BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. EC-2014-0224
	)	
Union Electric Company, d/b/a Ameren Missouri,	)	
	)	
Respondent.	)	

INITIAL POST-HEARING BRIEF OF AMEREN MISSOURI

Thomas M. Byrne, #33340
Director – Asst. General Counsel
Wendy K. Tatro, #60261
Director – Asst. General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
Phone (314) 554-2514
(314) 554-3484
Facsimile (314) 554-4014
amerenmissouriservice@ameren.com

L. Russell Mitten, #27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone (573) 635-7166
Facsimile (573) 634-7431
rmitten@brydonlaw.com

James B. Lowery, #40503
SMITH LEWIS, LLP
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

NP

TABLE OF CONTENTS

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
Complainants,	)	
v.	)	File No. EC-2014-0224
	)	
Union Electric Company, d/b/a	)	
Ameren Missouri,	)	
Respondent.	)	

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its Initial Post-Hearing Brief states as follows:

INTRODUCTION

Noranda Aluminum, Inc. ("Noranda") and the other complainants are asking the Commission to do something that it has never done: provide a single customer the financial benefits of a heavily-subsidized rate simply because that customer claims its private business needs or circumstances necessitate that it pay far less for electric service than it costs the utility to provide that service. And there are very good reasons why the Commission has never taken such action: because approval of such a proposal would constitute unlawful, undue discrimination and would also violate the prohibition on single-issue ratemaking.

Even assuming Noranda needs the subsidies it is requesting, granting Noranda's request would also require the Commission to adopt an inherently flawed policy of picking winners and losers among customers of a single utility. If regulatory law and policy in Missouri are to be changed to allow rate subsidies like those requested in this case, then it is the popularly-elected General Assembly – not the Commission – that must decide who should receive such subsidies and under what conditions they can and should be provided. Putting aside for the moment the fact that the General Assembly has neither made the policy decisions nor created the legal framework necessary to grant Noranda the relief it seeks, the evidence in this case demonstrates that decisions made by Noranda and its largest shareholder, Apollo Global Management, L.P. ("Apollo"), put Noranda in its current financial situation. Those decisions extracted hundreds of millions of dollars of cash from Noranda and burdened it with a debt load that Noranda claims prevents it from readily borrowing additional funds, at least from conventional sources. Appropriate management decisions in the past regarding dividend payments, debt financing, or both would have substantially alleviated the liquidity problems Noranda claims it faces today.

APPLICABLE LAW

1. *Noranda's Request Invites the Commission to Approve Unlawful, Undue Discrimination.*

This Commission long ago recognized (a recognition cited and quoted with approval by our Supreme Court) that the Public Service Commission Law "'and judicial decision forbids any difference in charge which is not based upon difference of service and even when based upon difference of service [the difference] must have some reasonable relation to the amount of the difference, and cannot be so great as to produce unjust discrimination.'" *State ex rel. The Laundry, Inc. et al. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 44-45 (Mo. 1931), *citing Civic League of St. Louis et al v. City of St. Louis,* 4 Mo. P.S.C. 412.[1] *See also Western Union Telegraph Co. v. Call Pub. Co.,* 181 U.S. 92, 100 (1901), *quoted with approval* by our Supreme Court in *The Laundry, Inc.* at 34 S.W.2d at 45 (The principle of equality that calls for all to have equal service and charges does not forbid different charges for different service, but it "does forbid any difference in charge which is not based upon difference of service.").[2]

[1] The Supreme Court quoted extensively from the Commission's decision, which the Court noted was authored by "Commissioner Eugene McQuillin, an eminent Missouri lawyer and distinguished text writer." *The Laundry, Inc.*, 34 S.W.2d at 44.

[2] Commissioner Hall asked a question about case law in this area (Tr. p. 81, l. 10-13), with Staff counsel indicating that he was not aware of any (Tr. p. 83, l. 5-7). In fact, as evidenced by these cases, including the Commission's own decision in *The Civic League*, there is indeed case law on point in this area.

The factors that Noranda claims justify a large subsidy from other customers have nothing to do with differences *in the service Ameren Missouri provides* to Noranda versus the service provided to those other customers. To the contrary, the factors relied upon by Noranda are solely based on Noranda's claims about the particular characteristics of Noranda's private business – *e.g.*, the aluminum prices it can receive for its products, its relative cost position in producing its products vis-à-vis competitors, how much cash and liquidity it has, and what capital investment it needs or may need to make. None of those factors has any bearing whatsoever on how Ameren Missouri serves Noranda or at what cost. None of those factors is "based upon difference of service" of any kind. In fact, the approximately 28 percent reduction in rates Noranda proposes would put it approximately 20 percent below what it cost Ameren Missouri to serve Noranda about two years ago, and approximately 26 percent below what it costs to serve Noranda now.[3] Consequently, Noranda's request cannot be approved as a matter of law.

As noted above, this Commission has recognized that it cannot approve what Noranda is asking it to approve, as evidenced by its finding of undue discrimination in the *Civic League* case. In that case, the City of St. Louis (whose rates were subject to Commission jurisdiction at the time) sought to give "manufacturers" a special rate to encourage them to locate in the City. *The Laundry, Inc.*, 34 S.W.2d at 44. In other words, the City was trying to give advantageous rates to certain businesses that had particular characteristics unrelated to how the utility would serve them in order to promote economic development in the City. This was unlawful, but is precisely what Noranda asks this Commission to do here. Just like the manufacturers in *Civic League*, Noranda wants an advantageous, subsidized rate justified solely by its own business characteristics, which have nothing to do with how Ameren Missouri serves Noranda (or at what

[3] Ex. 100, p. 6, l. 12-20 (Davis Rebuttal).

cost). Instead, in addition to its claim that a subsidized rate is necessary for it to stay in business, Noranda supports its claims by citing the jobs it will keep or create, the taxes it will pay, and the economic activity it creates and maintains. Promoting these economic benefits may indeed be laudable – just as they may have been laudable for the City of St. Louis in *Civic League* – but this Commission has not been empowered to sanction the undue discrimination that would be required to promote these economic benefits through creating a subsidized power rate for Noranda.

Simply stated, this Commission lacks the statutory authority to do what Noranda asks. Could the General Assembly confer such authority on the Commission? The answer is likely "yes." But has it done so? This Commission long ago recognized in *Civic League* that the answer is "no."

Ameren Missouri is not alone in its contention that what is being asked of the Commission here is unlawful. On September 12, 2012, the Missouri Industrial Energy Consumers ("MIEC"), represented by the same lawyers who represent Noranda in this case, filed Comments in the Commission's then-pending *Working Case to Consider the Establishment of a Low-Income Customer Class or Other Means to Help Make Electric Utility Services Affordable* (File No. EW-2013-0045). In those Comments, MIEC, citing precisely the authority we cite above, stated as follows:

> The Missouri Supreme Court long ago concluded that differences in rates must be based upon differences in service. In *State ex Rel. The Laundry, Inc. and Overland Laundry Company v. Public Service Commission*, 34 S.W.2d 37 (Mo. 1931), the Supreme Court addressed the appropriate standard under what is now subsections 393.130.2 and 3. There, a large commercial laundry operation that used over 500,000 gallons of water a month sought to be included under a rate class for manufacturers who consumed over 500,000 gallons of water each month. The evidence showed that the manufacturers' rate was below the water company's cost of service and that the water company adopted the special rate for the purpose of luring manufacturers to the water company's service territory in

> order to serve the manufacturer's employees that would presumably locate there as well. The court cited section 393.130's predecessor statute, and a Public Service Commission decision, in concluding that the discrimination against the laundry company compared to other large users of water and employers was illegal because it was not "bottomed upon any dissimilarity or difference in service or operative conditions[.]" *Id.* at 45.[4]

There could be circumstances where a departure from strict cost-of-service ratemaking does not present a case of clear undue discrimination (*e.g.*, where various class cost of service studies produce a range of cost results, as would be typical in a general rate case), but this is not that case. And no party to the current case is even arguing that Noranda's request has any basis whatsoever in any difference in the nature or character of the service Ameren Missouri provides Noranda.

Based upon the foregoing, the Commission's inquiry in this case should end here, and the relief sought should be denied.

2. Noranda's Request Invites the Commission to Engage in Unlawful Single-Issue Ratemaking.

Not only would granting the relief sought by Noranda constitute undue discrimination, it would also be unlawful because it would result in a rate change for Noranda, as well as all of Ameren Missouri's other 1.2 million customers, without consideration of all relevant factors, as required by Missouri law. The Missouri Supreme Court has made clear that before rates can be changed the Commission must consider *all* relevant factors. *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n,* 308 S.W.2d 704 (Mo. 1957) ("[T]he phrase "among other things" [in Section 393.270.4] clearly denotes that 'proper determination' of such charges is to be based upon *all* relevant factors" (emphasis added)).

---

[4] Comments of the Missouri Industrial Energy Consumers at pp. 4-5. Noranda, itself, has been an active MIEC member since at least 2009, when it intervened as a member of MIEC in Ameren Missouri's 2009 rate case, File No. ER-2010-0036. In fact, Noranda participated as part of MIEC in Ameren Missouri's last rate case (File No. ER-2012-0166), at the time MIEC filed the Comments cited above.

Others have argued that the requirement that all relevant factors be considered can be ignored or doesn't apply in this case because under Noranda's proposal it is only *rates* that will change.[5] They say that there is no single-issue ratemaking issue because under Noranda's proposal the target *revenue requirement* used to set those changed rates will remain the same as it was when the Company's rates were last changed in File No. ER-2012-0166.

The problem with those arguments, however, is that they are completely unsupported by the statutory language of the Public Service Commission Law ("PSC Law"), as interpreted by the courts. Utility customers do not pay a revenue requirement. Instead, they pay rates. The utility's revenue requirement is a target of total rate revenues that, if the assumptions underlying the revenue requirement turn out to be perfect in practice, will produce precisely the targeted revenues – not a dollar more or less. The targeted revenues are then divided by the assumed, normalized billing units for each rate class, from which rates for each class are then derived. We all know that the actual sales to each rate class will certainly not match the assumed ones, just as a utility's actual expenses, investment, depreciation, and taxes will not match the assumed levels of those costs. But, nonetheless, after the math is done, each rate class has a rate that applies to it, and that rate is what each customer will be charged.

The statute that is the basis for the "all relevant factors" requirement (Section 393.270.4) requires that all relevant factors be considered in "determining the *price* to be charged . . ." for the utility service at issue (emphasis added). That price is the rate, and under Noranda's proposal every one of Ameren Missouri's rates will change – Noranda's rate as well as the rates for all of the Company's other customers who must compensate Ameren Missouri for the subsidies provided to the New Madrid smelter.

---

[5] *Complainants' Suggestions in Opposition to Ameren Missouri's Motion to Dismiss Complaint*, p. 7l ; *Staff's Response and Suggestions in Opposition to Ameren Missouri's Motion to Dismiss*, p. 7.

POLICY CONSIDERATIONS

1. Adopting Noranda's Proposal Significantly Deviates from Well-Established Principles of Ratemaking and Would Constitute Bad Public and Regulatory Policy

Not only would granting Noranda's requested relief be unlawful, but doing so also would mark a complete departure from the Commission's longstanding policy of setting rates based on the costs a utility incurs to provide service to each of its rate classes. Putting aside for the moment the legal impediments to Noranda's proposal, abandoning the principle of cost-based rates for all of Ameren Missouri's customers would represent bad regulatory policy that cannot be justified based on the evidence in this case.

Traditional cost of service ratemaking determines rates based on the costs a utility incurs to serve each of its customer classes, which include both fixed costs (costs that do not vary with the amount of electricity generated or sold) and variable costs (costs that vary with the amount of electricity generated or sold). As described in the rebuttal testimony of the Company's witness Terry Jarrett,[6] cost of service-based ratemaking is a two-step process. First, the Commission determines the utility's revenue requirement. Second, rates are set that allow the utility a reasonable opportunity to fully recover that revenue requirement.[7] This second step, often referred to as "rate design," requires the Commission to equitably allocate the utility's total revenue requirement (which itself is based on cost of service) among its various rate classes. To accomplish this, the Commission uses an analytical tool called a class cost of service study ("CCOSS"), which determines the costs the utility incurs to serve each of its rate classes.

