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 RESPONSE TO APPLICATIONS FOR REHEARING

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and, pursuant to 4 CSR 240.2.080(13), hereby files its response to the Applications for Rehearing[1] filed in this case on September 12, 2014, as follows:

INTRODUCTION

All five Applications rest on the false premise that the terms of the *Non-Unanimous Stipulation and Agreement* (the "Stipulation") filed on August 1, 2014 was not "considered" or properly considered by the Commission, and that if only the Commission had "considered" it, Noranda would somehow be found to have met its burden of proof in this case. OPC and CCM go so far as to claim that the Commission erred as a matter of law, arguing in a conclusory fashion (not supported by citation to any authority whatsoever) that the Commission acted in an

[1] *Application for Rehearing* of Complainants ("Noranda" or "Complainants"), *Application for Rehearing* of the Office of the Public Counsel ("OPC"), *Application for Rehearing or Reconsideration* of Consumers Council of Missouri ("CCM"), *Application for Rehearing* of the Missouri Retailers Association ("MRA") and *Application for Rehearing* of the Missouri Industrial Energy Consumers ("MIEC"). MRA also attempts to justify rehearing from a somewhat different angle than do Noranda's other allies. We will address MRA's separate points below.

"unlawful, unreasonable, arbitrary and capricious" manner and that its decision was "against the weight of the evidence."[2]

Save Noranda's post-evidentiary hearing willingness to accept a higher rate than it insisted (and swore under oath) it must have, and to accept a phase-in of re-applying fuel adjustment clause ("FAC") charges to it that it insisted under oath that it could not pay, there is absolutely nothing of any substance new in the Stipulation. Consequently, the Commission has indeed "considered" the Stipulation in that it obviously considered all of the evidence that bears on the Stipulation's terms. Although Applicants don't like it, the Commission has concluded that the evidentiary record in this case does not support the conclusion that Ameren Missouri's current rates are unjust and unreasonable and that they should be lowered to subsidize Noranda's operations. Even a cursory examination of the record and the *Report and Order* demonstrates that the Commission's conclusions in this regard are unaffected by the Stipulation and were completely within the Commission's authority to reach, with or without the Stipulation.

The *Report and Order* is proper and will be upheld on appeal if it is (a) lawful, and (b) reasonable and supported by "competent and substantial evidence upon the whole record."[3] The Commission's decision is lawful if the Commission had the statutory authority to act as it did.[4] There is no question that the Commission had the statutory authority to decide this complaint. Any claim that the Commission's decision is "unlawful" is therefore simply wrong as a matter of law. With respect to "reasonableness," the question is whether the order (i) was supported by

[2] OPC Application at 1; CCM's Application is nearly identical in this respect.

[3] *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 293 S.W.3d 63, 69 (Mo. App. S.D. 2009).

[4] *State ex rel. Friendship Village v. Pub. Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. App. W.D. 1995).

competent and substantial evidence on the whole record; (ii) is not arbitrary, capricious or unreasonable; and (iii) does not reflect an abuse of discretion.[5] Substantial evidence is evidence that is probative of the issues it is offered to prove.[6] Competent evidence is evidence that is relevant and admissible. [7] The record is replete with evidence that is relevant, that was admitted, and that is probative of all of the issues in this case, including issues raised by the Stipulation, some of which are discussed immediately below.

For example, is Noranda suffering a liquidity crisis of the magnitude it claims such that any subsidy – as reflected in the Stipulation or not – should be granted? There is ample evidence to support the conclusion that the answer is "no." Even if it were, should it be granted relief (as it requested initially, or as it has now "stipulated to") given its own misuse of its cash and its mismanagement of its balance sheet in recent years? There is significant evidence that the answer is "no" to that question as well. Were the assumptions underlying Noranda's financial modeling reasonable, such that a subsidy (again, whether or not stipulated) is warranted? The Commission, judging the evidence of record and the credibility of the witnesses in this case concluded the model was "severely flawed."[8] Would the rate called for by the Stipulation or the rate originally sought cover the fully embedded cost to serve Noranda? There is no dispute: it would not. In summary, if the liquidity "crisis" was exaggerated by Noranda and based on a "severely flawed" analysis, and if Noranda's mismanagement created whatever situation Noranda finds itself in, and if the cost of providing service to Noranda is still not being covered by the proposed subsidized rate (and thus is not reasonably related to cost of service, as it must

[5] *Id.* at 344-45.

[6] *Office of the Public Counsel*, 293 S.W.3d at 72.

[7] *Id.*

[8] *Report and Order* at 25.

be), then it makes no difference if Noranda has now shifted its position to one that is less aggressive than the one it insisted it required as late as the date it filed its Reply Brief. Noranda still hasn't proven its case, and the Commission's decision is patently lawful and reasonable under the standards governing the Commission's decision-making. Consequently, there is simply no basis for rehearing.

