

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

In the matter of Union Electric Company,	)	
d/b/a Ameren Missouri's Tariff to Increase	)	Case No. ER-2014-0258
Revenues for Electric Service	)	

**MECG RESPONSE TO  
MOTION TO ADOPT JOINTLY PROPOSED PROCEDURAL SCHEDULE**

COMES NOW the Midwest Energy Consumers Group ("MECG"), pursuant to the Commission's October 20, 2014 Order Shortening Time To Respond, and for its Objection to the Motion to Adopt Jointly Proposed Procedural Schedule, respectfully states as follows:

1. On October 10, 2014, the Office of the Public Counsel, Missouri Industrial Energy Consumers, Consumers Council of Missouri, and the Missouri Retailers Association ("Signatory Parties") filed a Non-Unanimous Stipulation and Agreement ("Stipulation"). Under that Stipulation, Ameren would be required to create a new IAS rate schedule with a base rate that is \$3.50 / MWh less than the current LTS rate. As designed, so long as it meets certain employment and capital expenditure requirements, only Noranda Aluminum would be eligible for the reduced rates on the new IAS rate schedule. On October 17, 2014, MECG filed its Objection to the Non-Unanimous Stipulation. In its Objection, MECG asserted that such a proposal is only appropriate if it contained three consumer protections. First, the amount of rate relief should be limited to the amount needed to address any Noranda liquidity crisis. Second, Noranda should be required to demonstrate the implementation of a strict austerity program. Third, there should be sunset provisions attached to the rate relief in the event that aluminum prices or Noranda's net income increases.

2. On October 15, 2014, the Signatory Parties<sup>1</sup> filed a Motion to Adopt Jointly Proposed Procedural Schedule for Consideration of Non-Unanimous Stipulation and Agreement (“Motion”). In its Motion, contrary to the previously agreed upon procedural schedule, the Signatory Parties propose that Direct Testimony be filed on October 24, 2014; Rebuttal Testimony filed on November 10, 2014; Surrebuttal Testimony on November 19, 2014 with Evidentiary Hearings to be held on November 24 and 25, 2014.

3. On October 20, 2014, the Signatory Parties filed a Motion to Expedite Consideration of Jointly Proposed Procedural Schedule. Later on the same day, the Commission issued its Order requiring responses by 4:00 p.m. on October 21, 2014.<sup>2</sup> Through this response, MECG objects to the proposed expedited procedural schedule.

**The Signatory Parties Have Already Agreed to the Procedural Schedule**

4. On July 3, 2014, Ameren filed the immediate rate proceeding. On August 15, 2014, all the parties to this proceeding, including all of the Signatory Parties, filed a Jointly Proposed Procedural Schedule and Procedures. On August 20, 2014, the Commission approved the proposed procedural schedule.

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<sup>1</sup> The Signatory Parties like to call themselves the “Consumer Parties.” Such a designation is inherently misleading in that these entities do not represent all of the consumer parties to this case. Specifically, MECG represents customers served under the Large General Service / Small Primary and the Large Primary rate schedules that use approximately 1 billion kWh’s of electricity annually. Given its misleading nature, MECG believes that it is more appropriate to call the parties to the Non-Unanimous Stipulation the Signatory Parties.

<sup>2</sup> It is important to recognize that the Signatory Parties Motion to Expedite Consideration was procedurally defective. While counsel for the Signatory Parties directs the Commission’s attention to 4 CSR 240-2.080(14), counsel failed to address the requirements of that rule. Specifically, subparagraph (c) requires that counsel be able to state that “the pleading was filed as soon as it could have been or an explanation why it was not.” Certainly, if the Signatory Parties desired expedited treatment it was well aware that such a Motion should have been attached to its October 14, 2014 Non-Unanimous Stipulation. As a result of counsel’s failure to timely make such a request, other parties are required to communicate with clients, prepare and file a response within roughly 24 hours. The Signatory Parties’ Motion was procedurally defective and the Commission should have disregarded the Motion in favor of the 10 day response time provided by rule.

5. According to that Procedural Schedule, Direct Testimony was to be filed on December 5; Rebuttal Testimony on January 16, Surrebuttal Testimony on February 6 and an evidentiary hearing beginning on February 23. After agreeing to that procedural schedule, the Signatory Parties seek to implement an expedited schedule for the consideration of the issue that they deem most important. While such an issue may be of particular concern to the Signatory Parties, similar importance may not be placed on that issue by the remaining parties. Certainly for those parties served under the LGS / SP rate schedule, who are paying rates that are \$60 million above their actual cost of service,<sup>3</sup> other issues are undoubtedly of greater importance. Rather than seek expedited consideration for such an issue, those LGS / SP customers have abided by the agreed upon and ordered procedural schedule. After agreeing to the procedural schedule the Signatory Parties should also be required to abide by the dates contained therein. It is patently inequitable to allow one party to seek to elevate its issue above all other issues in this case and interrupt the trial preparation of all of the remaining parties.

