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 Annual Revenues for Electric Service	)))	Case No. ER-2010-0036

REPLY TO OBJECTION OF NORANDA

COMES NOW the Midwest Energy Users' Association ("MEUA"), and for its Reply to the Suggestions in Opposition filed on February 25, 2010 by Noranda, respectfully states as follows:

I. BACKGROUND

1. On February 21, 2010, MEUA filed its Motion to Compel Responses to Data Requests from Noranda Aluminum ("Noranda"). On February 25, 2010, Noranda filed its Opposition to the Motion to Compel ("Opposition"). In general, Noranda raises three (3) areas of concern which they maintain relieve them of the obligation to answer the Data Requests. ***First***, Noranda claims that the Data Requests have been "rendered moot" by Noranda's supplemental direct testimony.[1] Noranda posits that, since they are no longer seeking "a below cost of service rate," the discovery is not likely to lead to the discovery of admissible evidence.[2] ***Second***, Noranda claims that the discovery seeks "information related to scientific, technical or other specialized knowledge from fact witnesses who are not qualified by knowledge, experience, training or education to address such requests."[3] ***Third***, Noranda claims that the Data Requests seek information

[1] Opposition at page 1.
[2] *Id.* See also, pages 5-6.
[3] *Id.* at page 3. See also, pages 8-9.

that is protected by the attorney-client privilege.[4] As this pleading demonstrates, each of Noranda's assertions is legally and / or factually erroneous. As such, Noranda should be ordered to respond in full to each of the Data Requests.

II. STATEMENT OF FACTS

2. On January 6, 2010, Noranda filed its Direct Testimony. In that testimony, Noranda seeks an electric rate equating to $27 / MWH.[5] Such a rate would result in revenues from the LTS class of $112.6 million.[6] While it did not prepare its own class cost of service study, Noranda pointed to Mr. Brubaker's cost of service study as support for its request. In his initial study, Mr. Brubaker's finds that the cost of service for the LTS class is $105.1 million. Thus, Noranda testified that its rate request was consistent with its cost of service.[7]

In his testimony on behalf of MIEC, Mr. Brubaker recommends that the Commission implement his findings by initially moving all classes 20% towards their class cost of service.[8] Then, in an effort to accommodate the desires of Noranda, Mr. Brubaker makes the recommendation that Noranda be moved entirely to its cost of service.[9] Mr. Brubaker bases the second step of his recommendation solely on the alleged "***unique circumstances*** facing the aluminum industry."[10]

[4] *Id.* at page 3 and 10-12.
[5] Smith Direct Testimony, filed January 6, 2010, at page 6.
[6] 4,170,226 MWH (Brubaker Direct at page 16) 8 $27 / MWH = $112.6 million. As detailed in MEUA's Motion to Compel, Noranda's request equates to a reduction of 19% off of current rates.
[7] Smith Direct at page 8 ("Based on the cost of service study prepared by Maurice Brubaker, it is my understanding that if Union Electric Company would charge the New Madrid Smelter based upon the cost to produce the electricity sold to it, the New Madrid Smelter would be paying a lower rate.").
[8] Brubaker Initial Direct at page 36.
[9] *Id.* at page 37.
[10] *Id.* (emphasis added).

3. On January 20, 2010, Mr. Brubaker realized that the results of his class cost of service study were faulty.[11] Due to the misallocation of income taxes in Mr. Brubaker's initial service, the cost of service for the LTS (Noranda) class was significantly understated. While Mr. Brubaker was aware of the problem in his study, MIEC took seventeen (17) additional days to file his revised study and testimony. In that revised study, Mr. Brubaker indicated that the cost of service for the LTS class was actually $117.6 million. Suddenly, Noranda's request was no longer consistent with a class cost of service study. Rather, Noranda's request was significantly below every cost of service study for Noranda.

4. Realizing the unique treatment that both Mr. Brubaker and Noranda sought for Noranda, MEUA issued its first set of data requests (63 individual questions) on January 28, 2010.[12] On February 5, 2010, Noranda objected to virtually all of the data requests.[13] In those objections, issued a full week ***ahead of*** its supplemental direct testimony, Noranda asserted that much of the discovery was irrelevant and not designed to lead to admissible evidence.

