BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc. et al.,	)	
	)	
Complainants,	)	
v.	)	File No. EC-2014-0223
	)	
Union Electric Company, d/b/a Ameren Missouri	)	
	)	
Respondent.	)	

AMEREN MISSOURI'S MOTION TO DISMISS COMPLAINT

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or the "Company") and pursuant to 4 CSR 240-2.070(7) and 4 CSR 240-2.116(4) hereby moves for the dismissal of the Complaint filed in this proceeding. In support hereof, Ameren Missouri states as follows:

Introduction

1. On February 12, 2014, Noranda Aluminum, Inc.[1] filed a Complaint against Ameren Missouri, alleging that the Company has been earning in excess of the return on equity authorized by the Commission just a little more than one year ago. Based on that allegation, Noranda et al. allege that the Company's revenues are more than needed to earn a just and reasonable return and that therefore a rate decrease is justified.[2] Noranda et al. request that the Commission set an expedited procedural schedule for this case, conduct whatever investigation the Commission deems appropriate, and promptly reduce the Company's rates.

2. For the reasons discussed herein, the Complaint must be dismissed because it fails to state a claim upon which relief can be granted. A complaint fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the complaint

[1] Joining Noranda as complainants were 37 Ameren Missouri residential customers who, according to Noranda, can be "contacted through" Noranda's attorneys. Complaint, ¶ 2. For simplicity we will collectively refer to complainants as "Noranda et al."
[2] Complaint, ¶ 11.

nevertheless fails to establish that the complainant is entitled to the relief sought. *See, e.g., Tari Christ v. Southwestern Bell Tele. Co. et al.,* 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, *Order Regarding Motions to Dismiss*, Jan. 9, 2003), *citing Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. *banc* 1993). Application of this standard demonstrates that the Complaint fails to meet it.

3. To properly state a claim, the Complaint would have to allege that Ameren Missouri's current rates are unjust or unreasonable in that Ameren Missouri is currently and will be in the future earning more than a fair and reasonable return at its current rates. Indeed, a bare allegation that a utility has in the past earned more than its last-authorized return on equity does not state a claim upon which relief can be granted. The Missouri Supreme Court has recognized that the return a utility earns "will necessarily vary from time to time" and that "[n]o maximum or minimum return was determined when the rate was established." *See, e.g., Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (1950). While Ameren Missouri disagrees that it has "over-earned" in the past (i.e., that its current rates have been unjust and unreasonable) the Complaints' reliance on past per-book earnings and a limited set of adjustments based on data that in some cases dates back to October 2010 do not support their claim that current rates are unjust and unreasonable.

4. Put another way, the Complaint fails to state a claim upon which relief can be granted because it is focused solely on past results, and fails to allege that the Company's rates are unjust and unreasonable today or in the future. Under *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. *banc* 1979), the appropriate level of rates must be determined based upon a consideration of all relevant factors. The justness or reasonableness of rates must be evaluated in a complaint case the same way they

are evaluated in a general rate case: i.e., a reasonable test year must be established; all revenues, expenses, and investment during the test year must be matched and evaluated; and forward-looking evidence regarding a fair rate of return must be considered. But the Complaint here is not based upon that kind of analysis and therefore fails to state a claim upon which relief can be granted.

5. The Complaint also fails to state a claim because it contains no allegation that there has been a substantial change in circumstances since Ameren Missouri's rates were last set, and therefore the Complaint constitutes an unlawful collateral attack on the Commission's prior rate order and on Ameren Missouri's current lawful and effective rate tariffs. *See Tari Christ,* 2003 Mo. PSC LEXIS 37, *citing State ex rel. Licata v. Pub. Serv. Comm'n,* 829 S.W.2d 515 (Mo. App. W.D. 1992) and State *ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Comm'n,* 924 S.W.2d 597 (Mo. App. W.D. 1996) (A complaint challenging the justness and reasonableness of a tariff, including a rate tariff, is an unlawful collateral attack and thus fails to state a claim upon which relief can be granted unless its allegations, taken as true, demonstrate a substantial change in circumstances).