In Ameren Missouri's last general rate case, the Commission adopted a rate design for all rate classes – including the Large Transmission Service class, whose only member is the New Madrid smelter – based on a non-unanimous stipulation among several parties. The signatories of

---

[6] Ex. 103 (Jarrett Rebuttal).
[7] *Id*. pp. 4-5.

the stipulation included MIEC, which included Noranda among its members.[8] Even though the rate design the Commission approved was agreed to by the parties to the stipulation, the rates set for the smelter were fully consistent with the CCOSSs submitted in the case. This is clear from the uncontested rebuttal testimony of Ameren Missouri's witness William Davis, who stated that the rate design stipulation resulted in rates for the smelter that were less than two percent greater than the cost of service confirmed by the Company's own CCOSS and approximately three percent greater than the cost of service confirmed by MIEC's CCOSS.[9]

As described in the rebuttal testimonies of both Mr. Jarrett and Mr. Davis, the primary benefit of cost of service-based rates is that they ensure rates are set to recover each rate class' fair share of the utility's overall revenue requirement. A leading treatise on utility ratemaking, *Principles of Public Utility Rates*, written by Professor James Bonbright and others, describes cost-based rates as "the golden rule of socially optimal ratemaking."[10] But beyond fairly allocating costs among a utility's rate classes, Mr. Jarrett further testified that cost-based rates also satisfy other characteristics of an optimal rate design that Professor Bonbright believes are important. Those other characteristics include rate stability, public acceptance of rates, simplicity of understanding a utility's rates, and promoting cost efficiency.[11] And while the other characteristics are important, Mr. Jarrett emphasized that cost causation is the bedrock on which the ratemaking process is based.[12]

Noranda's request for a rate subsidy is contrary to all of these generally accepted principles of utility ratemaking. Noranda wants rates to be set for its smelter, as well as for all of

---

[8] Ex. 100, p. 4 (Davis Rebuttal). Under cross-examination, Mr. Brubaker admitted that Noranda supported the Stipulation and Agreement in Ameren Missouri's last general rate case. Tr. p. 753, l. 10-16.
[9] *Id.* pp. 5-6.
[10] *Id.*, p. 17.
[11] Tr. pp. 1001, l. 20 to 1002, l. 21.
[12] Tr. p. 1002, l. 16-21.

Ameren Missouri's other customers, on a basis that bears no relation to the costs the Company incurs to provide service. Instead, Noranda proposes to set rates based solely on the basis of what Noranda claims it can afford to pay, with any revenue shortfall resulting from such rates to be made up by Ameren Missouri's other customers. The essence of this unfair and unduly discriminatory proposal is that all of the Company's other customers must pay more than their fair share of Ameren Missouri's costs so that Noranda can pay less – significantly less – than its share. As discussed further below, this is, in effect, a tax on Ameren Missouri's other customers, with the proceeds of the tax being given to Noranda. Ratemaking has never been intended to act as a taxing device where winners and losers are chosen in the ratemaking process. Whether a tax is to be imposed in order to provide Noranda greater financial support for its operations is a matter for the elected members of the General Assembly. Not only is it unfair to ask Ameren Missouri's other customers to subsidize Noranda through what amounts to a tax on their electric bills, but it also is unfair to provide such special rates to Noranda when it is obvious that each of Ameren Missouri's other 1.2 million customers also would benefit financially if their rates for electricity were immediately reduced and capped as Noranda proposes.

The rebuttal testimony of J. Scott Conroy[13] on behalf of Continental Cement Company, LLC, clearly illustrates this point. According to Mr. Conroy, reducing that company's electric costs – which total more than $6 million annually – would improve both its competitive position in its industry and its profitability. But instead of lowering Continental's costs to improve its business prospects and bottom line, Noranda asks the Commission to raise Continental's rates – along with the rates of all of Ameren Missouri's other customers – so that Noranda, alone, benefits. Continental does not think it should be forced to pay more so the smelter can pay less,

[13] Ex. 500 (Conroy Rebuttal).

and it is reasonable to believe that the overwhelming majority of the Company's other customers feel the same way.

In addition, it is unfair to require Ameren Missouri's customers to bear the entire burden of subsidizing the New Madrid smelter, if a subsidy (properly approved by the General Assembly) is appropriate at all. Mr. Davis testified that approximately 47 percent of the households in Missouri's Bootheel region – the area where the smelter is located and whose residents most directly benefit from its continued operation – are not Ameren Missouri customers and will not pay one penny more in rates to provide Noranda the subsidies it seeks in this case.[14] Instead, the entire burden of the proposed rate subsidies will be borne by Ameren Missouri's customers other than the smelter, approximately 97 percent of whom do not live in the Bootheel area.[15] Mr. Davis further testified that the majority of the Company's customers are in the St. Louis metropolitan area, more than a hundred fifty miles from the smelter. Beyond the St. Louis area, Ameren Missouri's service area extends northwest past the City of Excelsior Springs.[16] Any benefits these customers derive from the New Madrid smelter would be both remote and indirect, yet under Noranda's proposal they will be forced to subsidize the smelter's operations while almost half the households in the Bootheel region will provide no subsidy whatsoever.

2. Providing Economic Assistance to Noranda Is the Province of the General Assembly Not the Commission.

As noted earlier, the Commission lacks the legal authority necessary to grant Noranda the rate subsidies it seeks in this case, and unless and until the elected members of the General Assembly pass legislation that gives the Commission the ability to set electric rates based on a

[14] Ex. 100, p. 10, l. 13 to p. 11, l. 3.
[15] *Id*., p. 9, l. 19-23.
[16] *Id*.; Schedule WRD-2.

customer's individual economic or financial circumstances, the rate subsidy Noranda seeks cannot be granted even if the Commission believes such action is warranted by the evidence in this case.

But beyond these legal considerations, the issues raised by Noranda's complaint are not questions of *public utility regulation*; instead, they are questions of *public and legislative policy*. Only the General Assembly can consider and resolve the broad public policy questions raised by Noranda's request, including (1) whether public support for Noranda is necessary and appropriate, and (2) whether the burden of subsidizing Noranda should be borne by the customers of a single utility or should, instead, be borne by all Missourians.

In his direct testimony, Noranda's witness Henry Fayne discussed action taken by utility regulators in West Virginia and Ohio to support aluminum smelters operating in those states. What Mr. Fayne failed to mention, however, was that in both those states the state legislature had to pass legislation authorizing special utility rates for the smelters before the West Virginia and Ohio commissions could act to approve such rates.

Consider the example of West Virginia. When faced with arguments that special rates were necessary to support a failing aluminum smelter, the West Virginia Legislature passed legislation that enabled the West Virginia Commission to consider and adopt special rates to address the energy needs of an aluminum smelter operating in that state.[17] Although the enabling statutes did not relate specifically to aluminum smelters – instead, they authorized the West Virginia Commission to approve special rates for any "energy intensive industrial consumers of electric power" – they not only authorized special rates for such customers but also provided that a portion of revenues collected from the state's coal severance tax be applied to partially fund

[17] Ex. 133, pp. 5-8.

those special rates. That meant that at least part of the burden of such special rates would be borne by citizens of the state as a whole and not just the other customers of the utility at issue.[18]

Action by the Ohio Legislature also was required to enable the utility regulatory commission in that state to adopt special rates for an aluminum smelter. As was the case in West Virginia, the enabling legislation was not specifically limited to aluminum smelters. Instead, the Ohio Legislature passed legislation that authorized the Ohio Commission to approve special rate arrangements between a public utility and any "mercantile customer," defined as a customer who consumes more than 700,000 kilowatt hours ("kWh") per year. The legislation also authorized the Ohio Commission to "include . . . recovery of revenue foregone as a result of any such program . . ..."[19]

Other states also have recognized that it is the state legislature that should determine if its state utility commission should have the power to grant special rate relief. *See, e.g.*, Conn. Gen. Stat. § 16-19hh(c), which was an amendment to the Connecticut public utility control law[20] that authorized the public utility commission to grant an exemption from certain charges for an "existing manufacturing plant located in a distressed municipality."

But aside and apart from the fact that Missouri's General Assembly ***must*** act before the Commission can grant Noranda's request for a special rate, questions related to whether Noranda needs or deserves public support to continue operating are the types of issues the General Assembly ***should*** decide. If, as Noranda argues, closing the smelter will negatively affect the economy statewide, then a statewide remedy should be fashioned. And the General Assembly is the only governmental entity that can provide relief that is not specifically limited to Ameren Missouri's customers.

[18] W. Va. Code § 24-2-1j and 11-13CC-1 et seq., adopted March 12, 2012.
[19] Ohio Rev. Code § 4905.31(E), effective July 31, 2008.
[20] Connecticut's corollary to Missouri's Public Service Commission Law.

Noranda's witness Dr. Joseph Haslag testified regarding his estimates of the negative consequences closing the smelter will have on Missouri's economy, both immediately as well as ten and twenty-five years into the future. For example, Dr. Haslag estimates that if the New Madrid smelter ceases operations, over the next twenty-five years Missouri's Gross Domestic Product ("GDP") and state and local tax revenues will decline by almost $9 billion and $339 million respectively.[21] He further estimates that employee layoffs related to a smelter closing would deplete the state unemployment insurance fund by between $2.7 million and $10.3 million.[22]

There is considerable reason to be skeptical about the accuracy of Dr. Haslag's estimates of the effects a smelter closure would have on the state's GDP and state tax revenues. For example, in order to accept Dr. Haslag's estimate, the Commission would have to believe that since he used the same econometric model and gave virtually identical testimony in File No. ER-2010-0036, the potential negative effects of a smelter closing on state GDP and taxes have increased threefold in just four years.[23] Such an unlikely result is rendered even more incredible when one considers that during that four-year period the annual GDP growth rate *declined* by approximately 20 percent, from 1.23 percent to 1.03 percent.[24] Dr. Haslag's estimates become even more suspect when one takes into account the fact that the data he input into his model – the data that produced the grossly diverse projections of the negative effects a smelter closure would have on the state's economy – were given to him verbally by Noranda, were not supported by any written documentation whatsoever, and were not independently verified by Dr. Haslag.[25] As Dr. Haslag admitted during cross-examination, you don't have to be a mathematics major to

---

[21] Ex. 10HC, p. 10; p. 4, l. 11-22 (Haslag Direct).
[22] *Id*. p. 5, l. 12-22.
[23] Tr. pp. 575-576.
[24] Tr. pp. 582-583.
[25] Tr. pp. 587-89.

understand that the larger the number you input into the model the larger will be the economic impact estimates the model produces.[26] Noranda's primary argument in support of the proposed rate subsidy concerns the negative effects closing the New Madrid smelter will have on the state's economy, in general, and the Southeast Missouri region, in particular, so clearly Noranda had an incentive to "game" Dr. Haslag's model to produce results that supported that argument as spectacularly as possible.

It also is clear that Dr. Haslag failed to consider all of the economic effects of a smelter closing. In his rebuttal testimony, Mr. Davis noted that:

> requiring Ameren Missouri customers to spend more money on utility bills to subsidize Noranda's operations will reduce the level of economic activity associated with how those customers otherwise would spend those monies. Considering the minimum end of the range of potential costs of the proposed rate shift, Ameren Missouri's customers will be spending (at a minimum and ignoring avoided FAC charges) $331 million less over 10 years on other items (e.g. eating out, shopping, buying energy efficient light bulbs, etc.) because those monies now go toward paying higher electric bills. In short, if the rate subsidy is approved, one result would be to reduce Ameren Missouri's customers' consumption of a wide range of goods and services because those funds would be diverted through rates to keep Noranda's smelter operating.[27]

And although his surrebuttal testimony seemed to take issue with Mr. Davis's argument, under cross-examination by Commissioner Hall Dr. Haslag admitted that under Noranda's proposal "total expenditures on electricity [by Ameren Missouri's other customers] would probably still increase, meaning they'd have less to spend on other goods and services."[28]

But regardless of how much a smelter closure will affect state GDP, state and local taxes, and the state unemployment fund, there is no denying that most of those effects impact the state as a whole and none is limited to Ameren Missouri's service area alone. Consequently, if the state as a whole will benefit if the New Madrid smelter continues to operate, and Noranda needs

[26] Tr. p. 581, l. 17-23
[27] Ex. 100, p. 12, l. 23 – p. 13, l. 9.
[28] Tr. P. 601, l. 10-13.

and deserves some sort of public subsidy or support to enable it to keep the smelter open, then it is the General Assembly that must make that determination, because only the General Assembly has the authority to fashion a remedy that spreads the burden of supporting Noranda's smelter over all the potential beneficiaries. And if the General Assembly determines the smelter deserves public support, that support should come from all the public, not just from Ameren Missouri's other customers.

Another reason the Commission should decline Noranda's request for special rate relief is that neither the Commission nor its Staff has the expertise or authority necessary to fully evaluate any individual customer's claims that the customer requires a special, subsidized rate in order to remain financially viable. The Commission's expertise is in the areas of public utility regulatory law and policy and the operations of public utilities subject to its jurisdiction. That expertise does not extend to other industries, in general, or, more specifically, to the finances and operations of Ameren Missouri's individual customers. The experience in this case illustrates that fact, as the Commission has been called upon to evaluate issues such as the worldwide market for aluminum, to determine whether prices for aluminum will increase in the future and if so by how much, and to evaluate whether past decisions of Noranda's management to take on significant debt necessary to pay dividends to shareholders (including especially generous dividends to Apollo) was prudent in light of Noranda's capital needs.

If the Commission crosses this extremely significant regulatory Rubicon, the difficulties it has faced in this case will be greatly magnified in the future when Ameren Missouri' other customers – either business or residential – inevitably seize upon a ruling in favor of Noranda as grounds to request their own special utility rates. Each such request would require the Commission to conduct the same type of investigation that it has been required to conduct for

Noranda, even though it lacks the experience, expertise, or resources to do so. The potential administrative burdens this could impose would be enormous, and would divert the Commission's already limited resources away from the regulatory objectives and responsibilities conferred on it by the PSC Law.