**The Non-Unanimous Stipulation Does Not Deserve Expedited Treatment**

6. As the Commission is undoubtedly aware, the pending Non-Unanimous Stipulation is merely a continuation of identical issues considered by the Commission in Case No. EC-2014-0224. Originally in that case Noranda sought rate relief amounting to \$48 million. In its deliberations on July 23, 2014, the Commission unanimously indicated that Noranda failed to meet its burden that it suffered from a liquidity crisis and that any liquidity crisis was largely a result of its own actions.

7. Recognizing that it was unlikely to prevail with its original position, Noranda rushed to provide the Commission with an alternative position. With this in

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<sup>3</sup> See, Warwick Direct, filed July 3, 2014, at Schedule WMW-1.

mind, a mere 6 days later, Noranda filed a Non-Unanimous Stipulation.<sup>4</sup> Instead of seeking \$48 million of rate relief, Noranda now sought rate relief of approximately \$27.8 million.<sup>5</sup> On August 20, 2014, the Commission issued its Report and Order. At footnote 87, the Commission addressed the revised request contained in the July 29 Non-Unanimous Stipulation. In that footnote the Commission pointed out that “[t]he Commission finds their [the Non-Unanimous Stipulation’s] proposals intriguing – and encourages the parties to continue to pursue negotiations on a compromise position as it could be considered in Ameren Missouri’s current rate case, File No. ER-2014-0258.” Thus, the parties have known since August 20, 2014 that the Commission would consider a Non-Unanimous Stipulation and Agreement in the pending rate case. Despite such an invitation, the Signatory Parties did not immediately file that Non-Unanimous Stipulation in the rate case. Instead, they waited almost two months and now ask that it be treated in an expedited fashion.

8. At 4 CSR 240-2.080(14) the Commission has provided rules for the consideration of Motions for Expedited Treatment. Included in that rule is a requirement that the moving party be able to show that “the pleading [for expedited treatment] was filed as soon as it could have been or an explanation why it was not.” In this case it is patently obvious that the Non-Unanimous Stipulation, and the accompanying Motion for Expedited Treatment, was not filed “as soon as it could have been.” Instead of immediately filing the Stipulation on August 20, as envisioned by the Commission’s

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<sup>4</sup> See, Non-Unanimous Stipulation and Agreement, Case No. EC-2014-0224, filed July 29, 2014. (EFIS item number 326).

<sup>5</sup> The Non-Unanimous Stipulation sought a reduction of \$3.50 in the LTS base rates (from \$37.94 to \$34.44 per MWh). In addition, the Non-Unanimous Stipulation sought to exempt Noranda from the fuel adjustment clause, thus avoiding a charge of \$3.09 / MWh. Therefore, the rate reduction amounts to \$6.59 / MWh. Recognizing that Noranda uses 4.214 million MWh / year, the overall rate relief amounts to \$27.8 million.

Report and Order, the Signatory Parties waited almost two months to file the Stipulation. Demonstrating the wasted nature of these two months, the Signatory Parties did not attempt to approach the parties and negotiate on a compromise position. In fact, the Signatory Parties never approached MECG to attempt to address any issues that MECG may have with the Non-Unanimous Stipulation.<sup>6</sup> Rather, the Signatory Parties simply waited two months to file a Non-Unanimous Stipulation that, in all material respects, mirrors that which was filed on July 29, 2014 in Case No. EC-2014-0224. After waiting two months to file a virtually identical settlement, the Signatory Parties now demand that the Commission and other parties accommodate their request to expedite the procedural schedule in order to allow consideration of the Non-Unanimous Stipulation by an arbitrary December 31, 2014 deadline. Certainly such a request does not comply with 4 CSR 240-2.080(14) and does not merit the expedited treatment sought by the Signatory Parties. Instead, the Commission should consider the Non-Unanimous Stipulation in the context of the procedural schedule already agreed to by the Signatory Parties.

**Expedited Treatment Will Violate Fundamental Notions of Procedural Due Process**

9. Section 536.070 RSMo provides certain aspects of procedural due process that are applicable to all contested cases. Included in these guaranteed procedural rights are: (1) the right to call witnesses; (2) to conduct discovery and (3) to cross-examine opponent witnesses. Recognizing these procedural guarantees, the Commission established a procedural schedule that allowed for evidentiary hearings beginning on February 23. Such a schedule provided the parties an opportunity to conduct discovery, arrange witnesses, file testimony and prepare cross-examination. Now, without any

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<sup>6</sup> Interestingly, when a representative of an MECG client contacted Noranda, he was told that Noranda would only engage in settlement discussions with MECG if MECG agreed to withdraw its pending discovery.

consideration of the rights of these other parties, the Signatory Parties seek to obliterate these due process guarantees by requesting a separate and expedite schedule for the issue it deems most important. Simply, the schedule proposed by the Signatory Parties does provide adequate time for opposing parties to conduct discovery, arrange witnesses or prepare for a hearing.