THE COMMISSION FULLY CONSIDERED EVERYTHING THAT IT MUST, AND SHOULD, CONSIDER

When the Stipulation was presented, the Commission had fully considered all of the above questions, and more, and the Commission knew what the evidence that bore on all of the terms reflected in the Stipulation showed. The Commission knew exactly what the $34.44/MWh base rate, which Noranda is apparently now willing to accept, represented – indeed the Commission discusses it at pages 17 to 18 of its *Report and Order*.[9] The Commission knew that while Noranda had staunchly claimed it must have a 10-year term, in fact this Commission could never have lawfully bound future Commissions for a "term" any longer than between now and whenever Ameren Missouri's rates were reset. It is entirely irrelevant that the Stipulation reflects a change of heart for Noranda such that it now claims a five-year term will do. The Commission knew that Noranda was willing to make employment and capital expenditure commitments – Noranda CEO Kip Smith so testified during the hearings. The Commission knew that Noranda was willing to agree to some kind of process relating to an attempted means to enforce those commitments.[10]

[9] The Commission discusses a rate identified as $34.45/MWh, as discussed in Ms. Kliethermes' testimony, but the one penny difference is immaterial.

[10] Tr., p. 642, l. 7-11.

Nothing in any of the Applications for Rehearing – even if one were to methodically parse through every word of the Stipulation – requires a change to the findings or conclusions reflected in the *Report and Order*. Noranda has still not carried its burden to show that the smelter cannot be sustained without rate relief. Noranda has still not carried its burden to show other customers would be better off under the terms Applicants propose. It remains true that Noranda's proposal is still significantly below its cost of service and that Noranda's witnesses made absolutely no attempt to examine or even consider what the impact of adopting Noranda's proposal (its original one or its latest one) would be on other customers during the period when the lower rates Noranda seeks would be in effect. There is nothing new in the Stipulation that would allow Noranda to meet its "very heavy burden" to show that a far-below-cost-of-service rate would not constitute an undue preference or advantage because by definition, the newly proposed rate is not based upon any difference in the character of the service provided to Noranda versus any other class, and is not reasonably related to any difference in cost of service.[11] There is nothing new that would establish why an economic development subsidy of this type should not be directed to the Missouri General Assembly, as the Commission recognized.[12]

As noted above, Noranda has still not proven that the liquidity crisis it claims is real, nor does the Stipulation change the fact that Noranda's financial model remains "severely flawed."

[11] *Report and Order* at 23.

[12] *Report and Order* at 28. While it is true that the subsidy reflected in the Stipulation is less than the subsidy Noranda initially demanded, it is still approximately $30 million per year, assuming no further rate increases (or FAC rate increases) for Ameren Missouri. *Report and Order* at 14 (recognizing Noranda's load is approximately 4.2 million MWhs per year). Prior to the latest FAC rate change to take effect later this month, Noranda's total rate was $41.44 per MWh, which does not include any future increases in base or FAC rates, which would increase the subsidy Noranda seeks.

Without such a showing, why should any subsidy be provided, even if it would be legally permissible? Noranda still hasn't proven that what it was telling this Commission was true, while what it was telling Wall Street was not.[13] Noranda's Application for Rehearing doesn't change the fact that the Commission concluded that any liquidity problems Noranda may have are "self-inflicted."[14] Nothing has changed about the fact that while Noranda focuses on its absolute rank in terms of its electricity costs versus other U.S. smelters, the record in this case shows that its electricity costs in 2013 were only 3% higher than the U.S. average.[15] Nothing has changed about the fact that Noranda's total costs – even at the electric rates it is paying now – are *below average*, and that indeed it is the third cheapest aluminum producer in the U.S. (and this is without *any* rate relief).[16] Nothing has changed about the massive dividends (many of them special dividends) declared and paid by Noranda to its controlling shareholder, Apollo Global Management, or about the unwillingness of Noranda to restrict future dividend payments. And nothing has changed about Noranda's unwillingness to forego a subsidy, even if aluminum prices are higher, as is forecast by aluminum market expert CRU.[17]

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[13] *Report and Order* at 26 (There is nothing to change the Commission's belief that "the financial projections Noranda has presented to its investors, and to Wall Street in general, cast considerable doubt on the financial projections [Noranda] presented to [the] Commission."

[14] *Report and Order* at 26 n.86.

[15] *Report and Order* at 22.

[16] *Id.*

[17] These concerns, which the Stipulation completely fails to address, are not hypothetical, as the Commission recognized in the *Report and Order* at page 13, paragraph 27. To the contrary, they are quite real as recent history proves. As the record in this case shows, Noranda previously came to this Commission with a very similar story, including claims that it must have a lower rate else the smelter's viability would be threatened. It did not receive what it asked for and a few months later declared a large, special dividend, the majority of which was paid to Apollo. Tr. p. 284, l. 22 to p. 289, l. 17; Exh. 121. And as we discuss below, Apollo indeed does still effectively control Noranda – Noranda's SEC filings so state.

Finally, as we will address in more detail below, OPC's arguments to the effect that the Commission is somehow precluded from judging Noranda's factually-based claims and must simply give Noranda what it wants so long as Noranda made determinations about what it needs "in good faith"[18] are both logically and legally flawed.