5. On February 11, 2010, Noranda filed the Supplemental Direct Testimony of Kip Smith.[14] In that abbreviated testimony, Mr. Smith states that Noranda was now requesting "a rate consistent with Maurice Brubaker's cost of service study."[15]

[11] Response to MEUA 1.19.
[12] Attachment 1 to MEUA's Motion to Compel.
[13] Attachment 2 to MEUA's Motion to Compel.
[14] It is important to recognize that Noranda merely "supplemented" its direct testimony of January 6, 2010. This stands in stark contrast to Mr. Brubaker's testimony of February 3, 2010 which "revised" his previous testimony. Therefore, Mr. Smith's January 6, 2010, as supplemented by his February 11, 2010 testimony, currently represents the entirety of Noranda's position. His January 6, 2010 testimony and the positions espoused therein are still relevant!
[15] Smith Supplemental Direct at page 2.

Therefore, Noranda was no longer seeking a rate that was below its cost of service according to that study.

6. On February 12, 2010, on the date that it was scheduled to file responses to the MEUA discovery, Noranda filed its objections to all the remaining data requests. As such, Noranda objected to each and every data request issued by MEUA. On February 21, 2010, MEUA filed its Motion to Compel responses to its discovery.

7. As this pleading reveals, MEUA's discovery is still designed to lead to admissible evidence. As discussed in more detail, *infra*, Noranda's supplemental direct testimony has no effect on the relevance of MEUA's discovery.[16] Furthermore, MEUA's discovery does not seek expert information from fact witnesses. In fact, MEUA's discovery is not targeted at any specific witness, but, instead, is sought from Noranda as an entity. Finally, MEUA's data requests do not seek to discover information that is otherwise privileged.

III. DISCOVERY HAS NOT BEEN AFFECTED BY NORANDA'S CHANGE IN POSITION

8. In his original direct testimony, Mr. Brubaker makes a two-step recommendation for the implementation of his class cost of service findings. In step one, Mr. Brubaker recommends that all classes be moved 20% towards their class cost of service.[17] In step two, Mr. Brubaker recommends that Noranda alone be granted the special privilege of a rate that equals its class cost of service.[18] In an effort to justify the

[16] Noranda claims that MEUA's discovery was "rendered moot" by Noranda's supplemental direct testimony. It is interesting that Noranda objected to the MEUA discovery (February 5) well before the filing of the supplemental direct testimony (February 11). In those objections, Noranda claimed that the discovery was irrelevant, yet the supplemental direct testimony that apparently made that discovery moot was not yet filed. The timing of such events underscores the lack of factual or legal basis underscoring Noranda's objections.

[17] Brubaker Initial Direct at page 36; Brubaker Revised Direct at page 36 (lines 13-19).

[18] Brubaker Initial Direct at page 37; Brubaker Revised Direct at page 37 (lines 7-15).

differential treatment that he proposes for Noranda, Mr. Brubaker references the "unique circumstances facing the aluminum industry."[19] In an effort to fully understand his testimony, MEUA submitted a data request asking Mr. Brubaker to "discuss the "unique circumstances faced by aluminum smelters." In response, Mr. Brubaker simply referenced the "testimony submitted by Noranda Aluminum."[20] **As such, the information contained in Noranda's testimony is not only relevant to Noranda's former request for a rate that is below its cost of service, that information is also relevant in that it is the sole support for step 2 of Mr. Brubaker's recommendation.**

9. By referencing Noranda's testimony, Mr. Brubaker failed to provide any specificity for the "unique circumstances" faced by aluminum smelters. As such, parties are required to guess as to the factors contained in Noranda's testimony which support step 2 of Mr. Brubaker's recommendation. In its direct testimony, Noranda discusses the following factors:

a) **Noranda's Electricity Costs Relative to Competitors**: "Electricity constitutes such a large percentage of the cost to produce aluminum, the New Madrid Smelter's viability depends on affordable electricity."[21] To this end, Noranda claims in its direct testimony, that it "needs a rate in the range of $27 per MWH to compete with other aluminum smelters in the United States and globally."[22] Furthermore, Noranda claims that its current electric rate "placed New Madrid among the highest-cost smelters in the US."[23] Given this testimony, MEUA submitted Data Request Nos. 5, 6, 7, 8, 9, 10,

[19] *Id.*
[20] Response to MEUA 1.1(a) (Attachment 3 to February 26, 2010 Motion to Compel Responses from MIEC).
[21] Smith Direct at page 5.
[22] *Id.* at page 6.
[23] Fayne Direct at page 8 and Schedule HWF-1.