Argument

6. In support of their Complaint, Noranda et al. cite certain "Facts Relevant to This Complaint" derived from the pre-filed Direct Testimony of Greg R. Meyer and Michael P. Gorman. Mr. Gorman's testimony contains several return on common equity analyses driven by Mr. Gorman's own subjective inputs, and results in a recommendation that the Commission lower Ameren Missouri's 9.8% return on equity, which was authorized in its last rate case, to

9.4%.[3] Mr. Meyer's testimony contains his quantification of the Company's alleged over-earnings, based on a very simplistic and demonstrably faulty analysis. Mr. Meyer simply took the book earnings of Ameren Missouri that were reported in its quarterly surveillance report for the 12 months ended September 30, 2013 and adjusted those earnings to reflect the estimated impact of Mr. Gorman's proposed 9.4% return on equity and 14 other adjustments. The surveillance report relied upon by Mr. Meyer is already over 5 months out-of-date and would be even more so by the time any new rates would be implemented.

7. The information that Noranda et al. have filed does not support the relief requested in the Complaint—a reduction in Ameren Missouri's rates. Even if the Commission were to accept every allegation in the Complaint as true, the allegations provide no meaningful information about whether Ameren Missouri's rates are too high, too low, or just right to recover its current cost of service.

8. As the Commission is aware, in every case where a utility's rates are adjusted up or down that adjustment occurs only after the Staff, the utility and other interested parties have conducted comprehensive cost of service studies to determine the utility's revenue requirement, and (typically) class cost of service studies to determine the allocation of the rate increase or decrease to the various customer classes of the utility. A cost of service study does not consist of simply picking the reported book earnings for a utility for some period as Mr. Meyer has done, and making adjustments that in some cases date to the test period from the Company's last rate case (October 2010 to September 2011, with a true-up of certain items to July 31, 2012).[4] Not

[3] Mr Gorman's claim that Ameren Missouri's cost of equity is now 9.4% is almost identical to his claim in the Company's last rate case that the cost of equity was 9.3%. This claim was rejected by the Commission in establishing the 9.8% return on equity.

[4] These figures are now between 20 and 41 months out-of-date. Moreover, they do not match the period covered by the September, 2013 surveillance report, a violation of the matching principle that the Commission relies upon in setting rates. *Re: Emerald Pointe Utility Company*, 2013 MO. PSC LEXIS 877 (2013).

only is the data stale, but it assumes, without any support whatsoever, that the Company is incurring certain expenses at the same level they were incurred years ago. The amount of expenses incurred by a utility years ago is a completely insufficient proxy for what is happening now, and is certainly an insufficient proxy for what may occur in the future. Instead, to state a claim that current rates are unjust or unreasonable requires selection of a representative and current test year, a detailed analysis and adjustment of the book figures to normalize, annualize and exclude certain amounts, and an update of certain items (such as rate base additions and retirements, revenues, employees, etc.) to a date close to when new rates will take effect. A test period that not only is based on per-book numbers and that uses two and three-year old data to adjust only a few items provides absolutely no basis for determining a revenue requirement that could be used to determine the level of rates that should be charged in a future period.

9. Conducting a cost of service study is no simple undertaking, and in Ameren Missouri's case it typically takes numerous Staff auditors approximately 5 months to conduct discovery, work through the process and develop the Staff's recommended revenue requirement.

10. Measured against this standard, the information Noranda et al. have provided in support of their rate complaint is woefully lacking and legally insufficient to support the Complaint. Again, Mr. Meyer simply took the reported book earnings for a period ending more than 5 months ago, made an adjustment to account for Mr. Gorman's recommended return on equity reduction, and made just 14 other adjustments, an analysis that falls far short of any basis for determining the appropriate level for Ameren Missouri's rates.

