

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the matter of Union Electric Company,)
d/b/a AmerenUE's Tariffs to Increase Its) Case No. ER-2011-0028
Annual Revenues for Electric Service)

**MOTION TO COMPEL RESPONSES FROM NORANDA ALUMINUM;
OR, IN THE ALTERNATIVE, MOTION TO STRIKE TESTIMONY;
MOTION FOR EXPEDITED TREATMENT AND
REQUEST FOR WAIVER OF 4 CSR 240-2.090(8)(B)**

COMES NOW the Midwest Energy Users' Association ("Applicants"), pursuant to 4 CSR 240-2.090(8) of the Missouri Public Service Commission's Rules of Practice and Procedure, and for its Motion to Compel responses to Data Requests from Noranda Aluminum ("Noranda"), or in the alternative, Motion to Strike Testimony, respectfully state as follows:

I. BACKGROUND AND NORANDA'S POSITION

1. On February 10, 2011, Noranda filed the Direct Testimony of Kip Smith and Henry Fayne.¹ Also, on that date, MIEC filed the Direct Testimony of Maurice Brubaker.

2. In its testimony, Noranda again alleges that the Commission's decision in this case "will have a significant impact on the New Madrid Smelter's near-term results

¹ Unlike Case No. ER 2010-0036 in which Noranda expressly sought and was granted intervention separate and apart from the Missouri Industrial Energy Consumers group, Noranda Aluminum has never sought or been granted intervention in this case. (See, September 24, 2010 Application to Intervene of MIEC and October 5, 2010 Order Granting Intervention to MIEC). As such, one must necessarily question Noranda's authority, separate and apart from MIEC, to file such testimony. Rather than engage in petty legal squabbles that could be quickly remedied through a revised Application to Intervene, MEUA simply treated Noranda as a party and issued discovery through the counsel that filed the Noranda testimony. One must now question, given the documents problems in compelling responses from Noranda in the last case, whether this was simply an intentional oversight designed to foreclose any discovery on the non-party Noranda.

and its long-term sustainability.”² Further, Noranda complains that, despite the Commission’s decision in the last case in which it excluded Noranda from any rate increase, its cost of electricity remains higher than the majority of the other domestic aluminum smelters.³

3. In his class cost of service testimony, Maurice Brubaker conducts an analysis that shows the relative cost of service of each of the Ameren rate classes. In order to bring each class closer to cost of service, Mr. Brubaker recommends that each class be moved 25% - 50% towards its actual cost of service.⁴ While it supports the cost of service resulting from Mr. Brubaker’s analysis, Noranda has indicated that it is dissatisfied with Mr. Brubaker’s recommendation to move classes only 25% - 50% towards cost of service. Instead, Noranda is again seeking unique treatment and is asking that it be moved completely to its cost of service. Meanwhile, other classes remain significantly above their cost of service.

II. DATA REQUESTS AND OBJECTIONS

4. Given the discriminatory treatment that Noranda seeks, MEUA propounded its First Set of Data Requests to Noranda and MIEC on February 23, 2011. On March 2, 2011, Noranda / MIEC objected to certain of the MEUA data requests with limited responses submitted on March 14, 2011. Through this Motion, MEUA will detail that of the 27 outstanding data requests, Noranda objected to 20 of the requests on various grounds. As such, Noranda concedes that responses to 7 of the data requests are due. Nevertheless, despite repeated attempts to obtain such responses, Noranda has refused to provide such responses. This pleading will initially address those data requests

² Direct Testimony of Kip Smith, filed February 10, 2011, at page 3.

³ Direct Testimony of Henry Fayne, filed February 10, 2011.

⁴ Direct Testimony of Maurice Brubaker, filed February 10, 2011, at Schedules MEB-COS-5 and 6.

for which Noranda does not object. Subsequent to that discussion, MEUA will address several of the data requests for which Noranda has provided some objection. In the interest of brevity, MEUA has not addressed each and every data requests, but still requests that the Commission compel responses to each of the 20 data requests.

A. NO OBJECTIONS PROVIDED (7 Data Requests)

5. At page 3 of his testimony, Mr. Smith asserts that “electricity is the single largest operational cost of the New Madrid Smelter.” Based upon its cost of electricity, Noranda claims that it has a cost *disadvantage* relative to other domestic smelters. In order to analyze potential offsetting cost *advantages* that Noranda has over these same domestic smelters, MEUA asked Noranda to identify its second, third, fourth and fifth largest operational costs as well as the percentage of overall costs represented by each of those cost items.⁵ Despite objections to other data requests, Noranda did not object to these requests. Nevertheless, despite the readily available nature of this data, Noranda has refused to respond.