11, 12, 15, 15, 16, 17, 18, 19, 20, 21, 32, 33, 35, and 51. Each of these data requests seeks to explore the affordability of Noranda's electric rates and the competitiveness of those rates relative to Noranda's competitors.

b) **Noranda's Cost of Production Relative to Competitors**: "[A]luminum is a commodity, sold at a price that is based on global supply and demand established by trading activity on the London Metal Exchange, or LME. In simple terms, the price is set by the marginal producer. Therefore, if other producers have a lower cost of production, which is driven primarily by the cost of electricity, then the selling price will reflect such costs, and the higher cost producer will not be able to complete since the price will not cover the higher cost of production."[24] Given this testimony, MEUA submitted Data Request Nos. 27, 28, 29, 30, 31, 36, 37, and 38 designed to explore Noranda's cost of production relative to its competitors.

c) **Employment Levels**: "The New Madrid Smelter has been an integral part of the economic landscape of Southeast Missouri for 38 years. . . Moreover, the New Madrid Smelter provides hundreds of skilled jobs that pay good wages and provides its employees good medical and retirement benefits."[25] Given this testimony, MEUA submitted Data Request Nos. 7 and 49 regarding the scope of Noranda's employment and the localized nature of that employment.

d) **Property Taxes**: "Taxes paid by the New Madrid Smelter help keep the school systems viable and help to maintain the infrastructure and needed government institutions in Southeast Missouri."[26] Given this testimony, MEUA submitted Data

[24] Fayne Direct at page 9.
[25] Smith Direct at page 10; See also, Hodges Direct at page 2; Mayer Direct at page 2.
[26] Smith Direct at page 10; See also, Hodges Direct at pages 2-3; Mayer Direct at page 2.

Request Nos. 8 and 50 designed to explorer Noranda's property taxes and the fact that those property taxes are localized to New Madrid County.

10. As can be seen, then, the MEUA data requests are relevant in that they are directed at the unique circumstances used as the basis for step 2 of Mr. Brubaker's testimony. While Noranda appears to have dropped its request for a rate that is below its cost of service (according to Mr. Brubaker), the data requests have not been made irrelevant. Absent such discovery, MEUA is incapable of challenging the basis for Mr. Brubaker's recommendations.

IV. MEUA'S USE OF DATA REQUESTS IS LAWFUL

11. At paragraph 23, Noranda makes the broad-brush assertion that MEUA's discovery seeks "expert testimony from non-expert witnesses." Further, at paragraph 24, Noranda asserts that, even if directed at expert witnesses, data requests are not appropriate in that the only way to obtain these expert opinions is through the use of depositions.[27] Specifically, Noranda asserts that MEUA is precluded, by Rule 56.01(B)(4) of the Missouri Rules of Civil Procedure, from issuing data requests of experts. Instead, Noranda believes that MEUA must discover such information solely through the use of depositions. Again, Noranda's assertions are factually incorrect and display a lack of familiarity with Commission procedure and the case law upholding that procedure.

12. MEUA has not sought "expert testimony from non-expert witnesses." In fact, very few of MEUA's data requests are specifically addressed to a particular witness. Rather, in many of the referenced data requests, MEUA asks for supporting

[27] Opposition at page 8.

documentation underlying prior statements contained in Noranda's SEC Form S-1. For example, in its Form S-1, Noranda claims a competitive advantage related to its bauxite source, alumina source, electricity reliability, cost of transportation, and geographic location. Given each of these statements, MEUA submitted data requests designed to enlighten on each of competitive factors, instead of simply focusing on the single factor (electric rates) pressed by Noranda.

13. Further, MEUA is baffled by Noranda's claim that these data requests seek expert opinions from non-expert witnesses. Noranda's witnesses include Layle K. Smith, Chief Executive Officer of Noranda. In its S-1, Noranda lauds the experience and expertise of Mr. Smith.