11. Moreover, as noted, even the few adjustments that Mr. Meyer made to the surveillance data have little or no bearing on Ameren Missouri's current cost of service; in many cases they consist of adjustments he simply pulled from Ameren Missouri's last rate case, which

do not take into account current circumstances. For example, Mr. Meyer's $12.7 million adjustment to account for the refueling of the Callaway Nuclear Plant is merely the adjustment supported by the Staff in Ameren Missouri's last rate case in testimony filed in 2012. It doesn't even take into account the costs that Ameren Missouri actually incurred during the most recent Callaway refueling that occurred in the spring of 2013, which is the most current and relevant information regarding that cost item. Similarly, Mr. Meyer's proposed adjustment to reduce rates to disallow $13.9 million of long-term incentive compensation simply picks up the Staff's adjustment from Ameren Missouri's last rate case. It appears that Mr. Meyer doesn't know how much long-term incentive is actually being paid, or even *if* it is being paid today, but he has nonetheless made an adjustment to reflect a $13.9 million disallowance because that was proposed in the Company's last rate case.

12. Mr. Meyer's adjustment to reflect disallowed advertising expense is similarly flawed. Again, Mr. Meyer did absolutely no analysis of Ameren Missouri's current advertising practices or the cost of advertising actually being incurred by the Company today, but instead he again just cut-and-pasted the Staff adjustment from Ameren Missouri's last rate case based on advertising expenses that were being incurred at that time. He apparently has no idea at all what the actual amount of Ameren Missouri's current advertising expenses are, or whether any of the Company's current advertising is contrary to Commission standards for rate recovery. Mr. Meyer's adjustments for "Miscellaneous Expenses" including lobbying expenses and membership dues for the Edison Electric Institute are similar cut-and-paste jobs from Ameren Missouri's last rate case. Like the other adjustments, they are not based on any analysis of Ameren Missouri's current costs or current practices, and so they are completely irrelevant to Ameren Missouri's current cost of service.

13. The adjustments to Ameren Missouri's book numbers that Mr. Meyer has failed to make are almost worse than those he has made. For example, Mr. Meyer failed to weather normalize the earnings results. Weather normalization is a critical, and usually material adjustment that must be made in any real cost of service study. It is an adjustment that must be made if one is to have any idea of whether a utility's rates are too high or too low, and Mr. Meyer's analysis completely ignores it. In addition, Mr. Meyer failed to properly update Ameren Missouri's rate base additions, failed to update property taxes, failed to update fuel costs in base rates, and failed to take into account approximately $92 million in additional solar rebates that the Company is paying today.

14. Mr. Meyer's slap-dash "estimate" of Ameren Missouri's alleged over-earnings is so logically and legally deficient that it cannot form the basis of any legitimate complaint about Ameren Missouri's rates. Moreover, there are real reasons to believe that Ameren Missouri's rates are not too high. For one thing, after examining comprehensive cost of service studies, the Commission increased the Company's rates to cover significantly increasing costs just over one year ago. In addition, Ameren Missouri has announced that it will be filing for another rate increase in July of this year, among other things being driven by (a) increased fuel costs, some of which are already reflected in the Company's fuel adjustment clause charges, (b) two large capital projects currently under way,[5] plus other investments in transmission and distribution reliability projects since the end of the true-up period in our last rate case that will total over $1 billion, and (c) the approximately $92 million in incremental solar rebates referenced above. Under these circumstances it is far more likely that Ameren Missouri's current rates are too low

[5] The two large projects are the installation of electrostatic precipitator upgrades required by environmental rules at its Labadie Energy Center, and replacement of the reactor head at its Callaway Energy Center.

rather than too high. But of course, that can't be known until a full investigation of the Company's rates supported by comprehensive cost of service studies is completed.

15. The Complaint fails to state a claim for an additional reason. As the Commission recognizes, complaints, including those challenging rates, cannot be maintained without proper and sufficient allegations of a substantial change in circumstances; otherwise, the complaint is an unlawful collateral attack on the Commission's order approving the existing rates. *Tari Christ*, 2003 Mo. PSC LEXIS at *34 -*36, *citing Licata* and *Ozark Border*, *supra*. There are no allegations that even if true would constitute a substantial change in circumstances. During the pendency of the Company's last rate case the two unadjusted surveillance reports filed in the quarters leading up to the Commission's Report and Order in that case showed that on a per-book basis Ameren Missouri had earned more than its then "allowed" return, as Noranda et al. allege was the case for the 12 months ending September 30, 2013. However, this did not then – and does not now – have any bearing on whether Ameren Missouri's rates were (or are) too high. Indeed, even though those surveillance reports (Noranda et al. would say) showed "over-earnings," the Commission determined based upon a full examination of the Company's cost of service that the Company's base rates were too low by approximately $260 million annually. No change of circumstances, much less a substantial one, can be shown by Noranda et al.'s reliance on surveillance reports, by cutting and pasting Staff adjustments from the Company's prior rate case covering a different time period, or by Mr. Gorman's very minor change in his view of what Ameren Missouri's cost of equity is today versus then.

