, the Court held that the operation of the rural electric cooperatives was not so clearly that of electric public utility companies as to justify the State Tax Commission's determination that it had the authority to assess the distributable property of the rural electric cooperatives. *Id*. The judgment of the circuit court was reversed and the cause was remanded with direction to enter judgment making the preliminary writ in prohibition absolute. *Id*. at 13.

AmerenUE noted in its Prehearing Brief that the anti-flip-flop/change of electric supplier statutes are Section 91.025, 393.106 and 394.315. See also 4 CSR 240-3.140. These statutory sections state, in part, that "[t]he public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential." These statutes further state that "[t]he 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."[3]

[3] The legal standard for the Commission approving an application for a territorial agreement is stated in various ways in Section 394.312. Where parties cannot agree on the boundaries of the electric service area of each electric service supplier, they may, by mutual consent of all parties involved, petition the Commission to designate the boundaries, and the Commission, after evidentiary hearings, "shall base its final determination upon a finding that the commission's designation of electric service areas is in the public interest." Section 394.312.2. After evidentiary hearings, the Commission may approve an application for a territorial agreement, if it determines that "approval of the territorial agreement in total is not detrimental to the public interest." Section 394.312.4. The Commission has jurisdiction to entertain and hear complaints involving Commission approved territorial agreements. If, after hearing, the Commission determines the territorial agreement is "not in the public interest," it has the authority to suspend or revoke the territorial agreement. If the Commission determines that the territorial agreement is still "in the public interest," the territorial agreement shall remain in effect. Section 394.312.6. The Commission's rule on territorial agreements, 4 CSR 240-3.130, identifies the legal standard as "in the public interest," 4 CSR 240-3.130(1)(C).

The Stipulation Of Uncontested Facts states, in part, that Noranda currently is not located in the certificated area of any Missouri public electric utility, and there are no residents or landowners, other than Noranda, within the area sought by AmerenUE to be certificated by the Commission. Noranda presently receives its electric supply from Brascan Energy Marketing, Inc. ("BEMI") under a power contract that expires May 31, 2005. BEMI is a power marketer and owns no generation in the Ameren control area. Prior to June 1, 2003, Noranda received its electric supply from plants operated by Associated Electric Cooperative, Inc. ("AECI"), a Missouri rural electric cooperative corporation, under contracts with AECI and the City of New Madrid, a municipally owned utility. If AmerenUE provides service to Noranda, AmerenUE will deliver the energy that Noranda will consume, plus sufficient energy to cover losses on AECI's transmission system to AECI at a new delivery point to be established under AmerenUE's existing Interchange Agreement with AECI.

Noranda witness George Swogger, who is Noranda's Manager – Energy Procurement, states in his direct testimony, at pages 9-10 of Exhibit No. 200, that Noranda is presently being served by BEMI pursuant to Section 91.026:

> For many years the Smelter purchased electricity under the contracts with the City of New Madrid and AECI . . . . Portions of the supplies came from the coal-fired New Madrid plant owned in part by the City of New Madrid and operated by AECI. Other portions were provided by AECI. These contracts ended simultaneously on May 31, 2003.
>
> In the late 1990's a contract for the period 2003through 2010 was developed between the Smelter and AECI. The pricing was based on an index tied to natural gas prices and to coal prices. As 2003 approached, it became clear that the price would be a burden for the Smelter and the contract was terminated consistent with its terms. The Smelter again searched for a reliable and economical supply of electricity.
>
> As I worked to develop a replacement contract I was aware that the City of New Madrid simply did not have the quantities of power the Smelter would need. This was because the City's current rights to power from the local coal fired plant

> ended May 31, 2003 with the termination of the 1968 contract for supply to the Smelter. The remainder of the supply had been coming from AECI and it planned to use its resources for its native load customers.
>
> . . . .
>
> For the two year period beginning June 1, 2003 and continuing through May 31, 2005 electricity is being supplied by an affiliate of Noranda, Brascan Energy Marketing, Inc. (BEMI). BEMI has no interest in continuing service beyond the contract period and will entertain early termination.