> We have a seasoned management team, whose members average more than 21 years of experience in cyclical and commodity industries. Our senior management team, led by CEO and President Layle K. "Kip" Smith, has achieved substantial cost-cutting and commercial goals since the onset of the global economic slowdown, allowing us to operate in the midst of a severe downturn in aluminum pricing and demand, while positioning us for better performance as markets return.[28]

As Chief Executive Officer, and consistent with his responsibilities under Sarbanes-Oxley, Mr. Smith signed the S-1 Form.[29] Therefore, while issues related to Mr. Smith's expertise to offer opinions in this case will be decided by the Commission, it is apparent that Noranda believes that Mr. Smith possesses a certain degree of expertise. Furthermore, given his attestation of the matters contained in the S-1 report, it is apparent that Mr. Smith believes that he possesses the necessary expertise. As such, it is appropriate to ask for the information contained in the MEUA Data Requests.

[28] Form S-1, filed January 15, 2010, at page 4.
[29] *Id.* at page II-7.

14. Furthermore, contrary to Noranda's legal assertion that information can only be sought from an expert through the use of depositions, Missouri courts have previously approved the use of data requests. In State ex rel. Southwestern Bell Telephone v. Public Service Commission,[30] the Missouri Court of Appeals considered the Commission's use of interrogatories [data requests]. In that case, Southwestern Bell alleged that "depositions and production of documents" were the "exclusive methods of discovery" to be used in Commission proceedings.[31]

In dismissing Southwestern Bell's assertions, the Court of Appeals found that the methods of discovery used in Commission proceedings are not limited. Rather, given the broad authority contained in Section 386.410.1, the use of data requests, as provided for in 4 CSR 240-2.090, was deemed lawful.

> The legislature has recognized these differences by creating the special and quite detailed statutes mentioned pertaining to proceedings conducted by the Commission. The authority under Section 386.410-1 for the Commission to adopt its own rules of procedure seems to be a rather uncommon grant to an administrative agency as indicated by a computer search by use of Lexis supplemented by additional research. . . . The only purpose of Section 386.410-1 was to serve the convenience of the Commission and the parties before it and to expedite proceedings. That purpose will be best served by upholding Regulation 4 CSR 240-2.090.[32]

15. Given that the Missouri Courts have found that the Commission's use of data requests is not limited by Chapter 536, it is equally likely that the Courts will find that the Commission's use of data requests is not limited by the Missouri Rules of Civil Procedure. For this reason, MEUA's use of data request to seek opinions of expert witnesses is entirely appropriate.

[30] 645 S.W.2d 44 (Mo.App. 1982).
[31] *Id.* at 50.
[32] *Id.* at 50-51.

V. DATA REQUESTS DO NOT SEEK PRIVILEGED INFORMATION

16. At paragraphs 27 and 28, Noranda claims that MEUA's data requests seek to discover information that is protected under the attorney-client privilege. Specifically, Noranda claims that the following data requests seek privileged information:

> MEUA 1.44: Please provide all documents, emails, or notes within Noranda's control or possession which discuss the arrangements reached between MIEC, its individual members and Noranda regarding Noranda's inclusion in MIEC.
>
> MEUA 1.11: Please provide all documents, email, or notes within Noranda's control or possession which discuss the positions to be taken in this case by MIEC or Noranda.

17. At the outset it should be noted that it is not MEUA's intention to discover privileged information through any of its data requests. That said, the allegation of attorney – client privilege is not merely a matter of self certification. Rather, Rule 57.01(c) of the Missouri Rules of Civil Procedure provides specific procedures to follow in the event such a privilege is asserted.

> If a privilege or the work product doctrine is asserted as a reason for withholding information, then without revealing the protected information, the objecting party shall state information that will permit others to assess the applicability of the privilege or work product doctrine.

While Noranda has claimed attorney client privilege, it has failed to provide the information necessary to allow opposing counsel of the Commission to "assess the applicability of the privilege."

18. In its Objection, Noranda further discusses the scope of the "joint-client" privilege. As Noranda properly recognizes, the joint-client privilege protects only certain communications between two or more clients that "jointly retain single counsel for a

particular purpose."[33] That said, just as with the attorney-client privilege, the joint-client privilege can be waived by failing to maintain the confidentiality of the communication.

19. It is well established that the attorney-client privilege is to be strictly construed and represents an exception to the general rule of disclosure.

> The circumstances, facts and interests of justice dictate whether a privilege set forth in § 491.060 is applicable to a particular situation. The party seeking to invoke a privilege set forth in § 491.060 bears the burden of proving its applicability. Statutes creating "testimonial privileges are to be strictly construed against the privilege."[34]

When analyzing the viability of this privilege, Courts look to see if the communication was made in confidence.

