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.	)	

AMEREN MISSOURI'S REPLY TO COMPLAINANTS' AND THE STAFF'S[1] SUGGESTIONS IN OPPOSITION TO MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or the "Company") and pursuant to 4 CSR 240.2.080(13) and the Presiding Officer's order granting the Company leave until April 15, 2014 to file replies to other parties' Suggestions in opposition to its Motion to Dismiss,[2] hereby replies to said suggestions and requests oral argument on its Motion, as follows:

Reply to the Complainants' Suggestions

A. Granting the Relief Sought by the Complaint Would Be Unlawful Single-Issue Ratemaking [Responds to Complainants' Point 2].

1. Complainants claim, without support, that the Commission can determine that the rates of every single one of the Company's non-lighting customers are unjust and unreasonable based solely on Complainants' claim that Noranda has a private business need to cut its rate from approximately $41 per megawatt-hour ("MWh") to $30 per MWh. Noranda claims that the Commission need not determine what the Company's revenue requirement post-the rate cut

[1] This filing also replies to Office of the Public Counsel's response to the Company's Motion to Dismiss, which consisted of agreeing with the Staff's response.
[2] *See Notice of Rulings Made at Conference*, issued March 28, 2014.

Complainants seek is, and that the Commission doesn't even need to know what it actually costs to serve Noranda. The implication of Complainants' position is that the Commission indeed does not need to understand the actual extent of the subsidy Noranda seeks. Thus, Complainants argue, there is no need for a cost of service study or a class cost of service study. To the contrary, Complainants say, since the Company's revenue requirement would not change rates can be changed by the Commission at will because of the Commission's "broad discretion" to set rates.[3]

2. As we discussed in our April 7, 2014 Response in Opposition to Jointly Proposed Procedural Schedule and Procedures (see ¶¶ 6-9 thereof), the applicable statutes and the case law demonstrate that the Complainants' assertion that rates can be changed based on a single issue (its needs/the impact of its financial circumstances), or otherwise based on less than a consideration of all relevant factors that bear on the Company's *rates*, is simply incorrect. To summarize that discussion here, the Missouri Supreme Court has instructed that the "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." *State ex rel. Missouri Water Co. et al. v. Pub. Serv. Comm'n*, 308 S.W.2d 704 (Mo. 1957) (emphasis added). The Supreme Court has also made clear that even if this is difficult to do (and thus time-consuming) it must be done. *Id.* The Public Service Commission Law demonstrates that it matters not whether the utility's target revenue requirement set in its last general rate case will remain unchanged because customers do not pay a revenue requirement. Instead, they pay *rates.* Section 393.270.4 requires a consideration of all relevant factors in "determining the *price* to be charged . . ." for the utility service at issue (emphasis added). A "rate" is "every individual or joint rate, fare, toll, [or]

[3] Complainants' Suggestions in Opposition to Ameren Missouri's Motion to Dismiss Complaint, pp. 7-10.

charge . . .." Section 386.010(46). This too confirms that the price to be charge is the rate to be charged. A revenue requirement is not a rate.

3. Complainants' citation to *State ex rel. Public Counsel v. Pub. Serv. Comm'n,* 397 S.W.3d 441, 448 (Mo. App. W.D. 2013) and *State ex rel. Laclede Gas Co v. Pub. Serv. Comm'n,* 535 S.W.2d 561, 566-67 (Mo. App. 1976) are off-point. The *Public Counsel* case involved the question of whether a rider (allowing rate adjustments outside a general rate case, which by its very nature means the Legislature has authorized the Commission to consider less than all relevant factors) was lawful under the Missouri Energy Efficiency Investment Act. The *Public Counsel* case's citation to the *Midwest Gas Users'* case was simply a citation to another case where the single-issue ratemaking prohibition did not apply because the rate at issue (a purchased gas adjustment clause rate) was interim subject to refund. Similarly, the *Laclede* case addresses emergency, interim, subject to refund rates. Complainants are not seeking a rider authorized by statute, nor are they seeking an interim, subject to refund rate. In fact their April 10, 2015 filing in response to the Commission's *Order Inviting Responses to Agenda Discussion* specifically states that they are not seeking such rates.