NORANDA'S SPECIFIC CONTENTIONS

At pages 5 and 6 of its Application, Noranda summarizes the five main terms of the Stipulation. It first addresses the base rate, claiming that a $34.44/MWh base rate would not constitute an undue or unreasonable preference. Noranda's theory is that all a customer (or customer class, with Noranda being in its own class) has to do to avoid an unjust discrimination problem is to cover incremental costs, but that is not what *Laundry, Inc.* or the *Report and Order* in this case say, nor is such a contention true.[19]

It is beyond debate that to serve a customer class a utility incurs both fixed and variable costs and in the case of a capital intensive business like an electric utility the fixed costs are quite substantial. Noranda has never claimed otherwise, and as the Commission points out, there was no dispute that the cost to serve Noranda (ignoring FAC charges, which of course cannot be ignored because they are real and have to be paid) – as of the Company's last rate case, which was trued up through July 2012 – was still significantly more than the $34.44/MWh rate Noranda asks for now.[20] Indeed, the Commission fully recognized that Noranda's approach (which Staff

[18] OPC *Application for Rehearing* at 4-5.

[19] And Noranda's entire theory is premised on a scenario where the smelter in fact closes, a theory that itself remains unproven.

[20] Noranda's current base rate is $37.94 per MWh. As the Commission recognized, that rate, like all of Ameren Missouri's rates, are "firmly based on cost-causation principles." *Report and Order* at 22-23. Indeed, Noranda's current rate is within about 2% of the results of the Staff's class cost of service study in the Company's last rate case. Ex. 100, p. 5, l. 6-10 (Davis Surrebuttal).

and Ameren Missouri were simply evaluating and correcting, as opposed to endorsing) does not determine Ameren Missouri's fully embedded cost to serve Noranda.[21] The bottom line is that even a rate that covers incremental cost is not "reasonably related to cost of service," because it does not cover the variable and fixed costs that make up cost of service. And if it does not cover cost of service, then, as the Commission recognized, Noranda has failed to meet its burden to prove that the rate it wants is "reasonably related to cost of service" and thus is not unduly preferential or discriminatory.[22] The Commission already considered all of these arguments. It didn't need a "stipulation" to do so. Noranda didn't meet its burden of proof, or cover its cost of service at $30/MWh or at $34.44/MWh, or any other rate below its current cost of service.

Noranda next addresses the five year "term" it now says it would accept, yet there simply can be no such term as a matter of law as this Commission cannot tie its own hands in any future case so that it could not make the decisions it is required by law to make at that time, let alone tying the hands of a future Commission with a different composition. Even Mr. Smith recognizes this; certainly Noranda's longstanding consultants, including Mr. Dauphinais, do.[23]

Noranda next points to the 2% cap per rate case, and to the partial avoidance (initially total avoidance) of FAC charges, apparently suggesting that since those items were the subject of

[21] *Report and Order* at 18.

[22] *Report and Order* at 22 (Under *Laundry*, the Commission "may set preferential rates [i.e., the rates would not be unduly preferential] *as long as the preference is reasonably related to the cost of service* and is not unduly or unreasonably preferential" (emphasis added)).

[23] Tr. P. 183, l. 13-16 (Mr. Smith); p. 711, l. 24-25 (Mr. Dauphinais). Noranda's citation to Ameren Missouri's EDR tariff is irrelevant. As we pointed out in our Reply Brief, although the EDR tariff is currently lawful in the sense that it took effect and now cannot be collaterally attacked, it would be pure speculation to assume a court would have affirmed it had it been challenged in court. Certainly there are significant differences between EDR-based rates and the rate subsidy Noranda seeks, but it is far from certain that a reviewing court would find those differences either legally significant or controlling.

evidence the Commission could adopt them. Even if the Commission *could* adopt these service terms, so what? The question is not what the Commission *could* have ordered had it adjudged the proof in this case differently. The question is, was the Commission entitled to adjudge the proof as it did? Without question, it was. So while it is true that a rate cap and avoiding the FAC charges were discussed and that there was evidence about them, including them in the Stipulation does not somehow lend them a legitimacy that they did not have before, nor does it provide any logical or legal basis for the Commission to do an about-face and reach a result that Applicants want.

Finally, Noranda touts the fact that there was "prefiled testimony and extensive questioning and testimony" about Noranda's "commitments." Again, this does not make the Commission's findings in the *Report and Order* incorrect. The commitments in the Stipulation are not materially different than those about which there was testimony. That they are now written down in the Stipulation changes nothing, and it certainly doesn't change the fact that Noranda failed to meet its burden to establish that the Commission should, or even could, grant it rate relief on the record before the Commission in this case.[24]

NORANDA'S CONTINUED PLEA FOR MORE "CONSIDERATION"

The remainder of Noranda's Application is a complaint that the Commission did not adequately "consider" the Stipulation. As we explained above, all of the material terms of the Stipulation were fully considered by the Commission because there was significant evidence and argument relating to all of those terms. Noranda isn't asking for more "consideration" of the Stipulation. To the contrary, in substance, Noranda is asking the Commission to *change its mind*. Noranda, as well as OPC, CCM, MRA and MIEC, are inaccurately and unfairly

[24] Noranda makes no attempt to address the significant enforceability problems inherent in any such "conditions," which we addressed in detail in our Reply Brief at pp. 25-26.

characterizing the *Report and Order* as though Noranda and its allies did not get a fair shake from the Commission, but that claim is false. In discussing the Stipulation, the Commission recognized that the signatories had taken new positions and noted that the proposal was "intriguing." However, the Commission also recognized that the relief sought and the case that was tried before it was premised on different terms. Noranda was given numerous opportunities while the evidentiary record in this case remained open to in effect propose to amend its Complaint. It refused to do so, except for making two "commitments" that contain severe legal and practical flaws, as we have previously discussed and briefed.