> The common law rule of attorney-client privilege extends only to *confidential* communications from a client to his or her attorney. Confidential communications encompass that information communicated on the understanding that it would not be revealed to others, and to matters constituting protected attorney work product.[35]

Therefore, in those situations in which communication is made in front of third parties, the confidentiality of the communication is immediately called into question.

> The attorney-client privilege attaches to: 1) Information transmitted by voluntary act of disclosure; 2) between a client and his lawyer; 3) in confidence; and 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted. All four of the above elements must be present for the privilege to apply.[36]

As such, when made in the presence of third parties, the attorney-client privilege is waived, unless the other party was "essential to transmission of information" – a factual determination.

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[33] Objection at pages 10-11.
[34] *State v. Gerhart*, 129 S.W.2d 893, 898 (Mo.App. 2004) (citations omitted).
[35] *In re Grand Jury Proceedings*, 791 F.2d 663, 665 (8th Cir. 1986) (emphasis in original, citations omitted).
[36] *State v. Longo*, 789 S.W.2d 812, 814 (Mo.App. 1990).

> The presence of a third party, not essential to the transmission of information and not necessary for the protection of the client's interest, during an attorney-client consultation vitiates the attorney-client privilege.[37]

Thus, while protection may exist under the joint-client privilege, the fact that such communications were made in the presence of others "not essential to the transmission of the information" constitutes a waiver of the privilege.

20. Missouri statutes provide an exhaustive list of individuals among whom communications are considered confidential. Communications with an attorney made in the presence of a spouse,[38] minister,[39] physician,[40] domestic violence shelter worker,[41] and certified public accountant[42] would still be treated as privileged. There is, however, no economist–client privilege recognized by Missouri statutes that protects communications made with Mr. Brubaker or other members of his firm. As such, while the joint-client privilege may otherwise be applicable, that privilege would be waived if the communication was made in the presence of Mr. Brubaker.

21. As previously mentioned, it is not MEUA's intention to discover privileged information through any of its data requests. That said, Rule 57.01(c) provides specific procedures to follow in the event such a privilege is asserted. By providing the information required by this rule (i.e., date of communication and list of all individuals privy to the communication), the Commission and all parties will be able to determine if the joint-client privilege is applicable or if the privilege has been waived through the presence of third parties.

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[37] *Kratzer v. Kratzer*, 595 S.W.2d 453, 456 (Mo. 1980).
[38] Section 546.260 RSMo.
[39] Section 491.060(4) RSMo.
[40] Section 491.060(5) RSMo.
[41] Section 455.220 RSMo.
[42] Section 326.151 RSMo.

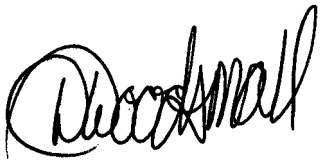
VI. CONCLUSION

22. Ultimately, it is apparent that Noranda has intentionally engaged in a strategy of refusing to respond to any legitimate discovery. Questions as simple as providing the qualifications of an expert witness (MEUA 1.52) or the source document referenced in a witness' schedule (MEUA 1.51) were the source of objection. While the Commission is necessarily limited in the sanctions it can impose, MEUA suggests that the Commission be mindful of Noranda's refusal to respond to such discovery when considering the credibility of its witnesses and the appropriateness of its position. Noranda's refusal to respond to MEUA's discovery demonstrates that Noranda is not being candid with the Commission, but, instead, is attempting to hide relevant information from the Commission and the other parties. The Commission should not countenance such conduct, and by declaring Noranda's testimony to be lacking in credibility the Commission will send the necessary message.

WHEREFORE, MEUA respectfully requests that the Commission order Noranda to fully respond to each of the MEUA's data requests by March 5, 2010

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

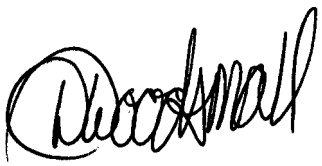


David L. Woodsmall, MBE #40747
428 E. Capitol, Suite 300
Jefferson City, Missouri 65101
(573) 635-2700
Facsimile: (573) 635-6998
Internet: dwoodsmall@fcplaw.com

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: March 1, 2010