4. We also pointed out in our prior filing that our research revealed that at least over the past 40 years (and we suspect since the Commission's inception) the Commission has never changed a rate in a rate design case without a stipulation that was unanimous or treated as such because it was not opposed. In that circumstance, as a practical matter the single-issue ratemaking problem that would otherwise exist is in effect "cured," because tariffs take effect without challenge, and those tariffs and the Commission's order approving them is immune from later challenge because of the collateral attack bar in Section 386.550. But here, where there will be no unanimous stipulation, the Commission cannot simply ignore its duty to consider all

relevant factors having a bearing on the Company's rates. Because the Complaint assumes that the Commission can ignore this legal duty, it is defective and must be dismissed.[4]

B. Granting the Relief Sought by the Complaint Would Constitute Unlawful Discrimination Because the Rate Shift Bears No Relationship to Any Difference in Service Provided to Noranda [Responds to Complainants' Point 4].

5. Complainants do not dispute that under *State ex rel. The Laundry, Inc. et al. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 44-45 (Mo. 1931), *Civic League of St. Louis et al v. City of St. Louis*, 4 Mo. P.S.C. 412 and *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92, 100 (1901), any difference in a charge from one customer to another must be based on a difference in service, and that even when based upon a difference of service the difference in charge must bear some reasonable relation to the amount of the difference in service. Complainants' proposed subsidy, as pled, has absolutely nothing to do with *any* difference in the service Ameren Missouri provides to Noranda versus the service it provides to other customers. To the contrary, it is simply based upon Noranda's private, claimed financial circumstances. Their request therefore constitute rates that are *per se* unlawfully discriminatory. Since the Commission has no authority to approve unlawfully discriminatory rates,[5] the Complaint is defective and must be dismissed.

6. Complainants sidestep this reality by acting as though the only test of whether a rate differential is unlawful is whether the difference in rates they seek is "unjustly" discriminatory, and that would be true if the difference sought was based upon a difference in service. On those facts, the Commission would have to decide if the difference is too great (is

[4] The other cases cited by Complainants (*Utility Consumers Council, Jackson County* and *Chicago R.I.)*, were all cited in support of Complainants' general assertion that fairly read can be characterized as "the Commission can do whatever it wants" when it comes to setting rates. It is axiomatic that this is not true. The Commission has considerable discretion within the confines of the authority it has been given, but it must follow the rules the Legislature has set for it, including the requirement that it consider all relevant factors having a bearing on rates.
[5] *City of Joplin v. Pub. Serv. Comm'n et al.*, 186 S.W.3d 290, 296 (Mo. App. W.D. 2005).

unjust), but here we never reach that inquiry because the reason for the difference itself is unlawful.

7. Noranda also conflates the legitimate difference in charges it obtains now (based entirely on the difference in the service Ameren Missouri provides to it, as is allowed) with the additional difference it asks the Commission to implement (based only on its claimed liquidity needs, which is not allowed). Complainants are right: Ameren Missouri does "admit" that Noranda should receive a lower rate than other customers because of the differences in the characteristics of serving it (notably, the almost total lack of use of the Company's distribution system), and Noranda does receive a much lower rate for that very reason. But that "admission," as Noranda characterizes it, has nothing to do with Noranda's push to cut its rate by nearly 30 percent more because of its claim that it needs more cash. It's claimed need for more cash has nothing to do with the character of the service Ameren Missouri provides.[6]

C. The Commission Should Not Make the Policy Decisions Complainants Are Asking it to Make [Responds to Complainants' Point 5].

8. Complainants disparage the Company's discussion of the inappropriateness of the Commission approving a rate shift from Ameren Missouri's other customers to Noranda.[7] Complainants urge that the Commission has the authority (Complainants apparently believe) to essentially do whatever it wants. Complainants make the case that the Courts are unlikely to disturb whatever decision the Commission decides to make.