Noranda's citation to general principles relating to the encouragement of settlements also misses the mark.[25] Both of the Commission cases cited by Noranda are, not surprisingly, cases where a *unanimous* resolution of the case was reached. It is absolutely true that the Commission has a long history of respecting unanimous stipulations (or non-unanimous stipulations that are treated as such due to non-opposition). That a "majority" of consumer parties who happen to be participating in this case now support a stipulation lends no legitimacy to the Stipulation, nor does it change the fact that the Stipulation presents virtually nothing new or different than was already presented to the Commission, and rejected by it, in the *Report and Order.* Similarly, Noranda's discussion of a "rich history" on the Commission's part of "accept[ing] full or partial compromise of contested cases" is misleading for similar reasons. That statement is only true when the "full or partial compromise" was unanimous, or deemed unanimous due to non-opposition. Noranda doesn't, and can't, point to a "rich history" of the Commission adopting the terms of a non-unanimous stipulation opposed by the respondent and the Commission's Staff when that Stipulation (a) was not even presented until after the evidentiary record was closed and

[25] MIEC's similar citations miss the mark for similar reasons.

(b) which, in substance, presents nothing new.[26] To Ameren Missouri's knowledge, the Commission has never approved a non-unanimous stipulation in such circumstances.

NORANDA MISCHARACTERIZES THE COMMISSION'S PROPER RELIANCE ON THE MOODY'S PRESENTATION

Noranda's arguments addressed above are all an attempt to *persuade* the Commission to change its mind, but they are not premised on any claim that the Commission outright erred as a matter of law. When it comes to the Moody's Presentation, however, Noranda takes a different tact and claims outright error. It does so using a sleight of hand not previously employed in this case, claiming that because one of the assumptions underlying the Moody's Presentation was that Noranda would receive a $30 per MWh power rate, the assumptions underlying the presentation provide no basis for the Commission's conclusion that Noranda's liquidity situation was not nearly as dire as Noranda portrayed. Noranda's argument is misleading.

Ameren Missouri never claimed that the Moody's Presentation assumed Noranda's rate remained as-is, and neither did the Commission.[27] But that assumption changes nothing, and it certainly does nothing to contradict the Commission's conclusion that Noranda was telling Wall Street one thing while telling this Commission another. It also does not undermine the Commission's conclusion that Noranda's financial modeling presented to this Commission was severely flawed.

This is shown by the last column of Mr. Mudge's Table 4 (at page 15) in his rebuttal testimony.[28] Using the Moody's Presentation assumptions, Table 4 shows that *even without the*

[26] We again reiterate the discussion at page 8 of our Reply Brief, which calls into serious question the very idea that a complainant and/or its allies can change the nature of the relief sought without running afoul of applicable legal principles.

[27] Mr. Mudge's testimony fully acknowledges that assumption.

[28] Ex. 102.

$30/MWh power rate Noranda asked for, Noranda's liquidity was *more than 1.5 times more than Noranda swore it needed* over the five-year study period looked at by Noranda. It is false to claim that the Moody's Presentation, and its assumptions (regarding capital investment, aluminum prices and also the lower power price at $30 per MWh) is not "competent and substantial evidence" to support the Commission's conclusion that Noranda's financial model is severely flawed.[29] The Commission understood and had direct evidence before it of what was and was not assumed in the Moody's Presentation. The evidence was admissible (and thus it was competent) and it bore on a question at the heart of this case – What was Noranda's liquidity position reasonably expected to be? – and thus the evidence was substantial.[30] Did the Moody's Presentation substantially contradict Noranda's claims to this Commission and undermine its case? Sure it did, and the Commission was entitled to consider and rely upon it.

OPC'S (AND CCM'S) APPLICATION IS LOGICALLY AND LEGALLY FLAWED

As earlier noted, OPC accuses the Commission of acting in an "unlawful, arbitrary and capricious" manner that is "against the weight of the evidence."[31] Notably, OPC cites to no legal authority to back up these claims. We already explained above that the Commission did have statutory authority to decide this case (and thus its decision is lawful), and that there is competent and substantial evidence to support the Commission's decision (and thus the decision is reasonable as a matter of law). OPC also claims that the Commission acted in an "arbitrary and capricious" fashion, but the case law tells us that that could only be true if the Commission

[29] Noranda's Application at 10.

[30] *Office of the Public Counsel*, 293 S.W.3d at 72 (Competent and substantial evidence is evidence that is admissible and relevant). Certainly Mr. Mudge's testimony qualifies on both counts given Noranda's contentions in this case.

[31] OPC Application at 1.

totally failed to consider an important aspect or factor of the issue before it,[32] and we have already explained that the Commission considered each and every issue addressed in the Stipulation.