6. At page 8 of his testimony, Mr. Smith claims that Noranda has invested \$38 million “to expand capacity.” In Data Request No. 18, MEUA asks Noranda to detail the steps it has taken to expand capacity and how this capacity addition will affect Noranda’s electric usage. Again, Noranda has not objected to this request, but has steadfastly refused to provide a response. Certainly, one must question Noranda’s willingness to “expand capacity” given the alleged questions regarding “long-term sustainability.”

7. At page 6 of his testimony, Mr. Fayne remarks that the West Virginia legislature has taken steps to “support a restart” of the Ravenswood smelter. In an effort

⁵ See, Data Request Nos. 8-11.

to assess the effectiveness of these legislative steps, MEUA asked Mr. Fayne to provide his “understanding” of any plans to restart the Ravenswood smelter. Again, despite the obvious relevance and lack of objection, Noranda has refused to respond. Interestingly, in subsequent questions in which MEUA has asked for Mr. Fayne’s “understanding”, Noranda has objected. It is baffling that Noranda did not offer a similar objection to this request. Nevertheless, the result is the same. Noranda has refused to answer.

B. OBJECTIONS PROVIDED (20 Data Requests)

8. Data Request Nos. 2, 3 and 4: At page 3 of his testimony, Mr. Fayne claims that “alumina, labor and electricity accounts for 75% - 80%” of a domestic smelter’s cost of goods and services. Despite the apparent importance of alumina and labor costs, Noranda and Mr. Fayne choose to focus solely on the cost of electricity. Using data provided by CRU, Mr. Fayne provides a relative ranking of the cost of electricity for domestic smelters. In Data Request Nos. 2, 3, and 4, MEUA asks Noranda and Mr. Fayne to provide the CRU data related to cost of electricity used by Mr. Fayne in his analysis. Similarly, MEUA asked for any CRU data for the other identified large cost items (alumina and labor).

9. In its objection, Noranda claims that: (1) the likely burden of this discovery outweighs the likely benefit; (2) that the information is obtainable from another source available to MEUA; (3) that such materials are privileged pursuant to the attorney work-product doctrine and the attorney client privilege and (4) the information is proprietary and confidential.

10. As an initial matter, the information sought in Data Request No. 2 should have been provided as a workpaper to Mr. Fayne’s testimony. In fact, the exact same

information, albeit for a different time period, was provided as a workpaper in the last UE rate case. Pursuant to the Procedural Schedule ordered by the Commission, this information was required to be provided within 2 days of the filing of the testimony.⁶ Therefore, while this information should have been provided on or before February 12, 2011 without the need for a data request, Noranda has refused to provide it over two months later.

Furthermore, while the benefit of the requested information is apparent, Noranda fails to provide any basis for its claim that the discovery is burdensome. If Noranda has the information or has access to the information, it should provide this relevant information. Finally, it is baffling that Noranda could claim that the information is proprietary and confidential, but similar information regarding the cost of electricity was filed in Mr. Fayne's testimony as public information.

11. Data Request Nos. 6 and 7: At page 3 of his testimony, Mr. Smith claims that the Commission's decision in this case will determine whether the New Madrid Smelter will have "cost-competitive power." In Data Request No. 6, MEUA asks for Noranda's definition of "cost-competitive power" and to provide any quantification of "cost-competitive power." In its objection, Noranda claims that these requests: (1) are overly broad and burdensome; (2) are neither relevant, material nor reasonably calculated to lead to the discovery of admissible evidence and (3) seek information that is privileged pursuant to the attorney work-product doctrine and the attorney-client privilege. MEUA is baffled how a witness defines a term used in his testimony would be burdensome, irrelevant or privileged.

⁶ See, Order Adopting Procedural Schedule, issued November 10, 2010, at ordered paragraph J.

12. Data Request Nos. 13, 14 and 15: Approximately May 13, 2010, Noranda Aluminum became publicly traded on the New York Stock Exchange. Despite Noranda's repeated claims regarding the non-competitive cost of electricity that it receives from Ameren, the price of Noranda's stock has increased approximately 63% in the following eleven months. Certainly, such information would be relevant to casting doubt on Mr. Smith's claim that the cost of electricity is threatening that "long-term sustainability" of the New Madrid Smelter. Through these data requests, MEUA seeks the admissions to prove these facts.