[6] All of the cases Complainants cite in this section of their Response deal with the sufficiency of the evidence, assuming that the reason for the claimed difference in service is at least alleged to be based on differences in the character of the service the utility provides. Again, if that were the allegation then we would agree that there are factual issues that the Commission might have to resolve through evidence to decide if there was unjust discrimination. Here, the very nature of the rate shift request constitutes unjust discrimination, even if the allegations of the Complaint about Noranda's cash needs were true.

[7] Referring to the discussion as "rambling policy narratives." Complainants' March 27, 2014 Suggestions, File No. EC-2014-0224.

9. Notably absent from Complainants' Suggestions is any attempt to address the important policy considerations inherent in the question of whether the Commission *should* force everyone in the St. Louis region and other areas of the Company's service territory to subsidize Noranda when they may be facing economic challenges of their own. Moreover, the Suggestions do not explain why, even if a subsidy is warranted, the vast majority of persons in the state, who are not customers of Ameren Missouri but who also would presumably benefit from Noranda's continued economic presence in Missouri, should pay nothing. For example, there are a large number of persons in the New Madrid area who are served by cooperatives or municipal utilities (like the citizens of the City of New Madrid themselves) who according to Complainants will also benefit greatly from the rate shift, but who are not being asked to pay even one dime to support it.[8] Having fully addressed these policy issues and others at ¶¶ 25 to 32 of our Motion to Dismiss, we will not further address them here. But we would point out that just because Complainants want to ignore those policy issues does not make them irrelevant to the Commission's disposition of this case.

10. Complainants go so far as to claim that a discussion of policy is "improper to support a motion to dismiss."[9] That claim is dead-wrong. The basis for the argument that the Complaint should be dismissed for good cause shown is not that the Complaint fails to state claim even if one assumes its allegations are all true. To the contrary, the basis for the argument is that even if the allegations are true the Commission, for policy reasons, the Commission simply has no business ordering a rate change that effectively taxes 1.2 million other households and businesses to confer a financial benefit on Noranda and its shareholders. The Company is

[8] Aside from the other legal problems with Noranda's rate shift request, which we discussed elsewhere in our Motion to Dismiss, we did not contend that the Commission lacks the statutory authority to consider relief of this nature. To the contrary, we indicated that the Commission should not do so, and should instead exercise its discretion to dismiss the Complaint for good cause shown.

[9] Complainants' Suggestions, p. 20.

not asking the Commission to "delegate" anything to the Legislature, but the Company is asking the Commission to recognize that what Noranda is asking for here is not the run-of-the-mill ratemaking decision (which we agree the Legislature envisions that the Commission will make in the ordinary course of its duties). The West Virginia commission fully recognized that this was the case when it expressed great reluctance to give Century Aluminum relief *absent* the specific statutory authority the West Virginia legislature had recently given it under the "Special Rates for Energy Industrial Consumers of Electric Power Act" that West Virginia adopted to address similar issues.[10] We take it then that Complainants would similarly disparage the West Virginia commission's recognition that these kind of policy issues *are relevant* to whether a state public utility commission (in the absence of specific legislation), as opposed to the state's legislature, ought to make the decision to subsidize a private business with other ratepayers' money where the private business claims it is having trouble competing in the market within which it operates.[11]

11. We must also briefly address Complainants' "philosophical response."[12] Contrary to Complainants' claims, Ameren Missouri doesn't fundamentally misunderstand[13] anything. We do not contend that the Legislature could not delegate authority to the Commission to make these kinds of decisions. What we've said is that the Complaint is defectively pled, that it is asking the Commission to approve unlawfully discriminatory rates not based on a difference in the service Ameren Missouri provides Noranda, and that the

[10] *Commission Order*, Case No. 12-0613-E-PC, 2012 W. Va. PUC LEXIS 2148 (Oct. 4, 2012) (Involving Century Aluminum's request for special rate treatment under the newly-enacted law).
[11] And this question is made even more important by the fact that the business at issue's controlling shareholder has taken well in excess of $400 million out of the business in recent years, leaving it highly leveraged and much shorter on cash than it would have been had some of those sums been left in the business. Also, keep in mind that the West Virginia commission, even with the special power it was given under the new statute, took a number of steps to make sure that other customers were not saddled with the risk that the smelter might not need a subsidy and would instead simply reap a windfall from the rate shift.
[12] Complainants' Suggestions, pp. 21-22.
[13] *Id.*

Commission in any event *should* not under the umbrella of its very general authority make these kinds of policy decisions, which implicate far more issues than what a single utility's rates to a single customer ought to be.