Turning now to the specifics of OPC's Application, the first five pages of it reflect OPC's argument that the complaint "unquestionably" put Noranda's liquidity at issue in this case. We agree. However, OPC claims that the Commission was wrong when it applied an objective standard instead of applying what OPC characterizes as a "subjective" standard that OPC says should only have asked was there "clear and satisfactory evidence . . . to support a finding that Noranda's board and management exercised a reasonable, good faith business judgment . . ." in concluding that Noranda was confronted with impaired liquidity.[33] But that is not the question, unless one subscribes to the view that the Commission no longer acts as a fact finder, and can no longer judge the credibility of witnesses or the weight to be given to both to the complainants' and the other parties' evidence. OPC's argument becomes even more incredible when one considers the fact that it is Noranda itself that specified the level of liquidity it said it needed, but the evidence in this case – objectively viewed – much more strongly supported the conclusion that Noranda would indeed have that level of liquidity, and more, even without rate relief – just as the Commission concluded. It simply cannot be – and is not – the law that the Commission is required to accept Noranda's "conclusion" about itself at face value. If that were the law, we could dispense with discovery, filing testimony and cross-examination for all Noranda needed to do was to file its testimony, swear that it was telling the whole truth and nothing but the truth,

[32] *State ex rel. Public Counsel v. Public Service Comm'n,* 289 S.W.3d 240, 250 (Mo. App. W.D. 2009) (*quoting State ex rel. GS Techs. Operating Co. v. Public Serv. Comm'n,* 116 S.W.3d 680, 692 (Mo. App. W.D. 2003) (*quoting Barry Serv. Agency Co. v. Manning,* 891 S.W.2d 882, 892 (Mo. App. W.D. 1995)).

[33] OPC Application at 3.

and even if other record evidence might have called that into question, under OPC's standard it would not matter.

OPC's theory is illogical. Imagine if a utility took a similar approach in a rate case filing. It is a virtual certainty that the Commission would summarily deny a utility's claim (and properly so) if a utility filed a rate case claiming that the only question before the Commission was whether the utility had put on evidence that the utility's board of directors and management had reasonably and in good faith reached the "business judgment" that the utility needed a 50 percent rate increase premised on a 15 percent return on equity[34] to remain viable financially, and that the Commission should defer to the utility's business judgment about what it needs. Whether a corporation has made a sound business judgment when it invests shareholder money is properly determined by the business judgment rule,[35] and the cases hold as much, but those cases have absolutely nothing to do with the Commission's right and obligation as the trier of fact to weigh the evidence, find the facts, and determine if, in its judgment, the party bearing the burden of proof has met its burden to prove its case.

The Commission properly recognized that in a complaint case before it the burden of proof is on, and always remains on, the complainant. The Commission cited the controlling law in this area, as did Ameren Missouri in its briefs. About one month ago, the Missouri Court of Appeals, citing those same standards and cases, reaffirmed this basic principle of the law and reaffirmed that it governs complaints before the Commission. *See In re: Emerald Pointe Utility Co v. Office of Public Counsel*, Case No. WD 76996, Mo. App. W.D., Slip. Op. (Aug. 12, 2014).

[34] At least given current capital market conditions.

[35] The business judgment rule applies only in the context of shareholder action claiming liability on the part of company directors, and shields the directors from liability to shareholders if the rule applies. *Black's Law Dictionary*. It has nothing to do with a tribunal's right and duty to find facts in an adjudicatory or quasi-adjudicatory proceeding.

The Court of Appeals, as it had already repeatedly decided (including in the *Ag Processing* decision cited by the Commission at page 24 of the *Report and Order*), concluded that even though the Commission had decided a complaint case concurrently with the utility's rate case, the burden of proof with respect to the complaint *always* rests on the complainant. Slip. Op. at 11. In *Emerald Pointe*, that burden was on OPC who, as it does here, was in the Court's words "complaining about its burden of proof." *Id.* But as the Court of Appeals explained (the explanation is not new – OPC simply ignores it), the party with the burden of proof carries the "risk of nonpersuasion" and if that party doesn't convince the trier of fact of the contentions that party makes then that party loses, and this is so even if the evidence is "'equally balanced and the [fact finder] is left in doubt.'" *Id.* at 12. (internal cite omitted).

Here, the *Report and Order* reflects no doubt on the Commission's part, but the point is that no matter how many times OPC ignores the case law and contends otherwise, and no matter what evidence there may have been that *if* the Commission believed it or found it more persuasive *could* have lent support to the relief Noranda wants, Noranda nonetheless had to sustain its burden of proof and it failed to do so.

One other point regarding OPC's arguments relating to "proof" on the liquidity issue bears noting. OPC claims, incorrectly, that the record is "clear" that Apollo no longer possesses a controlling interest in Noranda.[36] OPC's ignores the unrebutted proof in the record in this case, as we discuss at page 60 of our Initial Brief, showing that in fact Apollo does continue to effectively control Noranda. As we previously stated (based on record evidence):

> 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

[36] OPC Application at 5.