In response, Noranda claims that these requests: (1) are overly broad and burdensome; (2) seek public information which is readily obtainable from another source; and (3) the likely burden of this discovery outweighs the likely benefit to MEUA. Again, this information should be readily available to Noranda and would not impose any burden. Certainly, MEUA is entitled to an admission by Noranda of the date it became publicly traded as well as the subsequent 63% increase in its stock price. This request has been phrased as a data request because of the Commission's stated preference for the use of data requests. (4 CSR 240-2.090). If Noranda's objection concerns the phrasing of the data request, MEUA is willing to phrase and submit as a request for admissions.

13. Data Request No. 16: In his analysis, Mr. Fayne compares the Noranda cost of electricity against the Alcoa Warrick smelter. As was established in the last case, the Warrick smelter obtains its electricity through self-generation. In fact, Warrick receives electricity through the Alcoa owned 750 MW coal fired generating station. Undoubtedly, Alcoa spent 100s of millions of dollars so that it could have the advantage of self-generation. Nevertheless, Noranda claims that it should be entitled to a

comparable cost of electricity. This data request asks for any analysis undertaken by Noranda to explore the option of similar self-generation.

In response, Noranda claims that the data request: (1) is overly broad and burdensome; seeks information that is neither relevant, material nor reasonably calculated to lead to the discovery of admissible evidence and (3) is protected as attorney work-product doctrine and the attorney-client privilege.

14. Data Request No. 19, 20, 21, 23, and 25: In addition to his discussion of the relative cost of electricity of the domestic smelters, Mr. Fayne discusses the broader concept of the smelters overall “cost of production.” In this data request, MEUA asks Mr. Fayne to provide “his understanding” of the domestic smelters’ “relative cost of production.” Given that the cost of aluminum is driven by the overall cost of production and not the cost of electricity (as Fayne admits at page 5), the relative overall cost of production is more relevant than the relative cost of electricity. In addition, Data Request Nos. 20 and 23 asks for Mr. Fayne’s “understanding” of the operational status of other domestic aluminum smelters (Ravenswood and Massena East). Further, Data Request No. 21 asks for Mr. Fayne’s understanding of which smelters have a cost of electricity that is tied to the London Metal Exchange cost of aluminum. Finally, Data Request No. 25, asks for Mr. Fayne’s “understanding” of the location and electric provider for each domestic smelter. The common theme of all of these data requests is to obtain Noranda’s witness’ “understanding” on certain subjects.

In its objection to all 5 data requests, Noranda asserts that: (1) this data request is overly broad and burdensome; (2) this data request seeks public information which is

readily obtainable from another source; and (3) the likely burden of this discovery outweighs the likely benefit to MEUA.

Nowhere, however, does Noranda provide any discussion as to why it is burdensome to provide its witness' "understanding" of particular subjects. Further, while claiming it is publicly available, Noranda fails to indicate where MEUA could possibly obtain, from public sources, the understanding of the Noranda witness.

Interestingly, while Noranda failed to provide an answer to Data Request No. 24, it did not object to a question regarding Mr. Fayne's "understanding" of plans to restart the Ravenswood smelter. Nevertheless, when asked for his "understanding" of other aspects of smelter operations, Noranda objects on specious grounds.

15. Data Request No. 28: This data request simply asks for the individual at Noranda that is "most knowledgeable of Noranda's position on class cost of service / rate design." MEUA asked this exact data request in the previous case. Again, Noranda objected. In resolving this matter, the Commission found

Data request 1.42 asks for the identity of the individual at Noranda that is most knowledgeable to testify on Noranda's position on class cost of service / rate design. That is an appropriate question to ask in a data request and the Commission will grant MEUA's motion to compel a response to that data request. (See, Order Regarding MEUA's Motion to Compel Noranda to Respond to Data Requests, Case No. ER-2010-0036, issued March 3, 2010, at page 10).

16. MEUA asks that the Commission compel responses to Data Request Nos. 12, 17, 22, 26, and 27.

III. MOTION TO STRIKE

17. As an alternative to compelling responses to these Data Requests, MEUA asks that the Commission consider striking the direct testimony of Noranda witnesses

Smith and Fayne. As previously indicated, Noranda is not a party and has no independent authority to take a position that deviates from the MIEC witness Brubaker. That aside, the more disconcerting aspect of this dispute is Noranda's continued refusal to allow parties to engage in any discovery of its witnesses. Even in situations where it has not objected, Noranda has refused to provide any responses to data requests (See, Data Request Nos. 5, 8, 9, 10, 11, 18 and 24). Further, identical data requests to those which the Commission compelled responses to in the last case continue to draw further obstruction from Noranda in this case (Data Request No. 28). Finally, Noranda refuses to even provide information that is required to be provided within two days as workpaper (Data Request No. 2). All these demonstrate Noranda's apparent disdain for the Commission's rules regarding discovery. Certainly, a party that refuses to engage in proper discovery should not subsequently be permitted to benefit from other aspects of the Commission's procedure including the right to file testimony. For this reason, the Commission should send an immediate message, based upon a pattern of refusal to engage in proper discovery, by striking Noranda's testimony in this case.