12. Finally, we would note that Complainants' invocation[14] of President Reagan's 1981 Executive Order, which required administrative agencies to conduct cost-benefit analyses about the potential impact of *regulations of general applicability* that they were considering adopting,[15] is a bizarre way to argue that a state public service commission should approve a rate shift of more than $500 million over 10 years from all of the utility's other customers to improve the financial condition of one customer. It certainly doesn't stand for the proposition that administrative agencies routinely make the kind of "cost-benefit analyses" Complainants claim are at issue here, as Complainants' citation to it implies. And it is worth noting that President Reagan was generally opposed to the type of socializing of costs that Noranda is requesting in this case. He favored a system where businesses operating in the free market succeeded or failed on their own merits rather than based on government-mandated subsidies, making Complainants' invocation of his executive order even more bizarre.

D. The Complaint Constitutes an Impermissible Collateral Attack [Responds to Complainants' Point 1].

13. As explained in our Motion to Dismiss (¶¶ 7-10 thereof), a rate complaint is a collateral attack that is barred by Section 386.550, unless it reflects sufficient allegations of a *substantial* change in circumstances. As this Commission recognized in its decision that

[14] Complainants' Response, p. 21.

[15] U.S. Executive Order 12291, 46 FR 13193 (Feb. 19, 1981) ("By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows").

recognized this principle,[16] it is simply not true that those seeking dismissal on this basis are confined to the four corners of the Complaint. It is not possible to simply read a complaint and its allegations, and then test whether those allegations reflect a substantial change in circumstances without comparing those allegations to prior circumstances, which may not be mentioned in the complaint at issue at all. It is ironic indeed that even Complainants don't confine themselves to the four corners of the Complaint. Instead, they rely on facts that are in pre-filed testimony, certainly not all of which are reflected in the Complaint itself.[17] Even more to the point, there are allegations in Complainants' Suggestions that are not in the Complaint at all, including the assertion that Complainants' counsel have stated before (that closure of the smelter is "imminent") when in fact neither the Complaint nor any sworn testimony actually contains such an assertion.

E. Complainants Essentially Admit that the Complaint Asks the Commission to Do Something It Has No Power to Do: Relieve Noranda of Contractual Obligations **[Responds to Complainants Point 3].**

14. Although the title of this part of Complainants' Suggestions purports to claim that the Complaint does not seek to relieve Noranda of contractual obligations it owes to Ameren Missouri, the Response itself belies that contention. "[I]f some relief is determined to be beyond the Commission's jurisdiction to grant, the key relief requested – the reduced rate, is not beyond the Commission's jurisdiction to grant."[18]

15. Complainants also ignore the argument that Ameren Missouri actually makes – that the Commission cannot relieve Noranda of its private, contractual waiver of its right to use its special retail choice statute (Section 91.026) until 2020 or its contractual obligation to give

[16] The *Tari Christ* case we have previously cited.
[17] Complainants' Suggestions, p. 6.
[18] *Id.*, p. 11. *See also id.*, p. 12, acknowledging that the Commission may decide the Complaint "goes too far on this issue, and seeks relief beyond the Commission's authority to grant" (emphasis omitted).

five year's notice – and instead makes the obvious statement that the contract contemplates that the Commission will set Noranda's rates. We agree. The Commission does set Noranda's rates, and the contract at issue does not limit the Commission's authority to do so. But that does not give the Commission the authority to relieve Noranda of contractual obligations it owes Ameren Missouri that have nothing to do with Noranda's rate.[19]

