

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day of
April, 2011.

In the Matter of Union Electric Company, d/b/a)	<u>File No. ER-2011-0028</u>
Ameren Missouri's Tariff to Increase Its Annual)	Tariff No. YE-2011-0116
Revenues for Electric Service)	

**ORDER REGARDING MEUA'S MOTION TO COMPEL NORANDA
ALUMINUM TO RESPOND TO DATA REQUESTS**

Issue Date: April 19, 2011

Effective Date: April 19, 2011

On April 15, 2011, The Midwest Energy Users' Association (MEUA)¹ filed a motion to compel Noranda Aluminum to answer certain data requests submitted by MEUA. On April 15, the Commission ordered Noranda to respond to MEUA's motion to compel by April 18.

Noranda is a member of the Missouri Industrial Energy Consumers (MIEC) and is the only entity that takes service from Ameren Missouri under the Large Transmission rate class. On October 5, 2010, the Commission allowed Noranda and the other industrial entities to intervene individually and collectively as MIEC. Therefore, Noranda is a party to this case and is subject to discovery requests from other parties.

On February 23, 2011, MEUA sent 35 data requests to MIEC and Noranda. MIEC and Noranda objected and refused to answer twenty of those data requests. In addition, MIEC and Noranda failed to provide answers to seven data requests to which they did not

¹ The only member of MEUA for this case is Wal-Mart Stores, Inc.

object. MEUA seeks to compel answers to all unanswered data requests. Noranda responded to MEUA's motion to compel on April 18. MEUA replied on April 19.

Commission rule 4 CSR 240-090(1) provides: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." In addition to the discovery mechanisms used in circuit court, the Commission's rule also allows parties to send data requests to other parties as a means of discovery.² Data requests are used in a manner similar to the way interrogatories or requests for production of documents are used in civil court.

Rule 56.01(b) of the Missouri Rules of Civil Procedure allows parties to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action". That rule further indicates "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Finally, the rule puts the burden of establishing relevance on the party seeking discovery.

The following are the data requests to which Noranda has objected or has refused to answer:

2. Please provide all CRU data providing costs for Electricity for all US smelters.
3. Please provide all CRU data providing costs for alumina for all US smelters.
4. Please provide all CRU data providing labor costs for all US smelters.
5. What is Noranda's cost of electricity (in \$/Mwh) for the New Madrid smelter?
6. What is Noranda's definition of "cost-competitive power?"

² 4 CSR 240-090(2).

7. Has Noranda quantified what “cost-competitive power” would be for service from AmerenUE to the New Madrid Smelter? If yes, please provide Noranda’s quantification. Also, please provide all analyses supporting such quantification.

8. In his direct testimony, Mr. Smith indicates that “Electricity is the single largest operation cost of the New Madrid Smelter, constituting about one-third of its overall cost of producing primary aluminum.” What is the second largest operation costs for the New Madrid Smelter? What percentage of overall cost of producing primary aluminum is represented by the second largest operational cost?

9. What is the New Madrid Smelter’s third largest operational cost? What percentage of overall cost of producing primary aluminum is represented by the third largest operational cost?

10. What is the New Madrid Smelter’s fourth largest operation cost? What percentage of overall cost of producing primary aluminum is presented by the fourth largest operation cost?

11. What is the New Madrid Smelter’s fifth largest operation cost? What percentage of overall cost of producing primary aluminum is represented by the fifth largest operational cost?

12. Does Noranda believe that it has any cost advantages over another domestic US smelters? If yes, please list all cost advantages.

13. What date did Noranda Aluminum become publicly traded?

14. What was the price per share of Noranda Aluminum’s initial public offering?

15. Please provide the closing price of Noranda Aluminum’s stock on each day since its initial public offering.

16. Please provide all analysis undertaken by Noranda which considers the option of self-generating electricity for the New Madrid smelter.

17. Please provide the LME price of aluminum for each business day that aluminum was traded on the London Exchange in the past 12 months.