In addition, the Commission's authority under the PSC Law is limited to that necessary to compel *public utilities* to produce information necessary to enable the Commission to perform its regulatory duties, including allowing the Staff to conduct audits and investigations of utilities' operations, and allowing the Commission to enforce its orders in Missouri's courts. Those statutes confer no similar authority with regard to Noranda or to any of the Company's other customers who may be induced to seek special rates in the future.

Ameren Missouri's concerns regarding the limits of the Commission's expertise and authority extend beyond Noranda, and also beyond the facts and issues presented in this case. As stated in the testimonies of both Mr. Jarrett and Mr. Davis, if Noranda's request for special rates is granted the door will be open for any of Ameren Missouri's other customers to also request special rates based on each individual customer's specific financial circumstances. The testimony of Continental Cement's witness in this case already includes such a request; if the Commission grants Noranda's request for a rate reduction Continental Cement already has stated that it wants a rate reduction too.[29] This both validates and confirms concerns expressed by Messrs. Jarrett and Davis. Because of the administrative nightmare such a scenario would represent, as well as because of limits on the Commission's expertise and authority described above, the Commission will be as ill-equipped to evaluate and decide those requests as it is to decide Noranda's request in this case. The questions the Commission would face each time a customer seeks special rate treatment are not the types of questions the Commission was created, or given the resources or

[29] Ex. 500, p. 5.

authority or the resources, to consider. But limiting the Commission's authority was by design, because the General Assembly created the Commission for a specific purpose: to regulate public utilities. The General Assembly never contemplated that the Commission would – or could – extend its jurisdiction to consider the kinds of questions raised by Noranda's complaint or to grant the relief Noranda seeks. The same is true for all of the requests from other customers for special rate arrangements that can be expected to follow if the Commission reduces rates for the New Madrid smelter as Noranda has requested.

<u>THE RECORD DOES NOT SUPPORT NORANDA'S REQUEST</u>

Even if the relief sought by Noranda was lawful and did not reflect bad regulatory policy in general, the evidence in this case shows that Noranda does not need, or deserve, what would amount to a capital infusion from Ameren Missouri's other 1.2 million customers in the form of a rate subsidy totaling approximately $50 million per year.[30]

1. Noranda's Own Modeling and Documentation Demonstrates That at Current and Expected Aluminum Prices Noranda Has Sufficient Liquidity, as Noranda Itself Defines It.

When Noranda filed this Complaint, it rested its case on one central contention: that based on an assumed set of conditions[31] Noranda would fall below the liquidity level it says it needs to be a competitive smelter and to sustain operations at New Madrid as of the end of ** **,[32] which, in turn, would make the smelter "subject to closure" by ** **.[33] Since filing the Complaint, Noranda has attempted to paint an even more dire picture, claiming for the first time at hearing that as of Friday, June 13, its liquidity had been reduced by more than

[30] The nearly $50 million per year subsidy would grow as rate increases occur that exceed the two percent cap Noranda says it must have, and also if fuel adjustment clause charges grow as fuel costs increase.

[31] Forecasted aluminum prices and capital expenditures, plus other assumed financial parameters like sales volumes, etc.

[32] Exhibit A to Ex. 1HC (Smith Direct).

[33] Ex. 1HC, p. 6, l. 8-9. Noranda's liquidity-related testimony was provided by its President and CEO, Mr. Kip Smith, who testified that Noranda would be competitive and that the smelter's operations would be sustained as long as it maintained liquidity of ** ** or more. Tr. p. 195, l. 6-23.

approximately ** ** versus the liquidity level that existed at the end of the first quarter.[34] The implication of Noranda's testimony about this "new development" is that the date the smelter would become "subject to closure" is moving closer, and that a possible closure has become more imminent. But do the facts – fairly and objectively reviewed – support Noranda's sounding of the alarm? As we outline below, they do not. Consequently, the entire basis for Noranda's Complaint has not been proven, and, for that reason alone, the Complaint must fail.

a. Noranda Has Not Proved That It Will Have Insufficient Liquidity Because It Has Not Presented a Credible Case That It Must and Will Make $100 Million Per Year of Capital Investments.

It is Noranda's burden to prove the contentions made in the Complaint. *See, e.g., AG Processing et al. v. Pub. Serv. Comm'n*, 385 S.W.3d 511, 516 (Mo. App. W.D.2012) (It is reversible error to relieve the complainant in a complaint case before the Commission of the burden of proving its claim). If the evidence is unclear, if proof of Noranda's contentions cannot be determined, then even if what Noranda claims *could* be true the Complaint must fail. This means that it is Noranda that must convince the Commission (backed by substantial and competent evidence of record) of several things, not the least of which is that without a massive capital infusion from Ameren Missouri's other customers the smelter will, in fact, permanently shut down. And to make that showing Noranda has to prove that it will, and must, invest approximately $100 million of what Noranda itself calls "unidentified growth capital" between 2015 and 2018. But, as we discuss below, if the Commission finds that Noranda will not or must not invest that $100 million of "unidentified growth capital," the evidence shows that Noranda has enough liquidity to be competitive and sustain operations even if the low aluminum price

[34] Tr. p. 188, l. 16-17. Mr. Smith testified that this put Noranda's liquidity as of June 13 at about ** .**

assumptions included in Mr. Smith's direct testimony model are accurate and are, in fact, the best Noranda can do.[35]

Except for Mr. Smith's statement that "for purposes of this proceeding" Noranda has assumed that it will do so,[36] there is not a shred of evidence in this case that supports the conclusion that Noranda must invest – and in fact *will* invest – $100 million of unidentified growth capital ($25 million annually from 2015 to 2018.) Why is the level of capital investment important? Because, as alluded to above, Noranda's own modeling shows that if it does not (or does not need to) invest $100 million of unidentified growth capital over the period 2015 to 2018, Noranda never falls below the minimum level of liquidity that, by its own admission, is sufficient for it to sustain operations, even if Noranda's considerably conservative aluminum price forecasts prove to be accurate. And if Noranda can realize better prices for its products than were assumed in its direct testimony modeling (for example if the CRU aluminum price forecasts turn out to be more accurately reflect the future than do the prices used in Noranda's direct testimony modeling), Noranda's liquidity picture becomes significantly better than that depicted in Mr. Smith's direct testimony. In fact, using the CRU price forecast Noranda's liquidity would stand at about 2.6 times above the level Mr. Smith says is needed at the end of 2018 (** ** versus the required ** **).[37]

[35] It also would have to convince the Commission that Noranda deserves a customer bail-out, even if Noranda would have insufficient liquidity and would shut down the smelter. And to reach such a conclusion the Commission must put aside the legal bars on granting Noranda relief at all, as we discussed earlier.

[36] Ex. 3, p. 11, l. 3-5 (Smith Surrebuttal). Certainly Mr. Smith made a number of statements during the evidentiary hearing that one can fairly read as his *contention* that Noranda would invest $100 million per year, but he never actually said that Noranda commits to make those investments. We address the general commitments made on the second day of evidentiary hearings after Mr. Smith re-took the witness stand, below.

[37] Ex. 102HC, p. 15, Table 4, column 4 (Mudge Rebuttal). Noranda's direct testimony modeling, and thus Exhibit A to Mr. Smith's direct testimony, actually understate Noranda's liquidity in any event because Noranda's model improperly fails to capture the positive impact on cash flows of tax depreciation that the capital investments should be generating. Tr. p. 889, l. 25 to p. 890, l. 12. Moreover, the $100 million annual level of forecasted capital expenditures from 2015 to 2018 appears to be driven by plugging in sums approximating $25 million per year of "unidentified growth capital," which causes the capital expenditure forecast to total precisely $100 million each year. Ex. 102HC, pp. 24-25 (Table 7 on page 24, and in particular, lines 6 to 14 on p. 25).

As we discuss further below, why shouldn't the Commission rest its evaluation of Noranda's claims on the CRU price forecast instead of the price assumptions used in Mr. Smith's model? After all, Mr. Smith himself acknowledges that CRU is a reliable provider of industry data,[38] and that they are "thoughtful" and "well regarded in the industry".[39] Indeed, as we discuss below, Mr. Smith used CRU data himself,[40] so did Noranda witness Henry Fayne,[41] and so did Noranda when it modeled its finances for credit rating agency Moody's, Inc. ("Moody's").[42] In fact, Mr. Smith staunchly argues the aluminum prices he used[43] are not a forecast of prices at all.[44] But Ameren Missouri did not create the foregoing facts from thin air. To the contrary, all of these facts come from Noranda's *own* documents and financial models.

Consider, for example, the information Noranda provided to Moody's, which was referenced above. Just 13 days before Noranda presented this Commission with Mr. Smith's direct testimony describing his modeling results and assumptions (which painted a poor liquidity picture), Noranda completed modeling and made a presentation based thereon to Moody's.[45] The presentation reflected a forecast of Noranda's financial performance very much like the one Noranda presented to this Commission in Mr. Smith's testimony, and over exactly the same period – 2014 to 2018. But until Ameren Missouri witness Robert Mudge filed his rebuttal testimony on May 9, the Commission had no way to know that this contemporaneous modeling of Noranda's finances (including its forecasted liquidity) had been done.

The Moody's presentation and the modeling from Noranda underlying it revealed a number of important facts. First, Noranda's presentation to Moody's portrayed a far better

[38] Tr. p. 230, l. 8 – 16.
[39] Tr. p. 274, l. 21 to p. 275, l. 3.
[40] Exhibit A to Ex. 1HC (identifying use of the "Current CRU estimate").
[41] Ex. 7HC, p. 4 (Fayne Direct).
[42] Ex. 102HC, Sch. RSM-1 (Moody's Presentation).
[43] Mr. Smith used London Metal Exchange ("LME") forward prices as of January 22, 2014. Exhibit A to Ex. 1HC.
[44] Ex. 3HC, p. 7, l. 22 to p. 8, l. 2.
[45] Ex. 102HC, p. 13, l. 8-10 and following pages discussing the Moody's modeling; Sch. RSM-1.

financial and liquidity picture than the one Noranda shared with the Commission.[46] And the financial and liquidity picture presented to Moody's would not have supported this Complaint. Second, as we discuss below, we know that if what Noranda told Moody's is true, Noranda has plenty of liquidity on its own without obtaining a nearly $50 million per year capital infusion through a rate subsidy paid by Ameren Missouri's other customers.[47] We also know that Noranda either was forthright with the Commission, and therefore provided Moody's with useless (arguably false) information, or that Noranda provided Moody's with the facts and therefore was not forthright with the Commission, because the two inconsistent forecasts – which only vary based on differences in two key assumptions (aluminum prices and investment of the "unidentified growth capital") – cannot both be true. We discuss that issue further below.

Before getting into the details of the glaring inconsistencies between the picture Noranda paints for the Commission and the one presented to Moody's at essentially the same time, a few key facts that bear on the differences in the modeling should be kept in mind.

Noranda's testimony claims it must and will invest $100 million in capital each year through 2018, which includes an average of $25 million per year of "unidentified growth capital" for 2015 to 2018. But the evidence in this case establishes that historically Noranda's annual capital investments have been much less than $100 million per year. Those historical investment amounts are summarized below:

Actual Noranda Capital Expenditures – 2010 - 2013[48]

- 2010 - $61.3 million
- 2011 - $64.6 million
- 2012 - $87.9 million

[46] Ex. 102HC, p. 14, Table 3.
[47] With liquidity never below ** ** and even above ** ** during the five year period studied.
[48] Tr. pp. 247 – 249.

- 2013 - $72.7 million
- Four-year average: $71.6 million
- Three-year average: $75 million[49]

In addition, we also know that, except for the rod mill, all of the projects in which Noranda claims it would and must invest growth capital remain completely "unidentified," just as Noranda labeled them in Mr. Smith's direct testimony model.[50] Ameren Missouri tried to find out what these growth projects consisted of, asking Noranda a very specific data request[51] well before Mr. Mudge's rebuttal testimony was filed. In response to that data request, Noranda produced only a list of calendar year 2014 projects. Upon further inquiry from the Company, Noranda represented that there was no list beyond 2014.[52] Only after Mr. Mudge filed rebuttal testimony pointing out that Noranda had not justified the $25 million per year of unidentified growth capital spending – and that without it Noranda had no liquidity crisis – did Noranda cobble together a list of specific capital projects to include in Mr. Smith's surrebuttal testimony, a list that purports to show a "hopper" of projects that Noranda claims were "backlogged."[53] But to this day Noranda still hasn't identified which projects in that hopper would comprise the "growth capital" it claims it will and must invest. In addition, Noranda made no commitment that it will actually invest $100 million per year if Ameren Missouri's other customers provide a $50 million per year capital infusion.