> it owns more than 30 percent of Noranda's stock, Apollo has the right to designate six of Noranda's twelve board members. 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."[37]

THE COMMISSION PROPERLY APPLIED THE LAW

OPC next claims that the Commission misapplied its complaint statute by not engaging in a "broader analysis".[38] OPC cites no legal support for its theory, apart from quoting from portions of three provisions of the PSC Law, none of which stand for the proposition that the Commission *has* to decide (and analyze and discuss) a case different than the one the complainant put before it. By OPC's logic, if a Report and Order in a Commission case did not analyze, consider and discuss every single permutation of the possible outcomes in a case that might find support in the evidence, then the Commission will have acted in an "unlawful, unreasonable, arbitrary and capricious" manner "against the weight of the evidence."[39] That clearly cannot be the standard to which a Commission order is held.

As discussed earlier, the Commission *did* consider all of the key terms of the Stipulation. The Commission considered the $34.44/MWh rate, Noranda's request to fix a rate for a term, Noranda's request to avoid FAC charges, Noranda's claimed need for a subsidy and Noranda's "commitments." There was evidence before the Commission on all of those issues, and as earlier noted, the Stipulation presented little of substance beyond the evidentiary record that had been developed, although it did provide some details about how the commitments might work that Noranda CEO Kip Smith was unable to supply when he testified. The bottom line is that

[37] Ameren Missouri's Initial Brief at p. 60; Exh. 118, p. S-5 (March 11, 2014 Noranda Prospectus Supplement, describing Apollo's effective control even after Apollo reduced its share of Noranda's outstanding stock to approximately 33.67%.).

[38] OPC *Application* at 5-7.

[39] *Id.* at 5.

OPC doesn't like the result the Commission reached, but OPC's dislike does not mean the Commission erred. It didn't.

Moreover, as we also previously outlined (at pages 7 to 8 of our Reply Brief), well-established case law holds that the only relief that can be granted is that which has been pled. "[A] trial court [the Commission here] has the authority to grant relief only if (1) the relief is requested, and (2) issues are raised that support the granting of such relief." *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 264 (Mo. App. W.D. 2010). Indeed, if a court issues a judgment that goes beyond the pleadings, the judgment is void. *Residential & Resort Assocs., Inc. v. Wolfe*, 274 S.W.3d 566, 569 (Mo. App. W.D. 2009). There is no reason to believe that the Commission is any freer than a court is to decide a case that the complainant did not bring.

A final point bears noting. OPC cites to Section 393.130 and Section 393.140(5), implying (apparently) that the Commission had to determine that Ameren Missouri's current rates (at least for Noranda) were unjust and unreasonable and had to prescribe some new rate. OPC's "analysis" is flawed.

First, the Commission already directly stated that Noranda did not prove that there was anything unjust or unreasonable about Ameren Missouri's current base rate for Noranda of $37.94 per MWh.[40] The Commission doesn't "have" to find anything just because Noranda (or OPC) alleges it to be so. Moreover, neither of those statutes require a rate change in the absence of such a finding. Second, the Commission already concluded that in the absence of a class cost of service study it is "impossible to determine whether Ameren Missouri's current rates are now

[40] *Report and Order at* 27-28.

unjust and unreasonable."[41] There is no such study in evidence in this case. It was Noranda's duty – as the party with the burden of proof – to produce such a study and it is Noranda who failed to do so

In summary, the question is not whether "ample evidence exists" to support giving Noranda some relief. Even if ample evidence did exist in isolation, the Commission need not believe and find persuasive whatever this "ample evidence" may be that could have, had the Commission believed it or been persuaded by it, allowed the Commission to grant relief, partial or otherwise. The question is did, given the Commission's weighing of the evidence, Noranda meet its burden? In this case it did not.

AMEREN MISSOURI HAD, AND HAS, NO BURDEN

OPC (now joined by CCM), as it did in its Initial Brief, again claims that Ameren Missouri somehow assumed some burden in this case simply because it was named as a party. We thoroughly rebutted this argument in our Reply Brief (see pages 3 to 12 thereof), and it is no more correct now than it was when OPC first made it. No matter how many times OPC says it, it is not and will never be true that some kind of burden was, or could be, foisted on Ameren Missouri in this case, which sought no relief from Ameren Missouri. *AG Processing* and *Emerald Pointe,* discussed *supra,* make that clear. As we have already explained, OPC's legal theories that underlie its burden of proof argument are directly rebutted by the law. While we will not repeat the entirety of that discussion here, a couple of key points do bear noting.

OPC continues to fail to apprehend that Ameren Missouri has been and is charging rates that *the Commission* set. This means that even had Noranda's complaint been sustained it would not and could not have been because Ameren Missouri had failed to charge just and reasonable

[41] *Report and Order* at 27-38.

rates or had otherwise violated any principle of law or policy. Those rates are just and reasonable as a matter of law as long as they are in effect and until *the Commission* sets new rates prospectively. While utilities are exposed to adverse consequences (e.g., penalties) if a complaint is brought and if it is found that they did not *follow* the law or their tariffs (which have the force of law), utilities are not otherwise at risk to have their rates changed such that they will be forced to lower their Commission-approved revenue requirement as a result of a complaint that only seeks reallocation of a Commission-approved revenue requirement, as here. To obtain such relief, a complainant has to plead, and prove – has to meet *its* burden of proof – to show that the Commission-approved revenue requirement is now too high and that the utility's rates, as a whole, are unjust and unreasonable because they produce too much revenue. Noranda never tried to prove any such contention in this case. But had it tried to prove such a contention in this case, *it* would have borne the burden of proof, just as all complainants do. OPC can't wish that burden on Ameren Missouri.

