

**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)	

MIEC'S RESPONSE TO MEUA'S MOTION TO COMPEL

COMES NOW the Missouri Industrial Energy Consumers ("MIEC") and Noranda Aluminum, Inc. ("Noranda") and submit their response in opposition to the Midwest Energy Users' Association's ("MEUA") *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)* filed on April 15, 2011 ("Motion to Compel").

1. On February 23, 2011, MEUA served its First Set of Data Requests to MIEC and Noranda Aluminum.
2. On March 2, 2011, MIEC and Noranda provided written objections to MEUA Data Requests 1.2, 1.3, 1.4, 1.6, 1.7, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.19, 1.20, 1.21, 1.22, 1.23, 1.25, 1.26, and 1.27. MIEC and Noranda did not provide written objections to MEUA Data Requests 1.1, 1.5, 1.8 – 1.11, 1.18, 1.24, and 1.28 – 1.35.
3. On March 14, 2011, MIEC provided MEUA responses to 1.1 and 1.29 – 1.35.
4. On April 15, 2011, MEUA filed its Motion to Compel.
5. MEUA's counsel has asserted in its Motion to Compel that, among other things, Noranda's lack of response to MEUA's First Set of Data Requests demonstrates Noranda's "apparent disdain [sic] for the Commission's rules regarding discovery." See Motion to Compel, p. 9. These comments are baseless. Noranda communicated to MEUA that it was gathering the necessary information to provide meaningful responses to the data requests, consulting with experts, and communicating with Noranda's counsel. Additionally, contrary to MEUA's motion, MEUA and

Noranda have recently been actively engaged in negotiations regarding the discovery issues in dispute by email, telephone conference and personal conversation.

6. Data Request Nos. 1.2, 1.3, and 1.4: MEUA has specifically requested all “CRU data” in providing costs for electricity, alumina, and labor costs for all U.S. aluminum smelters. On March 2, 2011, MIEC and Noranda objected to these requests on the following grounds: (1) the likely burden of this discovery outweighs the likely benefit to MEUA; (2) the requests seek information which is obtainable from another source available to MEUA; (3) the materials are privileged pursuant to the attorney work-product doctrine and the attorney-client privilege; and (4) the requests seek information which is proprietary and confidential.

7. Any probative value of a response would be outweighed by Noranda’s burden in furnishing it under *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App. E.D. 1985) and this Commission’s ruling in Case No. TO-2000-667 (denying a motion to compel because the probative value of the information sought was outweighed by the burden to the party from whom it was sought).

8. In ruling upon an objection to a data request based upon an allegation of undue burden, the Commission has cited with approval the following language from *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App., E.D. 1985):

In ruling upon objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it. . . . Thus, even though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

9. Noranda is bound by contract with CRU pertaining to the data sought by MEUA, and is not authorized to publish the information as requested by MEUA.

10. It is unduly burdensome for Noranda to produce the CRU data not only because of its obligations under the existing contract with CRU, but also the extraordinary financial expense that Noranda would have to incur to produce the information. Like Noranda, MEUA has an ability to contract with CRU to acquire the same data. Therefore, MEUA's Motion to Compel should be denied for these three data requests.

11. Data Request Nos. 1.6 and 1.7: MEUA has requested that Noranda provide its definition of "cost-competitive power" and whether Noranda quantified what "cost-competitive power" would be for service from AmerenUE to the New Madrid Smelter. On March 2, 2011, MIEC and Noranda objected to these requests on the following grounds: (1) the information sought is overly broad and burdensome; (2) the information sought is not relevant, material, nor reasonably calculated to lead to the discovery of admissible evidence; and (3) the materials are privileged pursuant to the attorney work-product doctrine and the attorney-client privilege.

12. Missouri Rule of Civil Procedure 56.01(b)(1) prohibits the discovery of information that is not "reasonably calculated to lead to the discovery of admissible evidence." Further, the Rule states that "[t]he party seeking discovery shall bear the burden of establishing relevance." Missouri Rule of Civil Procedure 56.01(b)(1).

13. Noranda objects to MEUA Data Requests 1.6 and 1.7 as overly broad. With respect to both data requests, MEUA invalidly suggests that Noranda has defined "cost-competitive power" as a term of art. With respect to MEUA 1.7, Noranda objects to providing MEUA any analyses supporting a "quantification" about Noranda evaluating its "cost-competitive power." The information MEUA's Motion to Compel is requesting should be denied for these two data requests.