There are also other facts that bear on this critical capital investment issue. Although there is no direct evidence on this point, it is reasonable to conclude that a backlog of projects

---

[49] For the most recent 12 months ending with a reporting calendar quarter (March 31, 2014), Noranda has only invested at an annual rate of $65 million. Tr. p. 247, l. 21 to p. 248, l. 2.
[50] Ex. 114HC (Response to Data Request ("DR") 3.15, reflecting a list of 2014 capital projects, and letter regarding the same from Ms. Vuylsteke).
[51] Ex. 114HC
[52] *Id. (*Ms. Vuylsteke's letter)
[53] Tr. p. 284, l. 6. This list is Exhibit B to Mr. Smith's surrebuttal testimony (Ex. 3HC). It did not exist before May 27 of this year. Tr. p. 284, l. 19-25.

that total approximately ** ** at a company that, on average, has only spent about $71-$75 million per year on capital expenditures, wouldn't arise overnight. It also is reasonable to conclude that there are plenty of non-essential projects in this "hopper," particularly when one considers that when Noranda apparently had the money to spend on such projects it instead used large sums of that money to pay dividends and "special dividends," including paying more in dividends in two of four years than it re-invested in the company. We summarize those payments and investments below:

<u>Noranda Dividends – 2010 to 2013[54]</u>

- 2010 $0.00
  - (Capital Expenditures $61.3 million).
- 2011 $69.3 million[55] (Apollo $44.13 million[56])
  - (Capital Expenditures $64.7 million)
- 2012 $95.1 million[57] (Apollo $59.2 million)
  - (Capital Expenditures $87.9 million)
- 2013 $8.9 million (Apollo $4.27 million)
  - (Capital Expenditures $72.7 million)

As we will address in more detail below, Noranda has contended that it was prudent to pay these dividends at the time. But for purposes of this discussion at least, whether that is true completely misses the point. The point here is that *if* Noranda has the capital needs it claims it has ("for purposes of this case"), which alone drive it into the poor liquidity picture its direct testimony modeling paints, then one could reasonably conclude that Noranda would have invested more than it actually did invest when it had the money to do so. That it failed to do so leads to the following question: Might it be that Noranda's claimed need to invest $25 million

[54] Tr. pp. 279-280.
[55] Special dividends were $67.3 million. Ex. 116, p. 23.
[56] Apollo dividends are summarized by Mr. Mudge, Ex. 102HC, p. 39, Table 9.
[57] Special dividends were $84.3 million. Ex. 115, p. 23.

per year in "unidentified growth capital" is significantly overstated? And if, as Noranda claims, rates must be set based on history, then shouldn't what Noranda has invested in the past also guide the Commission's judgment of what Noranda will invest in the future? We are certain that Noranda and its supporters in this case would vigorously oppose any attempt by Ameren Missouri to forecast investments or other costs to justify rates the Company would seek to put into place in a general rate case. Yet Noranda asks that its electric rate in this case be set based on an analysis of projections of a liquidity crisis that its own history does not support.

Noranda is, in effect, asking this Commission to bet on the come – to hope that if the Commission provides a $50 million annual rate subsidy from Ameren Missouri's other customers that subsidy will establish both that Noranda actually needs to invest $100 million of its cash flow per year and that Noranda will actually do so. The evidence in this case fails to prove that either proposition will likely turn out to be true.

Not only do the foregoing facts call into significant question Noranda's claim that it must and will invest $100 million of unidentified growth capital in 2015 to 2018 (keep in mind that if it doesn't invest it, even Mr. Smith's modeling would show that it has sufficient liquidity), they also suggest there are other reasons the Commission should question Noranda's *need* to spend this unidentified growth capital. Those other reasons are found in the results produced by conforming Mr. Smith's direct testimony modeling to Noranda's Moody's modeling, specifically the CRU forecast LME[58] price assumptions used by Noranda in its Moody's modeling.

As shown in Table 6 of Mr. Mudge rebuttal testimony,[59] when he conformed Mr. Smith's direct testimony model to the aluminum price assumptions Noranda used for its Moody's presentation, he observed something that was very surprising and very counterintuitive: Mr.

[58] The London Metal Exchange ("LME") is the market where the base price of aluminum is established.
[59] Ex. 102HC, p. 22.

Smith's model, with $126.5 million more capital expenditures (including the $100 million of "unidentified growth capital") but otherwise identical to the Moody's model, reflected no positive impact to EBITDA[60] relative to the Moody's model, and no positive cash flow from any of the "unidentified growth capital" investments assumed in Mr. Smith's model.[61] Put another way, it was as if investing $100 million in Mr. Smith's model provided no financial benefit for Noranda, a proposition that makes no sense.[62] Again, Mr. Mudge was able to discern this fact by simply adopting the impact of the higher aluminum prices from CRU that Noranda used in its Moody's modeling, which did not include the unidentified growth capital. When he did so, Mr. Mudge saw the same EBITDA outcome – *i.e.*, no difference in EBITDA between Mr. Smith's and the Moody's modeling. This result made no sense from a business standpoint, because one would logically assume if the $100 million to be invested 2015 through 2018 was "growth capital," as Noranda claimed, then it should have produced growth in both Noranda's segment profit and cash, which, in turn, would improve Noranda's liquidity.

Mr. Mudge's conclusion from these facts, as explained in his rebuttal testimony, was that the "unidentified growth capital" couldn't really be growth capital. This further confirmed Mr. Mudge's belief that the "growth capital" did not need to be spent, particularly where Noranda had admitted that its sustaining capital needs were only $65 to $75 million per year.[63] Mr. Mudge's conclusion was quite reasonable given that, typically, "growth capital" is capital a business invests to grow its profits and improve its cash flows. The rod mill, which was discussed at some length during the evidentiary hearings, is a good example. The new rod mill

[60] "EBITDA" stands for "earnings before interest, taxes, depreciation and amortization" and is referred to by Noranda as "segment profit."
[61] Ex. 102HC, p. 28, l. 14 to p. 29, l. 3.
[62] The only growth capital that produced EBITDA was the identified rod mill.
[63] Ex. 111, p. 6.

will have a capacity of ** ** pounds[64] (increased from ** ** for the current mills[65]), and is projected to increase EBITDA by ** **.[66] Indeed, the investment in the rod mill was reflected in Mr. Smith's direct testimony modeling, as was the positive impact on EBITDA and cash flows it is expected to produce.

In his surrebuttal testimony, Mr. Smith tried to explain this glaring inconsistency. His answer was that "at Noranda," growth capital means capital needed to *retain* business.[67] Therefore, he argued, if Noranda doesn't spend that $25 million per year ($100 million over four years) of unidentified growth capital its EBITDA and cash flows would actually decline, which would mean that Noranda's liquidity would be forecast to be even worse than is depicted in his direct testimony. But Mr. Smith's answer fails to withstand scrutiny.

Indeed Mr. Smith's surrebuttal testimony concedes the implication that, in light of the above relationship between growth capital and EBITDA, the forecast of capital expenditures shown to Moody's was inconsistent with the corresponding forecast of EBITDA shown to Moody's. So what is Noranda's explanation for why its Moody's modeling, which *excluded* the $100 million of unidentified growth capital, produced the same EBITDA and cash flows as

[64] Tr. p. 400, l. 19.
[65] Tr, p. 201, l. 5.
[66] Ex. 102HC, p. 27, l. 10 to p. 28, l. 3. Operating the rod mill for just 10 years would produce an internal rate of return for Noranda of more than ** .** *Id.*
[67] Ex. 3HC, p. 13, l. 5-7. Mr. Smith also attempts to challenge the step-change comparisons between the model accompanying his direct testimony and the Moody's model, claiming that one cannot simply vary input assumptions in isolation. Instead, Mr. Smith claims that one would have to redo all of the assumptions in the model. But such an explanation makes no sense and is refuted by the evidence. Under cross-examination, Mr. Smith admitted that the purpose of running a model is to see what would happen if, in actuality, the assumptions used in the model turned out to be true (Tr. p. 280, 1. 16-23). Put another way, if Noranda adjusted the model by plugging in (or removing) $100 million of unidentified growth capital over five years, the results the model produces ought to show you what would really happen – what the EBITDA and cash flows would be – if Noranda actually spent $100 million of "growth capital" over that same period. The point of having a model is to allow one to vary assumptions to test different scenarios – in this case, one model with additional investment of $100 million over four years and a second model without the additional investment. Indeed, one can discern that Noranda uses its model in just that way in developing things like its estimate of the impact on EBITDA of each one cent change in aluminum prices. Tr. p. 359, l. 20-25.

produced by Mr. Smith's direct testimony model, which *included* the $100 million? Noranda says that the Moody's model was essentially useless to the very entity to whom the modeling results were presented – Moody's.[68] But Noranda claims this makes perfect sense because "Moody's knows Noranda."[69] Noranda further argues that Moody's would know it can't rely on the information Noranda gave it; that Moody's would know that when Noranda told Moody's that Noranda's capital investment levels from 2014 through 2018 would actually average only about $75 million per year Moody's would understand that Noranda really needed to invest $100 million per year. But this explanation also makes absolutely no sense.

Noranda's contention that the information it provided is largely useless to Moody's invites the following question: Why give the model results to Moody's at all? The obvious answer is there is no reason to have done so, unless we are to believe that Noranda intentionally misled Moody's. Noranda claims no intention to mislead. But what other claim can Noranda make? But Noranda's contention also raises another question: If Noranda were willing to mislead Moody's in an effort to prevent a credit downgrade, would Noranda similarly be willing to mislead the Commission in an attempt to get the subsidy it seeks in this case? A far more plausible explanation is that it is the Moody's presentation that reflects the realistic forecast, a forecast based on expected aluminum prices from an admittedly reliable source of industry data, and capital expenditure plans that reflect closely Noranda's actual history.[70]

There are also indications that Moody's does not "know Noranda" in the way Mr. Smith claims it does, which calls into further question the suggestion that Noranda can give Moody's useless data because it won't matter. If, in fact, Noranda really needs to invest $25 million per

[68] Tr. p. 300, l. 23 to p. 302, l. 10.
[69] Ex. 3, p. 10, l. 22.
[70] Mr. Smith of course denies this explanation. Whether this Commission, as the fact finder, will agree with him is up to the Commission.

year of growth capital from 2014 through 2018, and if Moody's knows this because it "knows Noranda," then why did Moody's March 11, 2014, report on Noranda reflect capital investment levels over the next five years much more in line with the information that Noranda provided to Moody's (and much more in line with actual history as well)? While Moody's assumed higher expenditures in 2014 and 2015 (when most of the rod mill expenditures would occur), Moody's also assumed that Noranda's investment levels would drop back to historical levels in 2016 through 2018.[71] If Moody's knew Noranda, and thus knew that $100 million per year was the "real, but unspoken number," why didn't Moody's use that amount in its analysis? And further, why did Noranda give Moody's any capital investment information at all, given that Noranda contends the information was mostly useless and that Moody's would not rely upon it?[72]

Mr. Mudge directly rebutted the nonsensical notion that when a company provides information to a credit rating agency like Moody's it should or would provide information that is useless and that is inconsistent with the company's true view of it's likely future:

> [I]t is unusual for anyone petitioning a rating agency to put forward a set of inconsistent facts. And unless I've completely misunderstood Mr. Smith's surrebuttal testimony[[73]], I believe what he has said is that the Moody's presentation on its face had logically inconsistent facts within it in the sense that the expenditure of the unidentified capex in Mr. Smith's telling is necessary to support the level of cash flows that are in that same model. Now the reason that that inconsistency was allowed to be present to Moody's, in Mr. Smith's account, is that Moody's understood, Moody's knew, they are a sophisticated audience, they would understand that the capex had to be spent to support that level of EBIDTA . . . Now I find that an extraordinary story. In no rating agency setting that I've been involved with would you – you put your best foot forward, sure, but it's got to hang together. The facts have to be consistent with each other.[74]

[71] Tr. p. 923, l. 25 to p. 924, l. 14 and p. 962, l. 17-24.
[72] It is very unclear in any event how it is that Moody's is to "know Noranda" and its capital expenditure plans or needs. When asked to provide documentation of information that Noranda had provided to Moody's, Noranda was unable to produce any. Ex. 129HC, response to DR. No. 11.6
[73] Mr. Mudge did not misunderstand it. Indeed, Mr. Smith's contention is precisely as Mr. Mudge describes it.
[74] Tr. p. 922, l. 21 to p. 924, l. 14.

The simple truth is that Noranda's attempt to explain away the contemporaneous modeling for Moody's, which very much undermines the story reflected in its testimony in this case, fails to hang together. That fact alone calls into very significant question Noranda's need to spend $125 million of growth capital over the period 2014 through 2018, and, in turn, calls into significant question Noranda's claimed liquidity crisis.

Noranda's attempt to support its claimed liquidity crisis with Mr. Smith's modeling suffers from another significant inconsistency. Noranda's model reflects a forecast of what Noranda claims its finances will be from 2014 to 2018 under assumptions that Noranda itself selected and used. Noranda asks the Commission to set its rate at $30 per megawatt hour ("MWh") based on the forecast the model produced because Noranda says that its modeling proves that a rate of $30 per MWh is what it needs. Put another way, Noranda asks the Commission to assume certain conditions will exist in the future (*e.g.*, that aluminum prices will end up matching the forward prices as of January 22, 2014, which Mr. Smith used, and that Noranda will invest $100 million per year (including the $125 million of "unidentified growth capital") in each year 2014 through 2018), and to give it a specified rate based on those assumptions about the future.