Commissioner Gaw asked what would be the procedure regarding AmerenUE's Application to extend its service territory to include Noranda if there were no Section 91.026, and Noranda was still being served by AECI and the City of New Madrid. Section 393.170 RSMo 2000 (certificates of public convenience and necessity) and 4 CSR 240-3.105 Filing Requirements For Electric Utility Applications For Certificate Of Convenience And Necessity would apply as they presently apply to the pending AmerenUE Application. Regardless of whether Section 91.026 exists or not, if Noranda was still being served by AECI and the City of New Madrid, Section 393.170 (extension of service territory to include Noranda), Section 394.315.2 RSMo 2000 (change of electric suppliers applicable to rural electric cooperatives), Section 91.025 RSMo 2000 (change of electric suppliers applicable to municipal utilities) and 4 CSR 240-3.140 Filing Requirements For Applications For Authority For A Change Of Electrical Suppliers would permit the Commission to authorize a change of electric suppliers to AmerenUE "on the basis that it is in the public interest for a reason other than a rate differential."

In response to another question from Commissioner Gaw, regarding whether a territorial agreement creates an obligation to serve, the answer arguably would be "yes." Section 394.312.1 RSMo 2000 states that "[c]ompetition to provide retail electric service, as between rural electric cooperatives, electrical corporations and municipally owned utilities may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this

section." It would seem contrary to public policy for a statute that eliminates competition to terminate any obligation to serve or any possibility of service that might otherwise exist if competition were not being eliminated. Seemingly the appropriate public policy would be to impose an obligation to serve as part of the elimination of suppliers that might otherwise provide service, but for the territorial agreement.

Resource Adequacy For AmerenUE Serving The Noranda Load: Question Of Reliability

There is one issue that the Staff raised in the rebuttal testimony of Dr. Proctor that AmerenUE satisfactorily addressed in the surrebuttal testimony of Mr. Nelson, which is not reflected in the Unanimous Stipulation And Agreement. That issue is resource adequacy / reliability.

As the Staff noted in its pre-hearing brief, as a member of the Mid-America Interconnected Network, Inc. (MAIN), electric reliability council, the Ameren system must meet a 15% short-term reserve requirement, i.e., Ameren should have 15% more capacity than the forecasted summer peak loads for AmerenUE and Ameren Energy Marketing. On January 18, 2005, in this case and Case No. EO-2004-0108, AmerenUE filed the affidavit of Richard A. Voytas, wherein Mr. Voytas stated that the Ameren system is short of meeting its 15% reserve requirement for peak load this summer. Dr. Proctor states in his rebuttal testimony that the Commission should condition any Commission approval of AmerenUE serving the Noranda Load on AmerenUE submitting documentation to the Commission prior to June 1, 2005 that the capacity needed to meet the short-term planning reserve margin of 15 % has been acquired.

In his surrebuttal testimony, Mr. Nelson states that since the Metro East transfer and Pinckneyville and Kinmundy combustion turbine generator (CTG) transfer will provide

sufficient capacity for AmerenUE to serve AmerenUE's needs, including the Noranda load, he questions the need for this Commission to review and scrutinize the Ameren system needs. Mr. Nelson further responds in his surrebuttal testimony that AmerenUE agrees to provide by June 1, 2005 documentation to the Commission that sufficient capacity has been secured to meet the 15% short-term planning reserve requirement for the summer of 2005:

> . . . Aside from this questionable jurisdictional assertion by Staff, Ameren has every intent of ensuring that it has secured the needed power and energy to serve its utilities' bundled customers and meet the requirements of its contractual obligations. AmerenUE therefore agrees to provide the Commission with evidence the "Ameren system" has the capacity to meet the 15% reserve requirement referenced by Dr. Proctor by June 1, 2005. As a matter of fact, Ameren Energy Marketing Company has already secured more than half of the small shortfall for the "Ameren system", and as stated, AmerenUE will provide documentation to the Commission that the difference has been secured by June 1, 2005. Regardless of whether I agree with the validity of Dr. Proctor's concern, AmerenUE agrees to address his concern, which will then become moot because the "Ameren system" will have sufficient capacity.

The Staff suggests that the Commission acknowledge this commitment of AmerenUE in the Commission's Report And Order approving the AmerenUE Application to extend its service territory to include the Noranda facilities in a portion of New Madrid County.