14. Data Request No. 1.12: MEUA demanded that Noranda provide a response as to whether Noranda believes that it has any cost advantages over other U.S. aluminum smelters. On March 2, 2011, MIEC and Noranda objected to these requests on the following grounds: (1) the information

sought is overly broad and burdensome; (2) the information sought is not relevant, material, nor reasonably calculated to lead to the discovery of admissible evidence; and (3) the materials are privileged pursuant to the attorney work-product doctrine and the attorney-client privilege. Notably, at no time in its Motion to Compel did MEUA discuss its purpose for demanding that Noranda provide a response to this data request. *See* Motion to Compel, p. 16. This data request fails to lead to the discovery of admissible evidence and seeks information which is privileged by requesting information discussed with Noranda's counsel. MEUA's Motion to Compel should be denied for this data request.

15. Data Request Nos. 1.13, 1.14, 1.15, and 1.17: In these four data requests, MEUA is asking for what date Noranda became publicly traded, the price per share of the initial public offering, the closing price of Noranda's stock on each day since its initial public offering, and the LME price of aluminum for each business day that aluminum was traded on the London Exchange for the past year. On March 2, 2011, MIEC and Noranda objected to these requests on the following grounds: (1) the information sought is overly broad and burdensome; (2) the information sought is readily obtainable from another source that is equally available to MEUA; and (3) the burden of the discovery outweighs the benefit to MEUA.

16. Discovery requests "presented . . . for any improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" are strictly prohibited. *See* 4 CSR 240-2.080(7)(A).

17. The crux of Noranda's objections to these four data requests involves the fact that this information is readily and equally available to MEUA. For example, the date that Noranda became publicly traded is public information. It is unclear to Noranda why MEUA is requesting information from Noranda that MEUA can acquire just as easily. Noranda was surprised that MEUA would have ever submitted 1.13, 1.14, 1.15, and 1.17 as data requests since MEUA has

access to this information. Noranda is concerned that these data requests may have been submitted for “an improper purpose” per 4 CSR 140-2.080(7)(A). MEUA should not be allowed to submit data requests to Noranda in order to require Noranda to locate and assemble public information that is readily available to MEUA. Accordingly, MEUA’s Motion to Compel should be denied for these four data requests.

18. Data Request No. 1.16: MEUA requests that Noranda provide all analysis undertaken which considers the option of self-generating electricity for the New Madrid smelter. On March 2, 2011, MIEC and Noranda objected to these requests on the following grounds: (1) the information sought is overly broad and burdensome; (2) the information sought is not relevant, material, nor reasonably calculated to lead to the discovery of admissible evidence; and (3) the materials are privileged pursuant to the attorney work-product doctrine and the attorney-client privilege.

19. In its Motion to Compel, MEUA discusses Noranda’s cost of electricity compared to the Alcoa Warrick smelter. This request is overly broad, does not seek relevant or material information reasonably calculated to lead to the discovery of admissible evidence, and involves privileged materials.

20. Data Request No. 1.27: MEUA requests that Noranda provide citations to all SEC filings in which Noranda warns that the Commission’s decision in this case will have a significant impact on long-term sustainability. On March 2, 2011, MIEC and Noranda objected to these requests on the following grounds: (1) the information sought is overly broad and burdensome; (2) the information sought is readily obtainable from another source that is equally available to MEUA; and (3) the burden of the discovery outweighs the benefit to MEUA. MEUA’s Motion to Compel did not discuss why it is demanding that Noranda provide a response to this data request. *See* Motion to Compel, p. 16. SEC filings are available publicly. MEUA wants Noranda to produce information that MEUA could just as easily generate.

21. MEUA argues that a party that “refuses to engage in proper discovery should not be subsequently permitted to benefit from other aspects of the Commission’s procedure including the right to file testimony.” *Id.* at 9. MEUA wants the Commission to “send an immediate message” to strike Noranda’s testimony. *Id.*

22. Striking testimony of Noranda’s witnesses is an extreme and unwarranted action that would deprive Noranda of its right to due process before the Commission. The Commission has expressed its reluctance against striking testimony on numerous occasions. *See, e.g., In the matter of Associated Natural Gas Co.*, 1995 Mo. PSC LEXIS 24, at *7-8 (July 14, 1995)(holding that the Commission is not inclined to grant the “harsh remedy of striking testimony”); *see also In the matter of Empire District Gas Co.*, 2009 Mo. PSC LEXIS 1336, at *5 (Dec. 23, 2009)(holding that the PSC was unwilling to strike testimony because it is a “drastic remedy”). MEUA has not shown that Noranda’s right to present evidence should be so drastically restricted.

WHEREFORE MIEC and Noranda respectfully request that the Commission: (1) deny MEUA’s Motion to Compel and (2) deny MEUA’s Motion to Strike the Direct Testimony of Kip Smith and the Direct Testimony of Henry Fayne.

Dated: April 18, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 18th day of April, 2011, to all parties on the Commission's service list in this case.

/s/ Diana Vuysteke