18. At page 8 of this direct testimony, Mr. Smith indicates that Noranda has invested \$38 million “to expand capacity.” What steps has Noranda taken to “expand capacity.” How will this capacity expansion affect Noranda’s electric usage?

19. At page 5 of his testimony, Mr. Fayne refers to other smelters “cost of production.” For the smelters listed on HWF-1, please provide Mr. Fayne’s understanding of these smelters’ relative “cost of production.”

20. What is Mr. Fayne’s understanding for the cost of electricity for the recently reopened Massena East smelter?

21. Please list all smelters which Mr. Fayne believes has a cost of electricity tied “to the price of aluminum on the London Metal Exchange.

22. Please provide a copy of the West Virginia legislation referred to by Mr. Fayne at page 6 of his testimony.

23. Please provide Mr. Fayne’s understanding of the current operation status of the Ravenswood smelter.

24. Please provide Mr. Fayne’s understanding of any plans to restart operations at the Ravenswood smelter.

25. For each smelter on Schedule HWF-1, please provide Mr. Fayne’s understanding of the state in which the smelter is located and the electric provider for each smelter.

26. For each smelter listed in HWF-1, please provide a copy of any contract or tariff supporting the associated electric rate.

27. Please 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.

28. Please identify the individual at Noranda that is most knowledgeable on Noranda's position on class cost of service / rate design.

Unanswered Data Requests to Which No Objection was Raised

The response filed by MIEC and Noranda acknowledges that MIEC and Noranda did not provide written objection to MEUA data requests 1.1, 1.5, 1.8-1.11, 1.18, 1.24 and 1.28-1.35. That response also acknowledges that MIEC and Noranda have responded only to data requests 1.1 and 1.29-1.35. MEUA asks the Commission to compel responses to data requests 1.5, 1.8-1.11, 1.18, and 1.24, for which MIEC and Noranda did not respond and did not raise an objection. The Commission will grant the motion to compel as to those unobjected to data requests.

Data Requests 1.2, 1.3, and 1.4

These three data requests ask MIEC and Noranda to provide all CRU data relating to costs for electricity, alumina, and labor costs for all U.S. aluminum smelters. MEUA states that in his direct testimony, Noranda's witness, Henry Fayne, relied on CRU data when he testified that the cost of alumina, labor, and electricity account for 75-80 percent of the cost of producing aluminum at U.S. smelters. MEUA asks MIEC and Noranda to disclose the detailed CRU data that would support that statement.

MIEC and Noranda contend that disclosing that CRU data would be unduly burdensome because it is bound by contract with CRU not to "publish" the information

sought by MEUA and because it would need to incur undefined “extraordinary financial expense” to produce the information. MIEC and Noranda suggest that if MEUA wants the information it should contract with CRU to obtain it.

MIEC and Noranda have not demonstrated that they will be unduly burdened by producing the data that would support or contradict its witness’ statements. MEUA is not asking MIEC and Noranda to “publish” the CRU data. It would only need to be shared with the other parties to the case, and with the Commission, if any party chooses to offer it into evidence. Certainly, MIEC and Noranda can designate that data as highly confidential or proprietary if they believe it needs to be protected from further disclosure. The Commission will grant the motion to compel as to data requests 1.2, 1.3, and 1.4.

Data Requests 1.6 and 1.7

Data request 1.6 asks MIEC and Noranda to provide its general definition of “cost-competitive power.” Data request 1.7 asks for any analysis that would apply that definition of cost-competitive power to Noranda’s New Madrid smelter. MIEC and Noranda object to data requests 1.6 and 1.7 as being overly broad, seeking irrelevant information, and seeking privileged information.