But when testing whether customers would be better off bearing the cost of giving Noranda a heavily subsidized rate (or having Noranda leave Ameren Missouri's system), Noranda unequivocally states that it would be *inappropriate* to evaluate Noranda's requested rate based upon a forecast of power or capacity prices. To the contrary, says Noranda witness James Dauphinais, any value used to evaluate and set *must be known and measurable – i.e.*, it must be based on historic data that reflects what actually happened. But as we stated earlier, Noranda has no liquidity crisis, according to its own modeling, if it in fact invests capital at historic levels instead of at a level that is based solely on Mr. Smith's undocumented *forecast* of what Noranda claims it must and will invest. Noranda can't have it both ways.

b. Not Only Are Noranda's Claims about Capital Investment Levels Unconvincing, But Noranda Also Asks the Commission to Rely on What Appear to Be Overly-Pessimistic Views of Aluminum Prices.

One thing that Ameren Missouri and Noranda likely can agree upon is that it is difficult to forecast commodity prices – be it prices for electricity or for aluminum. However, the centerpiece of Noranda's case here a financial *forecast* of what its liquidity will be from 2014 to 2018, both with and without the heavily-subsidized $30 per MWh power rate it seeks. In contrast, Noranda staunchly – and ironically – claims that when evaluating the risk to Ameren Missouri's other customers of setting such a far below cost of service rate, the Commission must only look at history and *cannot forecast* power or capacity prices. Because of these positions are inconsistent, and because Noranda chooses to rely on a forecast to justify its request for a rate subsidy, the Commission must evaluate the validity of that forecast, including its assumptions about aluminum prices.

There is no question that the aluminum price assumptions[75] that Mr. Smith used in his direct testimony modeling are lower than the prices Noranda has realized in 2014,[76] lower than the CRU price forecast Noranda used for its Moody's presentation,[77] lower than CRU's current forecast,[78] and lower than current forward prices.[79] Although, by his own admission, the forward prices Mr. Smith used are not a "forecast," the CRU prices clearly are a forecast, and that forecast is derived from a proprietary econometric model that accounts for supply, demand,

[75] The total of the LME and the Midwest Premium ("MWP"). The Midwest Premium is a premium added to the LME price of aluminum for aluminum produced in the United States.
[76] Ex. 123, p. 2.
[77] Ex. 102HC, Figure 1, p. 17.
[78] Ex. 124HC, p. 2.
[79] Ex. 123, p. 2.

inventory, macroeconomic factors, and interest rates.[80] Moreover, CRU's forecast was developed by a reliable, well-regarded entity with deep knowledge of the aluminum industry. And, as outlined above, even if Mr. Smith's aluminum price assumptions were "correct," the evidence that Noranda must only spend about $75 million per year on capital projects shows that Noranda still doesn't need the $50 million of annual ratepayer-funded subsidy it seeks.[81]

Mr. Smith's assumed aluminum prices are lower than just about any other prices discussed in this case, and it was clear during the evidentiary hearings that Mr. Smith desired to downplay or ignore evidence that demonstrates his assumed prices are both less realistic and quite conservative compared to more reasonable alternatives that could have been used. Indeed, the evidence shows that Noranda itself used these higher price assumptions when it attempted to portray its strong financial position and prospects to analysts and other interested parties.

The first time Mr. Smith testified at the hearing about aluminum pricing (under "cross-examination" by MRA's attorney, who is aligned with Noranda in this case), he characterized the pricing realized by Noranda so far this year as being "difficult" compared to Noranda's "expectations for the first part of the year."[82] In fact, that statement is an exaggeration, if not an outright misstatement. Page 2 of Exhibit 123 shows prices applicable to Noranda's aluminum production (the sum of the LME and the MWP) have been right at or above Noranda's 2014 plan for three of the first 5 months of 2014. And prices have been higher in every single one of those months compared to the prices Mr. Smith used in his direct testimony modeling. So while it is true that prices have not yet risen to the levels both the forward price curve and CRU are

[80] Tr. p. 974, l. 14-23.
[81] Of course no aluminum price forecast is "right," but that doesn't mean that the Commission ought to, or can, accept whatever Noranda claims, particularly where the consequence would be a rate shift of $50 million per year without any mechanism to make customers whole if indeed aluminum prices are higher and, as it turns out, Noranda didn't need the subsidy at all.
[82] Tr. p. 190, l. 22- 25.

expecting them to reach later this year and beyond, we can already see that the price assumptions included in Mr. Smith's modeling do not accurately reflect what is actually happening.

In addition, Mr. Smith's modeling, which used the CRU forecast for the MWP, understates CRU's most recent view of the MWP by, on average, approximately $0.021 per pound for the period 2015 through 2018.[83] While it may not seem like $0.021/pound is very much, Mr. Smith himself testified that in EBITDA terms $0.021/pound equates to approximately ** ** of EBIDTA annually. Spread over 5 years, the EBITDA impact of this change alone would total approximately ** **, or nearly ** ** more in after-tax cash and liquidity. That very significantly changes the liquidity picture Mr. Smith attempts to paint with his direct testimony, and significantly undermines the notion that Noranda would fall below the minimum level of liquidity it says is necessary to sustain its operations. And when coupled with the lack of proof that Noranda must and will spend the $100 million of unidentified growth capital, this $0.021/pound change completely undermines Noranda's claimed justification for the heavily-subsidized rate it seeks in this case.

Moreover, when combining the CRU's MWP forecast with the latest forward LME prices (the same sources of pricing information used by Mr. Smith), we see that those combined prices are also predicting higher realized aluminum prices than Mr. Smith's modeling assumes. Again, it takes very little in the way of aluminum price improvement (one cent = ** ** in EBITDA[84]) to change the liquidity forecast Mr. Smith relies upon, even aside from the very questionable levels of capital investment Noranda assumed.

Could aluminum prices turn out to be lower than Mr. Smith's direct testimony modeling forecasts over the 2014 to 2018 period? Certainly, anything is possible. But there is no evidence

[83] *Cf.* Exhibit A of Ex. 1 to Ex. 124HC, p. 2.
[84] Tr. p. 359, l. 20-25.

that points to that as being the probable outcome. In fact, the evidence strongly suggests such an outcome is *improbable*. Take, for instance, the demand picture for aluminum and Mr. Smith's own characterization of it. Demand has been robust in 2014, and the underlying demand fundamentals are sound.[85] And while Mr. Smith would qualify the impact of strong demand on price (because supply could catch up to rising demand eventually), when pressed on the question he admitted that his own expectation is that the strong demand *will* support an increase in price:

> **Q. Will these factors increase demand and -- in fact, the increased demand for Noranda aluminum in particular and the decrease in the U.S. supply of aluminum will, in fact, improve the price of the aluminum in the market, correct?**
>
> A. So if I could give a slightly longer answer, would that be all right? Because we – as a company, we fundamentally believe that the price trend driver really is very focused on fundamental demand. So we're always pleased when we see more demand.
>
> **Q. I believe your counsel will give you an opportunity to respond longer.**
>
> A. Uh-huh. The answer is yes. Yes. We do believe the demand will generally support price increases, but you can never predict that that's absolutely going to happen.[86]

So while it is true that we cannot predict with absolute accuracy what aluminum prices will be, it is equally true that the record strongly suggests that the very low prices Mr. Smith assumed are improbable and quite conservative. It also is true that Mr. Smith himself relied on CRU data; that Noranda used the significantly more favorable CRU pricing in its modeling for Moody's; and that, by Mr. Smith's own admission, only CRU provides a forecast of prices developed, as we noted earlier, through the use of CRU's proprietary model that accounts for important macroeconomic variables.

---

[85] Tr. p. 277, l. 1-17.

[86] Tr. p. 239, l. 4-20. Although one can never be sure about anything in the future, Noranda is asking the Commission to grant it a huge subsidy from other customers based upon Noranda's projections about what the future will bring. It's only fair to realistically assess that future based on the evidence at hand, as opposed to speculation.

c. The Lack of Documentation Underlying Noranda's Claims Calls Them into Significant Question and Also Prevents Noranda from Meeting Its Burden of Proof.

As we noted at the beginning of this brief, Noranda is asking the Commission to do something truly extraordinary at the expense and risk of all of Ameren Missouri's other customers. Putting aside the fact that the relief Noranda seeks is both unlawful and bad regulatory policy, Noranda's request ought to be denied because there is no compelling proof that Noranda's material justifications for the rate it seeks are currently true or that those justifications are likely to reflect reality in the future.

The following summarizes some of the documentation that is lacking or is inconsistent with several key arguments Noranda makes in support of its proposal:

- In documents or comments provided to investors, Noranda has not even mentioned that closure of the smelter is possible, let alone imminent or likely.[87]

- Noranda has not produced a single document reflecting a communication by or for its executive management or board of directors that discusses closing or curtailing smelter operations or laying off employees if Noranda does not get the rate it seeks in this case.[88]

- When asked, Noranda could provide no documentation whatsoever to support the contention that if it did not build the rod mill it would lose a major customer or impede Noranda's ability to compete in the North American rod market (contentions it never made until in its surrebuttal testimony).[89]

- When asked, Noranda produced no documentation whatsoever relating to the "hopper" of projects in a list that was not even prepared or available until three days before Noranda filed its surrebuttal testimony (May 27 of this year). To this day, Noranda cannot tell us what the "unidentified growth capital" projects in 2015 and beyond are or will be.[90]

- There is no documentation for investors or Noranda's board of directors that speaks of poor or weak liquidity. To the contrary, Noranda has consistently told the market

[87] Tr. p. 355, l. 8 to p. 356, l. 21.
[88] Ex. 122HC; Tr. p. 350, l. 1-22; p. 353, l. 4 to p. 354, l. 18.
[89] Ex. 129HC – DR Nos. 11.7 and 11.8.
[90] Ex. 130HC.

> and its board, as recently as May 16, that its liquidity performance was and remains "strong" and that it has a "healthy balance sheet."[91]

Based on these facts, to conclude that Noranda must have a $50 million per year capital infusion from Ameren Missouri's other customers provided via the heavily-subsidized $30 per MWh rate, the Commission must unquestionably accept virtually all of Noranda's arguments, even though those arguments are:

- Not supported by any documentation;
- Inconsistent with what Noranda was telling Moody's thirteen days before it filed this case;
- Based on conservative forward prices that Mr. Smith claims are not a forecast, but which he used to forecast liquidity;
- Inconsistent with data Noranda itself uses from CRU, a reliable provider of industry data that does reflect an actual price forecast for aluminum; and
- Are contrary to Noranda's consistent and very recent communications to its investors and its board of directors regarding how strong its liquidity is and will be, how healthy its balance sheet is, and how strong demand for aluminum is and is expected to be.

This record, as well as the legal obligation to decide cases based on competent and substantial evidence, do not allow the Commission to ignore these glaring holes in the story that Noranda has been telling.

d. <u>While It Is True That Power Costs Are Significant for an Aluminum Smelter, Noranda Has Completely Failed to Prove That It Must Have a Heavily-Subsidized Power Rate in Order to Be Competitive.</u>

As it did with respect to aluminum prices and capital investments, Noranda asks the Commission to make certain assumptions about its competitiveness. Indeed, Noranda again asks the Commission to take a leap of faith that is not supported by the evidence in this case. Noranda says that since power costs are about one-third of its total costs the New Madrid smelter

[91] Tr. p. 258, l. 14-24.

must have a much lower power rate or else it will not be competitive. But did Noranda prove that to be the case, and do its claims even make sense? The answer is "no" to both questions.

As Chairman Kenney's questioning of Mr. Fayne pointed out, there are domestic smelters with higher power costs, including ** ** per MWh higher than Noranda). Although he clearly wanted to avoid admitting that higher power costs alone will not make a smelter uncompetitive, when pressed by the Chairman Mr. Fayne had to admit that he had no basis whatsoever to draw the conclusion that ** ** was "struggling" because of a high power rate:

**

**[92]

This is typical of Noranda's evidence (or lack thereof) in this case. Nowhere in his prefiled or live testimony does Mr. Fayne provide a single fact that shows that Noranda is uncompetitive with the other eight domestic aluminum smelters on a *total cost* basis. As Mr. Mudge put it, Mr. Fayne simply "allows the impression to exist."[93] In fact, incredibly, Mr.

[92] Tr. p. 555, l. 13-25.
[93] Ex. 102, p. 42, l. 16 – 18.