10. Commission Rule and the previously ordered procedural schedule in this case, provide for 20 days for parties to respond to data requests. As proposed by the Joint Signatories, rebuttal testimony would be filed a mere 17 days after the filing of direct testimony. As such, given the current discovery guidelines, opposing parties would not be able to conduct any discovery on the Joint Signatories' direct testimony prior to filing their rebuttal testimony. Worse still, since there are only five days between the filing of the Joint Parties' surrebuttal testimony and the beginning of the evidentiary hearing, opposing parties would be completely precluded from conducting any discovery on the surrebuttal testimony.

11. Not only does the expedited schedule preclude the possibility of any future discovery, it also eliminates opposing parties' ability to utilize the discovery that has already been issued. For instance, MECG issued its third set of data requests to MIEC / Noranda on October 14. Responses to those data request responses would be due on November 3. By proposing that rebuttal testimony be filed on November 10, the Joint Signatories have effectively eliminated the opposing parties' ability to utilize those responses (assuming responses are even forthcoming). Further still, MECG issued its fourth set of data requests to MIEC / Noranda on October 16 with responses due on November 5. This leaves only two business days to receive those responses, interpret

those responses and include that information in rebuttal testimony. The Joint Signatories' proposed expedited schedule obliterates opposing parties' statutory right to conduct discovery.

12. Concerns with an opposing party's ability to conduct discovery of Noranda information is not simply an academic concern. Noranda's conduct in recent cases, as well as in this case, makes it patently obvious that discovery will not go smoothly. In Case No. ER-2010-0036, Noranda also sought rate relief from the parties. Again, MCEG opposed that request and sought to engage in discovery in an expedited period of time. Demonstrating its hesitancy to provide information, Noranda objected to virtually every discovery request. Requests as simple as asking for the information provided by Noranda to its hired consultants drew objections from Noranda. Given this refusal to provide information, MCEG was forced to file a Motion to Compel.<sup>7</sup> After holding an oral argument to consider the Motion to Compel, the Commission ordered responses to a vast majority of the MCEG data requests.<sup>8</sup> Despite such an order, Noranda data request responses were delayed by over three weeks. Certainly the expedited procedural schedule filed by the Signatory Parties does not contemplate any discovery let alone Motions to Compel responses.

13. Similar discovery problems have already been seen in the immediate case. Recognizing the possibility that Noranda may seek similar concessions in this case, MCEG issued a Data Request on August 26 asking MIEC / Noranda to identify all expert witnesses that it intended to call in this proceeding. The relevancy of this request is so absolute that the Missouri Supreme Court has codified this request at Rule 56.01(b)(4).

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<sup>7</sup> See, Motion to Compel, Case No. ER-2010-0036, filed February 15, 2010. (EFIS Number 357).

<sup>8</sup> See, Order Regarding MEUA's Motion to Compel Noranda to Respond to Data Requests, Case No. ER-2010-0036, issued March 3, 2014. (EFIS Number 420).

Nevertheless, despite its current proposal to file testimony this week, MIEC / Noranda have failed to provide an answer to this data request. (See, Attachment 1).

14. Similarly, on September 15, 2014, MECG asked MIEC / Noranda to provide all discovery and highly confidential pleadings from Case No. EC-2014-0224. Initially, MIEC / Noranda refused to provide a response to this data request on the basis that it was irrelevant. Ultimately, after the Signatory Parties filed the Non-Unanimous Stipulation, MECG was forced to file a Motion to Compel a response to this data request. Prior to the Commission having a chance to rule on the Motion to Compel, MIEC / Noranda provided a response to the data request. The fact remains, however, that MIEC / Noranda was once again hesitant to provide timely responses to legitimate discovery. Certainly, one cannot simply hope, given its well established history, that MIEC / Noranda will provide timely responses to data requests. Rather, given these ongoing discovery problems, any procedural schedule must recognize the need for Commission enforcement of discovery. Given the expedited nature of the Joint Signatories' procedural schedule, discovery will be effectively eliminated.

### **Conclusion**

15. There is an often repeated idiom that is particularly applicable to the immediate case. . . "Lack of planning on your part does not constitute an emergency on my part." In this case, as a result of their failure to plan, the Signatory Parties now want to create an emergency for all other parties. Specifically, if the Signatory Parties would have been properly planning, they could have raised this issue and insisted on a procedural schedule that recognized this issue. Similarly, if the Signatory Parties would have properly planned, they could have filed their Non-Unanimous Stipulation on August



20 when the Commission initially rejected their previous Non-Unanimous Stipulation. Instead, the Signatory Parties waited almost two months to file the immediate stipulation. Because of their failure to plan, the Signatory Parties now insist that this issue warrants emergency consideration. The Commission should reject such pleas and maintain the current procedural schedule.

Respectfully submitted,



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**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.



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David L. Woodsmall

Dated: October 21, 2014