Reply to the Staff's Suggestions

16. We incorporate by reference our discussion in our Reply filed today in File No. EC-2014-0223 in response to the Staff's arguments regarding the standard for dismissal and collateral attack. The Staff's arguments in this case are essentially the same as in that case, and thus so is our reply.[20]

17. The Staff's Suggestions in this case addresses another issue: single-issue ratemaking. The Staff's argument is essentially this: cases in this area have involved appeals from rate cases where a revenue requirement was determined *and* where new rates were set, or have involved the question of whether a mechanism that is by definition a single-issue ratemaking mechanism (like a fuel adjustment clause) is authorized. Therefore, goes the argument, since there are no cases decided where "rate design" was the only issue it must be that the requirement that all relevant factors having a bearing on the setting of rates does not apply in a pure rate design case.

18. In the first place, as we have pointed out there are no such cases because we seriously doubt (and have confirmed this for the past 40 years) that the Commission has ever implemented rates in a "rate design" case unless there was a unanimous stipulation (or one

[19] Complainants' citation to the *Kansas City Bolt* case is inapposite. In that case, like several other cases like it decided in the years following adoption of the Public Service Commission Law in 1913, the courts simply confirmed that the state had the authority to obviate a *rate* under a contract in effect prior to adoption of the Law.
[20] We have also already addressed all the Staff's other arguments, either above or in our Reply also filed today in File No. EC-2014-0223, so we will not repeat them here.

treated as such) in the case. In such a case, there would never be an appeal – and thus no court decisions – because the rates would never be subject to challenge. Second, although the Staff's historical recitation of cases that do exist may be interesting, it doesn't change the fact that the statutes in the Public Service Commission Law do not draw the distinction the Staff argues exists here. The statutes do not speak of "revenue requirement" versus "rate design" cases. The statutes do not distinguish between rates set in a combination "revenue requirement/rate design" case and those set only in a "rate design" case. The statutes do not require a consideration of all relevant factors that bear on the "revenue requirement." Instead, the focus is on rates. There can be no argument that to implement the relief Complainants seek would require that the rates in the tariffs for all seven of the Company's rate classes be changed.[21]

Request for Oral Argument

19. The circumstances surrounding the Complaint, and its companion complaint in File No. EC-2014-0223, are unique, as is Complainants' attempt to convince the Commission that it can or should proceed to hear a complaint without the benefit of a proper and full cost of service study that is at least designed to reflect an honest and intelligent forecast of the Company's revenue requirement under probable future conditions, and without the benefit of a proper class cost of service study based on that revenue requirement (so that the extent of the subsidy that is sought could actually be known). A number of legal and policy issues are presented by Complainants' efforts. Consequently, the Company believes the Commission would benefit from hearing oral argument on the Company's Motion to Dismiss and requests that oral argument be scheduled at the Commission's earliest convenience.[22] Since the Company

[21] We discuss this very issue in ¶¶ 1 to 4, *supra.*

[22] The Company suggests that oral argument be scheduled on this Complaint immediately following the oral argument on the Complaint in File No. EC-2014-0223, which the Company will also request in its Reply to the suggestions that were filed in opposition to the Company's Motion to Dismiss in that case.

bears the burden of sustaining its Motion to Dismiss, the Company suggests that it be given a total of 30 minutes (to be split between its initial and reply arguments as it sees fit), with the Compainants to be given 15 minutes, and with each other party that supports or opposes the Motion to be given 10 minutes.

WHEREFORE, Ameren Missouri hereby submits its Reply to the Suggestions filed in opposition to its Motion to Dismiss, and requests oral argument on its Motion as outlined above.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri

By *Thomas M. Byrne*
Thomas M. Byrne, #33340
Director & Assistant General Counsel
Ameren Missouri
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, MO 63166-6149
(314) 554-2514
(314) 554-4014 (FAX)
AmerenMOService@ameren.com

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of April, 2014, served the foregoing either by electronic means, or by U. S. Mail, postage prepaid addressed to all parties of record.

James B. Lowery
James B. Lowery