Fayne attempts to claim total costs are irrelevant.[94] It doesn't take an M.B.A. from Harvard to know that such a claim is pure folly.[95]

Mr. Mudge addresses these issues in his rebuttal testimony, and Noranda totally failed to refute any of the facts presented, or contentions made, by Mr. Mudge. In fact, Mr. Fayne admits he did not review total smelter costs.[96] This reflects an admission that he cannot possibly know (except by the artifice of his "educated guesses") whether or not the future success of Noranda hinges on its electricity costs.[97]

Mr. Fayne's justifications for his theory (again, not based on facts, evidence, or data) that Noranda must have lower electricity costs to compete also are incomplete in other respects. Although, according to CRU, it is true that last year Noranda's electricity costs were the ** ** of nine domestic smelters, that numerical ranking is at best incomplete, if not altogether misleading, given that Noranda's electricity costs in 2013 were only about ** ** than the U.S. average.[98]

Even more important is the fact that U.S. smelters compete on the basis of total costs, as Mr. Fayne himself admits: "[t]he cost of production will vary among smelters based on the cost of goods and services as well as the configuration of the plant. However, in general, the cost of alumina, labor and electricity each account for 75-80% of the cost, with alumina and electricity each comprising about one-third of the cost of production."[99] When viewed on a total cost basis, the New Madrid smelter fares quite well. It ranks ** ** out of nine smelters, with total costs

[94] Ex. 9, p. 1, l. 11-15 (Fayne Surrebuttal).
[95] If total costs don't matter, then why would owning its own mine and alumina refinery provide Noranda a competitive advantage, as Mr. Smith admits that it does? Tr. p. 315, l. 22 to p. 316, l. 1. Moreover, why would Noranda tout its second quartile (overall) cost position, as it does?
[96] Ex. 102, p. 42, l. 18 to p. 43, 2.
[97] *Id.*
[98] Ex. 102, p. 43, l. 9 -20. At Noranda's current rate, that amounts to about $5 million of higher electricity costs, or only a fraction of Noranda's total costs. It is quite a leap to contend that this, alone, renders Noranda uncompetitive, particularly given its overall cost advantages, as we address below.
[99] Ex. 102, p. 47, l. 7-14 (Where Mr. Mudge quotes Mr. Fayne's direct testimony, Ex. 9, at p. 3).

below the U.S. average. Indeed, the New Madrid smelter's total costs are only slightly higher than the smelter with the ** ** lowest total cost structure.[100]

In fact, as Mr. Mudge discusses at pages 48 to 50 of his rebuttal testimony, industry cost data from CRU belie Noranda's contention that its electricity costs are making it uncompetitive. If the Commission gives Noranda what it seeks in this case, Noranda would vault from number ** **, which is favorable to begin with, to number one in total costs, and would do so by a margin that is ** ** the smelter that would then become number ** **.[101]

The data also rebuts Mr. Fayne's speculation that electricity was the sole or necessarily the primary culprit when other U.S. smelters closed. As Mr. Mudge points out, of the six domestic smelters that have recently closed, all of them had higher total costs of production than those that remain in operation.[102] Moreover, when viewed on a per-ton of production cost basis, these non-electricity costs of the six closed smelters were much more consequential than were their electricity costs.[103] So while it is true that electricity costs are important, it simply is not true – based on the facts and data – that these smelters shut down "'because of high power costs,'"[104] as Mr. Fayne claims. It appears Mr. Fayne was guessing again.

e. <u>Noranda Has Sources to Obtain Capital Other Than From Ameren Missouri's Other Customers.</u>

The *evidence* that has been adduced in this case proves that any investment of "growth" capital beyond the rod mill project (and perhaps the rectifier project Mr. Smith discusses in his surrebuttal testimony, to the extent it can be considered a growth project) is highly speculative, at best. Consequently, to conclude – or even assume – that such investment will occur requires one

[100] Ex. 102, p. 47, l. 15 to p. 48 (as depicted in Figure 5).
[101] *Id.*
[102] Ex. 102, pp. 51-52.
[103] *Id.*
[104] Ex. 102, p. 52 (quoting Mr. Fayne's direct testimony at p. 4).

to accept an undocumented forecast about undocumented projects that Noranda couldn't identify when asked in a data request sent in April of this year. Even today, Noranda hasn't actually identified those projects beyond providing a list of projects in its "hopper." And it is also clear that if Noranda needs a bit more capital to finish projects like the rod mill and keep its liquidity above where it says it needs to be, then there are avenues for it to obtain that capital other than the capital infusion the proposed rate subsidy would produce.

Apollo has had not one dime of invested capital at risk in Noranda since 25 days after it initially invested $214 million to acquire essentially all of Noranda's stock.[105] A special dividend, paid with money borrowed by Noranda, already repaid that initial investment. In addition, more than $200 million in (mostly special) dividends have been paid to Apollo since then.[106] When those dividends are added to the proceeds of Apollo's sale of Noranda stock, Apollo has already stripped a whopping $359.7 million of funds from Noranda in excess of its initial investment, reflecting a pre-tax internal rate of return of 340 percent.[107]

Mr. Smith attempted to defend the staggering returns Apollo has earned on its 25-day investment in Noranda. One argument he makes is that public companies must pay dividends to attract equity capital. However, he admits that Apollo contributed no additional equity after receiving the special dividend that repaid it its initial investment, and contributed no additional equity after receiving three additional large special dividends.[108] He also admits that Noranda has no plans to go to the equity markets, and that Noranda has not asked Apollo to provide any additional capital – either debt or equity.[109] It is therefore disingenuous to try to justify the

[105] Ex. 102, p. 36, l. 11-15.
[106] *Id.* p. 39, Table 9.
[107] *Id.* p. 38, l. 14-19.Apollo's total take thus far also includes an additional $31 million in management fees, and it still holds stock worth nearly $80 million, the sale of which would be pure profit.
[108] Tr. p. 262, l. 25 to p. 264, l. 20.
[109] Tr. p. 264, l. 21 to p. 265, l. 10; p. 276, l. 14-22.

payment of these huge dividends, the majority of which went to Apollo, on the premise that they were needed to attract capital. Noranda hasn't as yet attracted any additional capital from Apollo, and with no plans to issue additional equity, no additional capital infusion is anticipated in the future unless Apollo steps up and provides capital necessary to protect its remaining equity holding in Noranda, worth approximately $77 million based on recent market prices.

Infusing additional capital – in the form of debt or equity – makes economic sense for Apollo. Mr. Mudge explains why this is so for a project like the rod mill:

> Apollo has no obligation, but I think they actually have an economic incentive to invest more, unless somebody else[[110]] steps in and just hands the company money. They have every reason to contribute more funds to optimize the value of their remaining 34 percent share. That's part of the story here.
>
> They've already earned 340 percent internal rate of return. Mathematically, contributing the remaining capital needed to complete the rod mill, 20-some-odd million dollars, a drop in the bucket, and probably preserves the value to a much greater extent of their remaining shareholdings.[111]

As Mr. Mudge further explained, it is also not necessarily the case that an equity infusion from Apollo would in fact be dilutive of shareholders, a topic he discussed with the Chairman:

**

[110] Ameren Missouri's customers.
[111] Tr. p. 941, l. 11-17.

**[112]

And, from a practical perspective, there is also nothing stopping Apollo from lending Noranda money (for the rod mill or otherwise) by subordinating Apollo's loan to existing debt, as Mr. Mudge also confirmed.[113] After all, if Mr. Smith is correct that not finishing the rod mill **

**, then Apollo has an incentive to protect the value of its remaining stock by making sure Noranda has the capital it needs. Would Apollo be better off if that capital comes, instead, from Ameren Missouri's customers? Of course it would. But that is no reason to force Ameren

[112] Tr. p. 929, l. 20 to p. 932, l.10
[113] Tr. p. 965, l. 1-16.

Missouri's customers to provide capital support to Noranda that its largest shareholder – who already has richly profited from its investment in Noranda – is not willing to provide itself.

With respect to growth capital projects like the rod mill, there remain good reasons to believe that Noranda could also get project-specific financing. We don't know the nature and extent of Noranda's efforts to get project financing, what possible terms have been discussed, or why the financing has not been put in place at this time. Mr. Smith himself knew very little about it, deferring to Noranda's Chief Financial Officer, who Noranda did not offer as a witness in this case. We also don't know why in mid-June Noranda believed it was necessary to borrow funds available through its short-term credit facilities, and then spring information about those borrowings on the other parties and the Commission midway through the evidentiary hearings in this case. Mr. Mudge indicates, the most plausible explanation for why Noranda sprung its newly announced liquidity position as of Friday, June 13, is that Noranda likely ** ** among other things. Those include Noranda's own admission that its liquidity is lower in the middle of a month because customers tend to pay at the end.[114] We do know that Mr. Smith was deposed extensively on June 9 regarding the fact that Noranda was doing quite well on liquidity in 2014, despite unusual and extreme weather in the first quarter, and that Mr. Smith made no mention of an impending need to burn through about ** ** of liquidity between May 30 and June 13. We also know Noranda has not issued an 8-K warning investors that it is sitting on the precipice of a financial catastrophe.

Noranda has not come close to proving that it cannot obtain the capital it needs from a source other than Ameren Missouri's other customers via a $50 million per year rate subsidy. Moreover, Noranda has not proved that its recent drop in liquidity is anything other than temporary.

[114] Tr p. 933, l. 19 to p. 934, l. 6; p. 954, l. 1 to p. 955, l. 8.

2. *Even If It Were Truly Facing a Liquidity Crisis, Noranda and Its Shareholders, Including Its Largest Shareholder, Apollo, Should Not Be Bailed Out by Ameren Missouri's Other Customers.*

We summarized earlier the dividends Noranda paid in recent years, including more than \$200 million of special dividends paid to Apollo *in excess of* the \$214 million special dividend paid, using borrowed funds, to reimburse Apollo in full its investment in Noranda. Putting aside dividends paid prior to 2011, we also know that in two out of the past three years Noranda actually paid more in dividends than it invested in capital projects, as can be observed from the dividend information summarized above.

It was certainly Noranda's right to make these payments – and Mr. Smith testified in a conclusory fashion that doing so was "prudent"[115] – but the consequences of having made the choice to pay those dividends is clear: Noranda depleted its liquidity and put itself in a position that it claims necessitates a bail-out from Ameren Missouri's other customers. Noranda can (and likely will) quibble with that conclusion. It will probably say that one can only reach that conclusion by assuming all else is equal, and that had it not paid the dividends its financial condition might still be just as poor. But such an argument belies common sense.

As for the dividends that were funded by debt, foregoing those dividends would have obviated some of the significant debt that now burdens Noranda's balance sheet. (Noranda's debt ratio is currently 87 percent).[116] And for those dividends funded by earnings, Noranda could have used that cash to pay down debt, and if it did that, it currently would have lower interest payments and additional liquidity. Had Noranda made either of these choices, it would also have a much stronger balance sheet, better credit metrics, and likely better credit ratings, all of which

[115] Tr. p. 213, l. 3-7.
[116] Tr. p. 266, l. 23-25.

could reasonably be expected to improve its current liquidity position.[117] If Noranda wants to argue with a straight face that had it not paid all those dividends it still would be here telling the Commission it can't (so far) get project financing for the rod mill, and if it wants to claim that its credit rating would still be as low as it is and that its balance sheet would be just as weak as it appears to be, then it is certainly entitled to make those arguments. But there is no evidence to support those claims, and Ameren Missouri has faith that the Commission knows Noranda's claims are not credible.

It was never contemplated that public utility ratemaking would be used to bail out one company that finds itself – or claims to find itself – in a financially disadvantageous situation due to circumstances that were most certainly substantially within its control. That is especially true where the bail-out is likely to substantially benefit a private equity fund that, if it lost the entire value of its remaining stock, would still have reaped a spectacular $359.7 million in pure profit over and above the repayment of its original investment.[118] Manufacturers in St. Louis, residents in Jefferson City, businesses at the Lake of the Ozarks, and hundreds of thousands of other customers who reside and work in St. Louis and across much of this state, should not be asked to foot this bill. Noranda and Apollo don't deserve to be declared winners here.

3. *Even If a Subsidy Were Truly Needed and Deserved, and Even If Providing a Subsidy through the Rate Setting Process Was Not Unlawful and Otherwise Poor Public Policy, Noranda's Specific Proposal Is Unreasonable.*

Noranda's special rate proposal for its New Madrid smelter consists of four elements. First, Noranda asks the Commission to immediately reduce the smelter's current electric rate

[117] We know that after the 2010 initial public offering and after Noranda paid down a significant quantity of debt (and before it paid large special dividends in 2011 and 2012), Noranda's credit rating did improve. Tr. p. 948, l. 12 to p. 949, l. 1.

[118] As noted, Apollo also received $31 million in management fees. If it retains or improves the value of its remaining shares, it stands to reap at least $467 million of cash from Noranda, above its net investment of zero.

from $41.44/MWh (which includes a fuel adjustment surcharge of $3.50/MWh) to $30/MWh.[119] Second, Noranda wants to exempt the smelter from all current and future fuel adjustment surcharges. Third, Noranda proposes that future increases in the smelter's electric rate be capped at two percent in each future rate case during the term of the special rate when and if the Commission authorizes Ameren Missouri to increase its rates.[120] And fourth, Noranda requests that the special rate arrangement remain in effect for ten years.[121] To recover rate revenues lost as a result of the special rate arrangement, Noranda proposes that the rates of all Ameren Missouri's other customers be increased on an equal percentage basis applicable to each of the Company's rate classes except for the Large Transmission Service class.[122] But Noranda makes no pretense that its proposed $30/MWh rate is based on the costs Ameren Missouri incurs to serve the smelter.[123]

Because Noranda's proposal is completely unrelated to the costs the Company incurs to serve the New Madrid smelter but is, instead, based solely on Noranda's own estimate of the maximum rate it can pay in order for the smelter to remain viable, assuming the Commission had the authority to do so, to approve Noranda's proposal the Commission would need to make the following findings of fact. First, it would need to determine that Noranda's evidence demonstrates that a rate reduction is necessary to allow the smelter to continue operation. We discussed earlier why Noranda has failed to make that demonstration. Second, it would need to determine that each element of Noranda's proposal – the $30/MWh rate, exemption from the FAC, a two percent rate cap in all future rate cases, and the 10-year term of the special rate

---

[119] Complaint, ¶21.
[120] Ex. 1, p. 3, l. 12-17.
[121] *Id*.
[122] Ex. 16, p. 4, l. 14-18.
[123] Ex, 17, p. 3, 2-18.

arrangement – is reasonable and is supported by the evidence on the record. Noranda has failed to produce any evidence to support these findings.

a. A Rate of $30 Per MWh with Limited Adjustments for the Next 10 Years Is Completely Unsupported by the Record in this Case.