As was also explained in our Reply Brief, OPC's position now reflects a complete about-face on this issue since OPC had already admitted in this case – twice – that Ameren Missouri could suffer no adverse consequences as a result of this complaint. And as we also pointed out, to accept OPC's argument would be to violate the prohibition on single-issue ratemaking. Even Noranda and the Staff agree with this.

MRA'S APPLICATION MIS-STATES THE RECORD

The first part of MRA's Application is largely the same plea the other Applicants make; that is, an attempt to get the Commission to change its mind. MRA's premise is that Noranda is going to shut down if it does not get a huge rate subsidy and that if that were to happen then other customers would be worse off.

First, Noranda never once has actually said it would shut down the smelter, and as the Commission recognized, it certainly gave absolutely no indication of such a result to Wall Street or even to its Board of Directors. Noranda's own statements to investors and its Board, which were included in the record in this case, prove that. Second, MRA misleads when it concludes that the evidence showed that at the $34.44/MWh rate Noranda now (despite its sworn protestations to the contrary) says it would accept customers are better off subsidizing Noranda than if Noranda leaves the system. Noranda's analysis, and Staff's analysis (that produced the $34.44/MWh rate), made no attempt to predict whether in fact such a rate (or any other rate) would protect customers in the future period during which the heavily-subsidized rate Noranda seeks would be in effect.[42] All that these numbers represent is the rate at which customers might be better off paying a subsidized rate than having Noranda leave the system, if, and only if, the conditions in certain historical periods repeated themselves. Mr. Dauphinais was very candid on this topic, agreeing that his analysis had nothing to do with the $30/MWh rate Noranda first swore it had to have,[43] and agreeing that he simply looked at historical costs, primarily energy prices, which he indicated drive 95% of his results.[44]

For similar reasons, MRA's "lesson" on normalization (¶¶ 7 to 9 of MRA's Application) has no application here. When analyses are being done on which to determine a cost of service that is then used to set rates, weather normalization is essential and appropriate. Ameren

[42] Only Ameren Missouri witness Matt Michels did so.

[43] By the same token, it has nothing to do with the $34.44/MWh rate they ask for now.

[44] Tr. p. 699, l. 22 to p. 700, l. 25 (His analysis has nothing to do with the $30/MWh rate – he doesn't even know how it was developed); Tr. p. 704, l. 7-24 (Used historical energy price data, which drives 95% of the result); Tr. p. 709, l. 2-8 (Analysis made no attempt to account for the future); Ex. 105, p. 10 (Michels Surrebuttal) (Neither Ms. Kliethermes nor Mr. Dauphinais attempted to determine what the opportunity cost to customers would be in the future period when the requested subsidized rate would be in effect).

Missouri's analyses of the market opportunity cost to continue to serve Noranda in the future (as opposed to Noranda being off of the system) were not done to determine a cost to serve Noranda or to set any rate. Instead, the analyses simply examined the reasonableness of Noranda's proposal. MRA misrepresents Ameren Missouri's analysis in this case, and mixes apples and oranges when comparing it to what it says Ameren Missouri has done (to develop a cost of service; to set rates) in the pending rate case.[45]

MRA next acts as though a subsidy of one-half billion dollars is inconsequential, but the argument misses the point. As the Commission recognized, rates have always been firmly rooted in fully embedded cost of service. Neither Noranda's initial request nor the rate specified in the Stipulation have anything to do with cost of service, as we have already explained, and thus those rates cannot be reasonably related to cost of service, as the law requires. Second, when is the last time in memory that any party to any Ameren Missouri rate case claimed that $50 million per year (or $30 million per year) is not consequential? Every one of the signatories to the Stipulation has aggressively fought over many issues far, far less consequential.

MRA next disparages the Commission's decision-making in this case, claiming that it is following the will-of-the-wisp and seeking "certitude" about Noranda's allegations. Requiring Noranda, the entity that brought this complaint and claimed that it needed a heavily subsidized rate in order to survive and claimed quite specifically what that rate had to be, and what it's liquidity had to be, to actually prove that its contentions were more probably true than not true, is not a search for certitude, nor is it following a flickering light. To the contrary, it reflects the fact that the Commission did the job its enabling statutes require it to do: provide a fair hearing,

[45] MRA's reference to evidence in the pending rate case is also improper and invites the Commission to commit error. The Commission has to decide *this* case on the record in this case, and that record alone.

evaluate the evidence and find the facts, consistent with the allocation of the burden of proof required by law.