16. In summary, Noranda et al.'s Complaint is completely meritless and its request for relief is demonstrably unsupported by the allegations in the Complaint. Even if all allegations that Noranda et al. have made are taken as true, they have still not demonstrated whether Ameren

Missouri's rates are too high, too low or just right. The Complaint does not allege a substantial change in circumstances and therefore constitutes an improper collateral attack on the Commission's last rate order, which has already been upheld on appeal. In these circumstances, the Commission must dismiss the Complaint.

17. Even if the Complaint somehow stated a proper claim, the Commission should exercise its discretion to dismiss the Complaint for good cause shown. Good cause for dismissal is amply demonstrated by the failure of Noranda et al. to allege that Ameren Missouri's rates will be unjust and unreasonable in the future, as we outline above. The Commission possesses full authority to dismiss the Complaint under those circumstances and it should exercise that authority here. *See* 4 CSR 240-2.116(4) (Specifically authorizing dismissal for good cause shown on 10 days' notice); *Report and Order, In Re: Aquila, Inc.*, Case No. ER-2007-0004 (2007) (*citing Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo. 1963) and *Matter of Seiser*, 604 S.W.2d 644, 646 (Mo. App. E.D. 1980)) (Where the Commission recognized that "good cause" "'lies largely in the discretion of the officer or court to which the decision is committed' and 'depends upon the circumstances of the individual[case].'").

18. Nonetheless, if the Commission has any concerns that Ameren Missouri's rates may be too high, it can and should open a separate investigatory docket and direct its Staff to conduct a full cost of service study and class cost of service study to determine if the Staff believes any rate adjustment is appropriate. This is what is commonly done in other cases where the Commission is concerned that a utility's rates may be too high, and it is the course that the Commission should follow here if it has any such concerns about Ameren Missouri's rates. As noted above, in July of this year Ameren Missouri will be filing a request for a general increase in its rates so that it rates can be adjusted to reflect, among other things, the large rate base

additions it has placed in service and that it continues to place in service throughout its system. If such an investigation were initiated by the Commission, it could then be combined with that rate case. In fact, whether an investigatory docket is opened or not, that rate case will provide a vehicle by which Ameren Missouri's cost of service and rate design can be subjected to a full and proper evaluation by the Staff, the Commission, the Office of the Public Counsel and other intervening parties including, presumably, Noranda, based upon all relevant factors.

19. In summary, the Complaint should be dismissed because:

- The Complaint fails to allege a substantial change in circumstances and therefore constitutes an unlawful collateral attack on Ameren Missouri's rates and the Commission's order approving them;
- The Complaint fails to state a claim upon which relief can be granted because its allegations, even if true, fail to establish that Ameren Missouri's current rates are unjust and unreasonable. The revenue requirement calculation submitted in support of the Complaint is so deficient that it provides no evidence as to whether Ameren Missouri's rates are too high, too low, or just right. It does not take into account the many factors that suggest Ameren Missouri's rates are too low—over $1 billion in additional rate base investment, increased fuel costs and $92 million in solar rebates, among other things; and
- Aside from the foregoing bases for dismissal, the Commission should exercise its discretion to dismiss the Complaint for good cause shown because of the above-identified deficiencies.

WHEREFORE, for the reasons stated herein, Ameren Missouri prays that the Commission make and enter its order dismissing the Complaint.

Respectfully submitted,

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d/b/a Ameren Missouri

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of March, 2014, served the foregoing either by electronic means, or by U. S. Mail, postage prepaid addressed to counsel for all parties of record.

James B. Lowery
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