As noted previously, Noranda's proposed $30/MWh rate for the New Madrid smelter bears no relation to the costs Ameren Missouri incurs to serve the smelter. Instead, the proposed rate is based exclusively on what Noranda claims it can afford to pay in order for the smelter to remain viable. As such, Noranda's proposal represents a departure from cost of service-based ratemaking that is unprecedented in Missouri. That, alone, is sufficient reason for the Commission to reject Noranda's proposal.

The record in this case is clear that Noranda has failed to establish that its proposed $30/MWh rate is reasonable. In fact, the rebuttal testimony of Ameren Missouri's witness Matt Michels is a veritable treatise on Noranda's failure to support its proposal with credible evidence. Mr. Michels' criticisms of Noranda's proposed rate include:

- Noranda grossly understates the amount of the subsidy Ameren Missouri's other customers will be asked to provide. Over the ten-year period covered by Noranda's proposal, the minimum subsidy will be $331 million, assuming no increases in Ameren Missouri's base rates for the full ten-year period, and further ignoring the effect of exempting Noranda from FAC charges. Adjusting for those factors alone, the amount of the likely subsidy increases to well over $500 million.[124]

- Noranda grossly underestimates the costs Ameren Missouri would avoid if the smelter closes and Noranda leaves the Company's system. Noranda's error is attributable to Mr. Dauphinais' (1) selection of a very short sample period for energy prices, (2) use of data for estimating capacity prices that was out-of-date at the time he filed his direct testimony, and (3) his failure to include in his estimate of avoidable costs a variety of costs that Ameren Missouri currently incurs to serve the smelter.[125]

- Mr. Dauphinais' calculation of Ameren Missouri's avoided costs relied exclusively on historical energy prices for a very short sample period. He did not rely on any projections of forward market prices for the ten-year period Noranda's proposed

[124] Ex. 104, p. 6, l. 1-9.
[125] *Id*. p. 15, l. 1-7; pp. 17, l. 3 – p. 19, l. 5.

special rate would be in effect. Including consideration of these forward market prices would, alone, increase the amount of the potential subsidy that would be provided by Ameren Missouri's other customers to more than $800 million over the ten-year life of Noranda's proposal.[126]

- Even though Noranda proposes that the smelter receive rate subsidies for ten years, neither Mr. Brubaker nor Mr. Dauphinais attempted to estimate Ameren Missouri's costs to serve the smelter through that entire ten-year period.[127]

Mr. Dauphinais' reliance on historical energy prices is especially troubling. Even though Noranda's proposed rate subsidy would remain in effect for ten years, all of the components of his calculation of Actual Net Energy Costs ("ANEC") were based entirely on historical costs.[128] This includes the cost of energy, which Mr. Dauphinais admitted comprises approximately 95 percent of his ANEC estimate.[129] Yet, under cross-examination, he admitted that energy prices are volatile and can change significantly over ten years.[130] They can, he admitted, be affected by things such as changes in environmental regulations – a topic currently under consideration by the Environmental Protection Agency – as well as other factors, both known and unknown.[131] Yet despite the fact that energy prices can – and probably will – increase substantially over the term of Noranda's proposed rate subsidy, Mr. Dauphinais did not perform any analysis of the risks that Ameren Missouri faces or the changes that could occur in its cost of energy over the ten-year period the New Madrid smelter's electric rate would be subsidized by the Company's other customers.

The error-filled analysis described above caused Noranda to conclude that its proposal to provide rate subsidies to the New Madrid smelter would be of more benefit to Ameren Missouri's other customers than if the smelter ceased operations altogether. In fact, the opposite

[126] *Id*. p. 21, l. 13 – p. 27, l. 11.
[127] Ex. 105, p. 12, l. 1-7.
[128] Tr. p. 702, l. 16-19.
[129] Tr. p. 704, l. 11-15.
[130] Tr. p. 709, l. 9-14.
[131] Tr. p. 711, l. 5-15.

is true. Because Noranda's analysis of the benefits the proposed rate subsidy will provide Ameren Missouri's other customers assumes, among other things, that the Company's costs will remain static throughout the ten-year term of the proposal, and ignores rate changes associated with the FAC,[132] that analysis, and the estimates it produced, are not reliable.

As shown in the table on page five of Mr. Davis's rebuttal testimony, since 2007 Ameren Missouri has filed five general rate cases, and in each of those cases the Company has been authorized to increase rates. Those cases were filed because the costs of providing service to customers increased over time, so to assume, as Noranda does, that costs will not increase over the ten-year term of the proposed rate subsidy makes no sense, especially in light of the historical record Mr. David described. But Noranda's assumption isn't just contrary to history; it also ignores a current fact: On July 3, 2014, Ameren Missouri filed a general rate case, just as it indicated several months ago it would do,[133] and it did so because the Company's costs to provide service have continued to increase, just as they did in the recent past.

Mr. Michels also demonstrates that Noranda's estimates of whether Ameren Missouri's other customers would be better off providing rate subsidies to the smelter ignore the potential effects of future environmental regulations on the Company's operating costs. If, for example, those regulations set limits on greenhouse gas emissions such that Ameren Missouri would be required to install carbon capture equipment on its existing coal generators, those limits could be satisfied either by installing the required controls or by retiring an existing generator and replacing it with a new unit that complies with the new regulations. Under the latter scenario, having Noranda off the system would give the Company much more flexibility in complying

[132] Ex. 104, p. 6, l. 13-23.
[133] *Id*. l. 15-16.

with the new regulations than it would have if the smelter continues to operate.[134] And greater flexibility in complying with future environmental regulations could result in savings to Ameren Missouri's other customers.

But Ameren Missouri is not the only party that has analyzed Noranda's evidence regarding the reasonableness of the proposed $30/MWh rate and found that evidence to be unpersuasive. The rebuttal and surrebuttal testimonies of Staff's witness Sarah Kliethermes also conclusively demonstrates that Mr. Dauphinais' analysis is fundamentally flawed and his conclusions are unreliable. She is equally clear that "[a] rate of approximately ** ** to ** ** per MWh at Noranda's meter is necessary to provide other customers the level of benefits assumed by Mr. Brubaker in his testimony[135]

Notwithstanding that affordability should not be the basis for setting rates for the New Madrid smelter or any of Ameren Missouri's other customers, Noranda has failed to demonstrate that its proposed $30/MWh rate is reasonable under any recognized regulatory standard. Noranda concedes the proposed rate is not cost-based, and the evidence that purports to show that the Company's other customers would be better off if the smelter remains on the system under a subsidized rate simply is not credible.

b. There Is No Basis Whatsoever for Excluding Noranda from Its Fair Share of FAC Charges, from Artificially Moving It Away from Cost of Service by Capping Future Increases at Two Percent, Or for Extending the Proposed Rate Subsidy for Ten Years.

The remaining features of Noranda's proposal – the request for exemption from the FAC, a two percent rate cap, and a ten-year term for the proposed rate subsidy – are similarly not supported by record evidence and should be rejected for that reason. Noranda's testimony offers very little in the way of specific support for any of these features. Certainly they are mentioned

[134] *Id*. p. 30, l. 4-18.
[135] Ex. 204, p. 2, l. 20 – p. 3, l. 2.

in the direct or surrebuttal testimonies of Messrs. Smith and Brubaker, but their mention is limited to a brief explanation of the specific features of Noranda's proposal and provides justification of those features.[136] The only justification offered is an implicit one: That the FAC exemption and the rate cap are needed to keep the smelter's future rates as close as possible to $30/MWh, and the ten-year term is necessary to effectuate Noranda's desire for a long-term solution to the smelter's financial problems.

Ameren Missouri, the Staff, and the Office of the Public Counsel ("OPC") each argue that the Commission should reject each of these three features of Noranda's proposal. With regard to the proposed exemption from the FAC and the rate cap, both Mr. Davis and the OPC's witness Lena Mantle point out that separately, but especially when taken together, these two features of Noranda's proposal will exacerbate the gap between subsidized and cost-based rates to a point that at the end of the ten-year term it will be difficult – if not impossible – for the Commission to return the smelter to a rate that is based on Ameren Missouri's actual cost of providing service.[137] Focusing on the effect of the proposed rate cap alone, Mr. Davis estimated that assuming Ameren Missouri's rates are increased by six percent every two years, at the end of Noranda's proposed ten-year term the smelter's rates would be approximately 34 percent below its cost of service.[138] Adding the effects of the proposed FAC exemption would increase that gap even more, probably significantly more. This prompted Mr. Davis to observe that:

> [a]s this gap increases, it will become impossible as a practical matter, to eliminate the subsidy after ten years because moving from a subsidized rate to a cost of service-based rate overnight will produce significant rate shock for Noranda. Consequently, I am concerned that eliminating the subsidy at the end of the 10-year proposed effective period and moving to a cost-based rate will not be accomplished in a single rate change but will, instead, require a lengthy phase-in to avoid severe rate shock. That suggests Ameren Missouri's other customers will

[136] See Ex. 1HC, p. 3, l. 13-17.
[137] Ex. 100, p. 7, l. 1-15; Ex. 300, p. 12, l. 18 to p. 14, l. 7.
[138] *Id*. p. 7, l. 18-22.

be on the hook to subsidize rates for Noranda well beyond the proposed ten-year period.[139]

As for Noranda's proposed ten-year term, Staff argues that if the Commission approves a reduced rate for the smelter Noranda should be required to justify the continuation of the special rate at each of Ameren Missouri's general rate cases.[140] Because the Company opposes any special rate for the smelter, it did not present testimony specifically addressing the proposed ten-year term. But in considering Noranda's proposal, in addition to the concerns already described the Commission should keep in mind that it is a well-established principle of regulatory law that a current Commission cannot by its action bind any future Commission[141] or restrict its actions in any way.[142] But that is precisely what will occur if the Commission approves Noranda's proposal and guarantees the smelter a rate subsidy for ten years.

c. Noranda's Proposal Is Also Unreasonable; In Fact, It Is Unlawful Because It Asks the Commission to Unlawfully Void a Term in Noranda's Contract with Ameren Missouri.

It is beyond debate that the Commission has no power to relieve a contracting party of its contractual obligations. *State ex rel. Utility Consumers Council v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. *banc* 1979). As the Commission is aware, when the Commission granted the Company the certificate of public convenience and necessity ("CCN") that allowed Noranda to obtain service from the Company, Noranda and the Company agreed that Noranda would take electric service from Ameren Missouri (and the Company would provide that service) through at least May 31, 2020. We say "at least" because under the contract neither the Company nor Noranda could ask that the service arrangement be changed until 10 years of

[139] *Id*. p. 8, l. 3-10.
[140] Ex. 200, p. 4, l. 1-4.
[141] Indeed, this particular Commission cannot bind itself as new cases arise.
[142] *See, e.g., In the Matter of Lake Region Water & Sewer Company's Application to Implement a General Rate Increase in Water and Sewer Service*, (File No. WR-2013-0461), Order Regarding Motion to Quash Lake Region's Subpoena, pp. 8-9.

service had passed, and even then if one or the other party desired a change five years notice is required.[143] What this means is that Noranda contractually waived its right to leave the Company's system until May 31, 2020, and the Company contractually waived its right to ask the Commission to rescind the CCN until that same date. Noranda's agreement was consideration for the Company's agreement to pursue an extension of its service territory so that it could serve Noranda. Without its contract with Noranda, the Company had no legal obligation to pursue that extension or to commit to serve Noranda for at least 15 years.

Noranda asks the Commission to change those contractual obligations, which is a power the Commission simply does not possess. As Noranda witness Brubaker's testimony makes clear, Noranda not only wants a large rate subsidy now, it also wants a 10-year commitment for below-cost rates (which would extend well beyond May 31, 2020). Further, it wants the ability to leave the Ameren Missouri system on just two years' notice.[144] Moreover, Noranda seeks to change the ability to terminate the service arrangement from a bilateral right, where Noranda can leave the system on May 31, 2020 (or thereafter upon proper notice *and* where the Company can seek to cease serving Noranda as of that date as well), to a unilateral right, where *only Noranda* can terminate the service.[145] Indeed, under the proposed tariff provision that would purport to make this change, Noranda could, in effect, keep its subsidized rate with caps in each rate case in place in perpetuity because the term of the agreement "evergreens" after year 10, and according to the tariff provision, only Noranda can give notice to terminate it.