MRA's next argument (¶10 of MRA's Application) accuses Ameren Missouri of inconsistency, claiming that Ameren Missouri witness William Davis' testimony "acknowledges significant inter-class rate inequalities," pointing to pages 13-15 of what MRA claims was Mr. Davis' testimony. No such acknowledgment appears on those pages, or anywhere else in Mr. Davis' testimony admitted into evidence in this case. Since Ameren Missouri did not file any direct testimony in this case nor do the page references and the allegations MRA makes match any of Mr. Davis's testimony in this case, it is assumed that MRA is referencing Mr. Davis's direct testimony in Ameren Missouri's pending rate case, Case No. ER-2014-0258. This means MRA is pointing to pre-filed testimony that is not only not evidence of record in *this* case, but it has not even been admitted in that case. Rehearing cannot be based upon extra-record evidence of this type, and MRA (again) invites error by relying upon it. Mindful of this, we will not address MRA's inappropriate reference in detail, but will say that MRA selectively picks parts of Mr. Davis' testimony in that case that it thinks support its point, while ignoring others. For example, MRA fails to tell the Commission that Mr. Davis explains how energy efficiency is expected to drive actual costs closer to the cost of service and that it is appropriate to let classes converge to the cost of service naturally over time where possible. In contrast, it is clear that the Stipulation results in rates that are far below Noranda's cost of service and will systematically result in Noranda being further from its cost of service at the end of the five year term provided for by the Stipulation.[46]

[46] As earlier noted, Noranda's rates in that last case were set within just 2% of the results of class cost of service studies and the other rates were set via a stipulation that entities like MRA, but not Ameren Missouri, signed onto.

Finally, MRA essentially argues that since it is "our opinion" that Noranda should be given a large subsidy the Commission should just go along.[47] The Commission doesn't even know who MRA's members are,[48] and neither Noranda nor its allies can confirm that their opinions reflect any consensus among the other 1.2 million Ameren Missouri customers who would have to pay higher rates to fund the subsidy, that a subsidy in fact ought to be allowed. But even more to the point, Noranda did not prove its case, and even if it could have proved its case, it is asking for an economic development package of the kind the General Assembly ought to be considering.

DENIAL OF NORANDA'S COMPLAINT DOES NOT FORECLOSE ADDRESSING NORANDA'S CLAIMED NEEDS

The Commission has encouraged the parties to continue negotiations. The Commission has also recognized that economic development is a matter that should more properly be directed toward the General Assembly. Ameren Missouri has consistently indicated that it wants Noranda to be successful, and Ameren Missouri has never denied that Noranda is very important to the Bootheel and surrounding areas. Indeed it was Ameren Missouri who agreed to give Noranda exactly what it was asking for in 2005 – a cost-based rate from a well-established electric service provider. Ameren Missouri did so by asking the Commission to extend its service territory to include Noranda's property. Ameren Missouri was under no duty to take that step back in 2005, but it did so and thereby gave Noranda what Noranda said it wanted, and needed – cost based rates.[49]

[47] *See* MRA Application, ¶ 11.

[48] Tr. pp. 113-114.

[49] Ex. (Davis Rebuttal) p. 16, l. 18 to p. 17, l. 9 (quoting Noranda's own statements, including as follows: "Noranda can reasonably expect to receive fair treatment in future rate proceedings with rates that *reflect the cost of the service provided to Noranda"* (emphasis added); and "[t]he

Ameren Missouri is fully willing to engage in a good-faith discussion of Noranda's claimed needs with the goal being to achieve an agreement that is fair to all stakeholders and that is consistent with the law if indeed such an agreement is needed to address any legitimate financial needs that Noranda may have. Those discussions should take place outside the context of this complaint case.[50] Those discussions should take into account a number of relevant facts, including Noranda's competitive position in the aluminum industry (electricity is important – so are other considerations), conditions in that industry (including current and reasonably expected aluminum pricing), and the potential impact of how Noranda might be charged for power, and at what price, in the future.

As for the Applications for Rehearing, as we outlined above, they present nothing new of substance and they fail to provide any justification whatsoever for the Commission to come to conclusions that are different than the ones the Commission thoughtfully came to when it issued its *Report and Order* a few weeks ago. Noranda was given its "day in court." It filed the Complaint and it got the last word in surrebuttal testimony, which is appropriate since it bore the burden of proof. It sought and received a fair evidentiary hearing. Its witnesses' testimony was admitted and its witnesses were allowed to testify; indeed, Mr. Smith was given an additional opportunity to testify beyond that called for by the hearing schedule. Noranda was afforded the opportunity to file briefs. In the end, Noranda failed to meet its burden of proof and it

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regulated service offered by AmerenUE substantially met Noranda's *goal of a cost based supply*") (emphasis added).

[50] While OPC by statute represents the interests of the public, that certainly does not mean that all customers supported Noranda's complaint and we know that in fact not all customers did support it. We don't mean to suggest that this means that OPC should not have supported Noranda in some fashion in this case – that's a judgment for OPC to make – but just because it did so does not mean that if one asks a wide array of customers that those customers would agree that their interests are being adequately protected or represented.

consequently lost the case. The Applications provide nothing that changes that result. The rehearing requests should be summarily denied.

Respectfully submitted,

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

Dated: September 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2014, a copy of the foregoing was served via e-mail on all parties of record in File No. EC-2014-0224.

/s/James B. Lowery
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