IV. COMPLIANCE WITH RULE AND REQUEST FOR WAIVER

18. Commission Rule 4 CSR 240-2.090(8)(A) and (B) sets two prerequisites prior to a party filing a Motion to Compel. ***First***, the rule requires that counsel "attempt to confer by telephone with opposing counsel." In addition to numerous emails on this matter, counsel certifies that he has attempted to reach opposing counsel repeatedly by telephone over the past week. Counsel has attempted to contact opposing counsel both on the office number as well as on the cell phone. Counsel has left messages asking for counsel to return a call and notified counsel that a motion to compel was forthcoming.

Much like Noranda's recalcitrance on this matter, opposing counsel has refused to return calls. As such, counsel certifies that he has "attempted to confer by telephone with opposing counsel."

Second, subpart (B) requires that "counsel arrange with the commission for an immediate telephone conference with the presiding officer and opposing counsel." That rule further provides that "no written discovery motion shall be filed until this telephone conference has been held. Counsel left messages on both April 14 and 15 informing opposing counsel of the need to set a telephone conference with the presiding officer. Counsel asked repeatedly that opposing counsel return a call. Ultimately, counsel left a message indicating that he would contact the presiding officer at 10:00 on April 15 regarding this matter. Again, counsel refused to return calls or provide any instructions regarding convenient time for a telephone conference with the presiding officer.

At 10:00 on April 15, counsel contacted the Presiding Officer. Without discussing any of the merits of the pending discovery dispute, counsel indicated that he had attempted to schedule a joint call, but had been unable to obtain any assistance from opposing counsel. As such, counsel asks, to the extent necessary, that MEUA be granted a waiver from Rule 4 CSR 240-2.090(8)(B) regarding the need for a joint telephone conference involving opposing counsel. To insist that such a joint call take place would enable opposing counsel to unilaterally prevent a party from seeking discovery relief from the Commission.

V. MOTION FOR EXPEDITED TREATMENT

19. Pursuant to 4 CSR 240-2.080, MEUA seeks expedited treatment for this Motion. Consistent with that request, MEUA asks that the Commission rule on this

matter at its next regularly schedule agenda session. MEUA asks for this treatment because the evidentiary hearing in this matter is scheduled to commence on April 26. Action by this date will allow counsel to send additional clarifying discovery as well as engage in any necessary depositions. Consistent with this request and in order to allow the Commission to process this request, MEUA asks that any response be filed by the end of the day on April 18, 2011.

20. This Motion was filed as early as reasonably practical. Noranda's responses were initially due on March 14. In such situations, counsel is always tasked with accommodating the schedules of opposing parties with the need to seek expeditious relief. In this case, opposing counsel was out of the office on vacation during a portion of the subsequent period of time. In addition, counsel has attempted to repeatedly engage counsel through emails and telephone calls. As such, counsel's efforts to informally resolve this matter (as required by 4 CSR 240-2.090(8)(A) also meant that some period of time would inevitably elapse from the date that responses were due. Given the circumstances and counsel's repeated attempts to resolve this matter informally, this Motion was filed as early as reasonably practical. As such, this Motion and the request for expedited relief are timely and appropriate.

WHEREFORE, MEUA respectfully requests that the Commission: (1) act on this matter in an expedited fashion; (2) issue its Order compelling responses to all outstanding Data Requests to Noranda; (3) consider striking the testimony of Noranda witnesses Smith and Fayne; and (4) waive, to the extent necessary, the requirement of 4 CSR 240-2.090(8)(B). Further, MEUA requests that the Commission issue any orders in the way of sanctions that it deems appropriate and reasonable.

Respectfully submitted,



David L. Woodsmall, MBE #40747
428 E. Capitol, Suite 300
Jefferson City, Missouri 65101
(573) 635-2700
Facsimile: (573) 635-6998
Internet: dwoodsmall@fcplaw.com

ATTORNEY FOR THE MIDWEST
ENERGY USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: April 15, 2011