Conclusion

A new rate classification for AmerenUE should receive a full and timely review before it is implemented. Generally, new customer classes have not been established outside the context of a customer class cost of service / comprehensive rate design proceeding and/or rate increase / excess earnings - revenues rate decrease proceeding. Not only has AmerenUE sought to establish a new customer class in a certificate of convenience and necessity proceeding, it has engaged in doing so in an expedited proceeding. The Staff raised questions concerning how AmerenUE structured the LTS tariff regarding adjustments for energy and demand losses and adjustments for Noranda's nonuse of AmerenUE distribution facilities. AmerenUE performed

no cost studies respecting the components of the LTS tariff, which the Staff recommended should be performed. The Staff proposed that the reasonableness of any new rate form to serve Noranda should be determined by the Commission in AmerenUE's next general rate/revenue requirement proceeding or Missouri jurisdictional customer class cost of service study/comprehensive rate design proceeding, which may occur as early as next year. As originally filed, the proposed LTS tariff could only apply to one customer, Noranda, under the criteria in paragraph "6. Rate Application" of the LTS tariff. Since the criteria had not been shown to be cost based, it had not been shown that the criteria were not unduly discriminatory or unduly preferential.

Regarding the question what is the effect of the December 14, 2004 Agreement between AmerenUE and Noranda, the Staff would note the following from the Missouri Supreme Court's decision in *May Dept. Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (Mo. 1937):

> . . . Contracts cannot limit this regulation because our Constitution specifically provides: "The police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." Section 5, article 12. Therefore "the power of the public service commission * * * overrides all contracts, privileges, franchises, charters, or city ordinances." State ex rel. City of Kirkwood v. Public Service Comm., 330 Mo. 507, 50 S. W. (2d) 114, 118. See, also, State ex rel. City of Sedalia v. Public Service Comm., 275 Mo. 201, 204 S.W. 497; City of Cape Girardeau v. St. Louis-S. F. R. Co., 305 Mo. 590, 267 S.W. 601, 36 A.L.R. 1488; State ex rel. Washington University v. Public Service Comm., 308 Mo. 328, 272 S.W. 971; Kansas City Power & Light Co. v. Midland Realty Co. (Mo.Sup.) 93 S.W. (2d) 954, 958; Midland Realty Co. v. Kansas City Power & Light Co., 57 S.Ct. 345, 347, 81 L.Ed. --. See, also, Pond's Public Utilities, Vol. 3, chap. 32, ss 900-913. Regulation of rates certainly could not be successful without regulating all rates, and in the Washington[341 Mo. 317] University Case this court said "that contract prices count for naught in the fixing of rates."

See Section 393.140.11 RSMo 2000 and Section 393.150.1 RSMo 2000.

Article XI, Section 3 of the Missouri Constitution RSMo. 2000 currently states:

> The exercise of the police power of the state shall never be surrendered, abridged, or construed to permit corporations to infringe the equal rights of individuals, or the general well-being of the state.

In 1918 this provision was Article XII, Section 5 of the Missouri Constitution, and in 1918 the Missouri Supreme Court in *State ex rel. City of Sedalia v. Public Serv. Comm'n*, 257 Mo. 201, 204 S.W. 497, 499 (Mo. 1918) held that the fixing of reasonable rates for services to be rendered to the general public is an exercise of the sovereign police power of the state and cannot be contracted away. *See Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 76, 35 S.Ct. 678, 682, 59 L.Ed. 1204 (1915). In *State ex rel. Kansas City v. Public Serv. Comm'n*, 524 S.W2d 855, 859 (Mo.banc 1975)(hereinafter referred to as "*Kansas City*"), the Missouri Supreme Court stated that "[t]here also is no question but that abrogation of a contract or rights thereunder as a result of proper exercise of the police power does not violate state or federal provisions against impairment of contracts."

Missouri law is clear that the authority to set just and reasonable rates cannot be contracted away. A purported contract cannot remove from the Commission's authority that which the courts have said cannot be so removed. 312 S.W.2d at 796; 532 S.W.2d at 29-30; *See State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo. App. 1993). Furthermore, the United States Supreme Court has consistently stated its view that "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Coop v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983). The Supreme Court in *Stone v. Mississippi*, 101 U.S. 814 (1880), related its consistent position that the police powers of the State cannot be contractually infringed. 101 U.S. at 817-18. As the Court stated in *Stone*:

> [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'

101 U.S. at 820.

Wherefore, the Staff submits the instant Staff Suggestions In Support Of The Unanimous Stipulation And Agreement filed on February 24, 2005.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 2nd day of March 2005.

/s/ Steven Dottheim