None of these changes can be lawfully ordered by the Commission. Indeed, we would contend that not even a court of competent jurisdiction could order these changes because

---

[143] Paragraphs 4 and 5 of the Agreement between Noranda Aluminum, Inc. and Union Electric Company dated December 14, 2004, attached as Schedule CDN-1 to the Direct Testimony of Craig D. Nelson in Case No. EA-2005-0180 (Ex. 100).
[144] Ex. 16, Schedule MEB-1, Page 3 of 4, in the "Contract Term" provision thereof (Brubaker Direct).
[145] *Id.*

Noranda could never establish the elements necessary to invoke the drastic contractual remedy of reformation, which is in effect the remedy Noranda seeks.[146] Nor, as earlier noted, can the Commission essentially divest itself of its ongoing jurisdiction.

d. *Noranda's Belated "Commitments" Are Insufficient and Impractical*.

After many questions during the first day of hearings – some four months into this case – Mr. Smith, in an apparent attempt to salvage a flawed proposal, offered two "commitments" so long as Noranda got *everything else* it has asked for in this case: to maintain 888 full-time workers (employees or contractors) at the New Madrid smelter, and to make $350 million of capital investments in the smelter over the next ten years. Consider, however, that Mr. Smith would not agree to the following:

- He would not agree to limit dividends to Apollo or other shareholders, or on other restrictions on returning value to shareholders;
- He would not commit to provide any upside to the other customers who would be providing the huge subsidy each year, even in the case where aluminum prices recover or Noranda's fortunes otherwise improve, nor would he agree to return, over time, subsidies provided by Ameren Missouri's other customers even if, again, Noranda's financial fortunes improved;
- He would not agree to pay Noranda's fair share of FAC charges; and
- He would not agree to pay Noranda's fair share of future rate increases.

An examination of what he indicated Noranda would agree to reveals numerous problems relating to the practicality and enforceability of Mr. Smith's commitments. With respect to the commitment to maintain 888 full-time employees or contractors at the New Madrid smelter, while Mr. Smith professes no "drive to convert to contract workers,"[147] he admits that his commitment would allow Noranda to increase the number of contractors and decrease the

[146] But no matter what Noranda might be able to argue or prove in a court, those claims, and any relief a *court* could grant, are beyond this Commission's jurisdiction.

[147] Tr. p. 669, l. 2-3.

number of employees.[148] He further admits that contractors could be supplied by contracting companies whose employees do not even live in the Bootheel or even in Missouri.[149]

Mr. Smith also could not answer a series of questions about how, as a practical matter, the Commission could effectively enforce the limited commitments he says Noranda is willing to make. For example, Mr. Smith was unwilling to agree (even assuming some practical means could be found to do it) to a retrospective look back to see if Noranda had or had not met its commitments. He further was unwilling to agree that if it was found that Noranda had not met its commitments, any subsidy the smelter had received would be returned to other customers.[150] Without such a commitment, Noranda could receive a large subsidy for a given period, and if it closed the smelter anyway, laid off workers, or failed to invest as much as it agreed, there would be no mechanism to recover the subsidy from Noranda. Such a scenario would enable Noranda's shareholders to gain the benefit of the approximately $50 million per year of subsidies provided by Ameren Missouri's other customers without any assurance that Noranda would meet its commitments. And even if Noranda would commit to pay back such sums (a purely hypothetical proposition), how could the Commission be assured that Noranda would have the money necessary to do so? And how would the process of either stopping the subsidy prospectively, or recovering subsidies Noranda already had received (assuming Noranda were to agree to a claw back), work?

The statutes authorizing the Commission to hear complaints brought against utilities clearly do not extend to a complaint by a utility (or anyone else, for that matter) against Noranda. Moreover, the law is very clear that the Commission cannot award any kind of damages or pecuniary relief. *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 668 (Mo. 1950) (*citing*

[148] Tr. p. 637, l. 5-9.
[149] Tr. p. 637, l. 23 to p. 638, l. 3.
[150] Tr. p. 642, l. 13-23; p. 643, l. 15-25; p. 644, l. 1.

Laundry, Inc., 34 S.W.2d at 460. Put another way, the Commission cannot issue an enforceable judgment against Noranda. In addition, even if one could somehow figure out a process to enforce the commitments to at least change Noranda's rate prospectively should it not live up to its commitments, doing so will take time and money. All the while, Noranda – and ultimately its shareholders – would continue to benefit from a heavily subsidized rate that it did not deserve because it did not meet its commitments.

The following exchange between Commissioner Hall and Ameren Missouri witness Terry Jarrett show that Mr. Jarrett also has grave concerns about the Commission's ability to enforce any condition to which Noranda might agree.

> **Q. Do you know how if even – even if Noranda was willing to make those – make those promises, do you know how the Commission could assure that those promises were complied with?**
>
> A. To tell you the truth, I don't see how you could make it in any way enforceable. Noranda is a customer and it's not regulated by the Commission. The tariffs address what the utility has to do. It doesn't address what the – usually what a customer has to do. And so I don't know – I don't know how you could bring an action to – that a customer violated the tariff.[151]

It is no answer to simply state, as Mr. Smith did, that "we would expect to meet the commitment."[152] Fully taking Mr. Smith at his word doesn't change the fact that people and companies intend to meet commitments all the time, but sometimes fail to do so.[153] These are difficult questions, for which there are no good answers. And that is yet another reason why the Commission should deny Noranda's request.

It is noteworthy that the General Assembly could fashion legislation that would empower the Commission to solve all of the problems associated with Noranda's request for a rate

[151] Tr. p. 993, l. 15 – p. 994, l. 1.
[152] Tr. p. 641, l. 19-20.
[153] Who knows if Mr. Smith will still be Noranda's CEO in the future, or who will control Noranda's board or otherwise make decisions for Noranda?

subsidy, and thereby provide the Commission the tools it would need to require and enforce commitments like those proposed by Mr. Smith. But absent such legislation, the Commission lacks those tools, and without the ability to enforce Noranda's proposed commitments, those commitments are all but worthless.

Noranda's unwillingness to limit dividend payments, or to agree to other mechanisms that would prevent it from further enriching its shareholders, warrants further attention. In attempting to deflect the justified criticism of Noranda paying several special dividends, Mr. Smith tried to make two points. First, he made vague references to the "prudence" of paying those dividends at the time, and he worked very hard to suggest that the days of Apollo's control over Noranda are past, and that we can all trust the new "independent" Noranda board to act in accordance with its fiduciary duties. In contrast to these assertions, in his surrebuttal testimony Mr. Smith claimed – without any support whatsoever – that Apollo saved the smelter from closure.[154]

In evaluating Mr. Smith's claims, the Commission should consider the following undisputed facts. Between 2008 and 2012 Noranda paid approximately $265 million in dividends, with more than $200 million of them going to Apollo. While it is true that from 2008 to 2010 Noranda's debt declined (although it was still quite substantial), it again increased between 2010 and 2012, and increased further in 2013. Today debt stands at a whopping 87 percent of the capital structure, and Noranda pays just about as much in interest expense each year as it is asking Ameren Missouri's other customers to contribute to it now through rate subsidies. Moreover, Noranda has been to this Commission before claiming that its viability was

[154] At one point he suggested that Apollo saved the smelter because "who else would buy a two-thirds shut down" smelter, alluding to the 2009 ice storm that knocked down Associated Electric Cooperative, Inc.'s transmission lines cutting power to Noranda. However, as later pointed out to him, Apollo bought Noranda in 2007 at a time when aluminum prices were and had been quite high, and when the smelter was in full operation.

threatened and that an electric rate increase would threaten it further, only to then declare – not long after it made that plea – additional large special dividends.

On May 28, 2010, the Commission rejected a Stipulation and Agreement to which Noranda was a party that called for Noranda to receive a rate reduction while all other customers would receive a rate increase – an 11.74 percent increase for Ameren Missouri's residential customers.[155] Noranda attempted to justify the terms of the proposed Stipulation with a refrain that should sound very familiar:

> MIEC, and in particular, Noranda, attempt to justify these results by claiming that Noranda needs special rate consideration to remain competitive with other aluminum smelters in the United States, lest it be forced to close, resulting in economic devastation to Missouri.[156]

After considering Noranda's pleas, the Commission rejected the Stipulation.

The next year, despite its claims that without special rate considerations the New Madrid smelter might be forced to close, Noranda declared and paid a large special dividend totaling approximately $67 million. And it did so again the next year, this time in the amount of approximately $84 million.[157]

Mr. Smith talks about the aluminum industry's "cycle," although he can't tell us where the industry currently is in that cycle. We know that just a penny improvement in aluminum prices increases Noranda's segment profit by about ** **. Under the construct being proposed by Noranda, even with the additional "commitments" it has indicated it would make, there is nothing whatsoever stopping Noranda from taking advantage of improvements in its earnings by paying further dividends to its shareholders or by employing other means to return value to shareholders.

---

[155] Ex. 120, pp. 89-90.
[156] *Id.*, p. 90, ¶ 30.
[157] Ex. 116, p. 23; Ex. 115, p. 23.

In addition, the Commission should not take comfort in Mr. Smith's claim that Apollo no longer controls Noranda. *After* Apollo sold nearly $50 million worth of Noranda stock earlier this year, it continued to retain about 34 percent of Noranda's outstanding stock. And according to filings made with the Securities and Exchange Commission, as long as it owns more than 30 percent of Noranda's stock, Apollo has the right to designate six of Noranda's twelve board members.[158] Because of that *right*, as stated in Noranda's March 11, 2014, Prospectus Supplement, "Apollo will continue to be able to significantly influence or effectively control our [Noranda's] decisions."[159]

Neither Noranda's board, as currently constituted (with Apollo having apparently only designated four directors, plus Mr. Smith), nor any Noranda board of the future, owes any duty whatsoever to this Commission, to the state of Missouri, to Ameren Missouri, or to Ameren Missouri's other customers. In fact, by law the board owes its duties to Noranda's shareholders, and if in the board's judgment paying more dividends to shareholders is in its shareholders' best interests, then that is what the board will – and arguably must – do. Further, there is no doubt that, as a matter of law and practicality, an entity that has the ability to designate one-half of the directors on the board can effectively control the company by, at a minimum, ensuring that only the non-designated directors it approves are nominated to the board.[160] Consequently, even if Mr. Smith himself truly does not intend to support additional shareholder dividends, it would be naïve to believe that Noranda (at Apollo's behest or otherwise) cannot pay whatever dividends it

[158] Ex. 118, p. S-5.

[159] *Id.*

[160] And while the rules of the New York Stock Exchange ("NYSE") are not before the Commission, one must question Mr. Smith's claim that those rules somehow would prevent Apollo from exercising what Noranda's own SEC filings admit to be Apollo's ability to effectively control Noranda. At a minimum, it must be understood that there is no law that requires Noranda's stock to be listed on the NYSE, even assuming the NYSE rule Mr. Smith vaguely points to provides for what he said it provides for.

wants to pay in the future, including dividends funded by the nearly $50 million per year Noranda is asking Ameren Missouri's other customers to pay.

CONCLUSION

Noranda's proposal to receive a huge rate subsidy that is far below its cost of service constitutes a clear case of unlawful, undue discrimination, because it would not be based on any difference whatsoever in the nature of the service provided to Noranda by Ameren Missouri. It is also unlawful because it would require a rate change without consideration of all relevant factors, thus violating the prohibition against single-issue ratemaking.

Noranda's proposal also reflects bad regulatory policy, for it would put the Commission in the position of picking winners and losers, and would lead to a rush of similar requests from others who prefer to be a winner, rather than a loser. Where would the Commission draw the line?

But even if the proposal were not unlawful and were not bad policy, Noranda has failed to meet its burden to establish that it is entitled to a nearly $50 million per year rate subsidy from other customers. It has not proven that it must have this relief in order to sustain its operations, and even if its financial situation were as bad as Noranda claims, Ameren Missouri's other customers should not be forced to bail out the New Madrid smelter given the record of bad management and shareholder decisions (including those of Apollo) that both drained Noranda of liquidity it now seeks to restore, and so highly leveraged the company that it pays nearly $50 million per year in interest charges alone, and is effectively barred from borrowing additional funds from conventional sources.

Aside from these deficiencies, it is clear that the kind of relief Noranda is requesting is essentially an economic development proposal that is the proper province of the General Assembly. As Senator Chris Kelly testified,

> I cannot conceive of a more damning indictment of our educational system than the fact that we are even having this discussion. The Public Service Commission is being asked to perform an essentially legislative function. That is to grant large subsidies.
>
> * * *
>
> * * *
>
> ***
>
> For you to start down that road I think is tragic and is a disaster and is a perversion of the roles of the two institutions.[161]

For all of the reasons stated in this brief, the relief requested by Noranda should be denied.

[161] Tr., Vol. 4, p. 21, l. 8 to p. 24, l. 19 (Jefferson City Local Public Hearing).

Respectfully submitted:

SMITH LEWIS, LLP

/s/ James B. Lowery
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Thomas M. Byrne, #33340
Director - Asst. General Counsel
Wendy K. Tatro, #60261
Corporate Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
Phone (314) 554-2514
(314) 554-3484
Facsimile (314) 554-4014
AmerenMoService@ameren.com

L. Russell Mitten, #27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone (573) 635-7166
Facsimile (573) 634-7431
rmitten@brydonlaw.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

Dated: July 8, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 8th day of July, 2014.

/s/L. Russell Mitten
L. Russell Mitten