Data request 1.6 merely asks Noranda to offer a definition of a term used by its witness and is not objectionable. Data request 1.7 goes further and would require Noranda to produce all analysis that would support its quantification of “cost-competitive power” for its New Madrid smelter. Such analysis would clearly be relevant, but, conceivably, it could fall within an attorney-client privilege if it were prepared in anticipation of trial. However, MIEC and Noranda have not asserted any specific claim of privilege and have not even acknowledged that any such analysis exists. MEUA is entitled to see any non-privileged

analysis if such exists. Therefore, the Commission will grant the motion to compel as to data requests 1.6 and 1.7. If MIEC and Noranda wish to assert a privilege as to any specific analysis they may do so and the Commission will address that privilege claim in a subsequent order.

Data Request 1.12

This data request asks Noranda to list any cost advantages it believes it has over other U.S. Aluminum smelters. MIEC and Noranda object that this data request fails to lead to the discovery of admissible evidence and seeks information that is privileged by requesting information discussed with Noranda's counsel.

The data request seeks information that is relevant to a determination of whether Noranda should receive special rate consideration when the Commission determines the rates Ameren Missouri may charge its various customer classes. The mere fact that otherwise relevant information may have been discussed with Noranda's counsel does not make that information privileged. The Commission will grant the motion to compel a response to data request 1.12.

Data Requests 1.13, 1.14, 1.15, 1.17 and 1.27.

In these five data requests, MEUA asks MIEC and Noranda to provide publicly available information relating to Noranda's stock prices, the daily variations in the price of aluminum on the London Metals Exchange, and SEC filings. MIEC and Noranda object that they should not be compelled to locate and assemble public information that is readily available to MEUA. MEUA explains that it intended its data requests to serve as a short-hand means of obtaining admissions of fact from MIEC and Noranda.

MIEC and Noranda's objections to these data requests are well taken. MEUA's data requests are asking MIEC and Noranda to do MEUA's work by compiling public information. If MEUA wants MIEC and Noranda to admit to certain facts, it can compile the public information and present it to MIEC and Noranda in a proper request for admissions. The Commission will deny MEUA's motion to compel as to data requests 1.13, 1.14, 1.15, 1.17 and 1.27.

Date Request 1.16

In this data request, MEUA asks MIEC and Noranda to provide all analysis undertaken by Noranda that considers the option of self-generating electricity for the New Madrid smelter. MIEC and Noranda object that the data request is overly broad, seeks irrelevant information, and seeks privileged information. MEUA claims this data request seeks relevant information because in his testimony, Mr. Fayne compares Noranda's cost of electricity against the cost of electricity at another smelter that obtains its electricity through self-generation.

The fact that Noranda compares its cost of production to a competing smelter that self-generates electricity makes Noranda's analysis of the possibility of self-generating electric power relevant to this case. Even if such analysis is not directly admissible in this proceeding, the discovery of such analysis is likely to lead to the discovery of relevant information.

Noranda and MIEC also assert that any analysis should be protected from discovery as privileged. Conceivably, such analysis could fall within an attorney-client privilege if it were prepared in anticipation of trial. However, MIEC and Noranda have not asserted any specific claim of privilege and have not even acknowledged that any such analysis exists.

MEUA is entitled to see any non-privileged analysis if such exists. If MIEC and Noranda wish to assert a privilege as to any specific analysis they may do so and the Commission will address that privilege claim in a subsequent order. The Commission will grant the motion to compel as to data request 1.16.

Data Requests 1.19, 1.20, 1.21, 1.22, 1.23, 1.25, and 1.26

These data requests ask Noranda and MIEC to provide additional information about various aspects of Mr. Fayne's testimony. MIEC and Noranda do not address these data requests in their April 18 Response, but in their objection letter, they claim that the requests are overly broad, seek irrelevant information, and seek privileged information.

Nothing in these data requests is objectionable and the Commission will grant the motion to compel as to data requests 1.19, 1.20, 1.21, 1.22, 1.23, 1.25, and 1.26.

Data Request 1.28.

In this data request MEUA asks Noranda to identify the individual that is most knowledgeable on Noranda's position on class cost of service / rate design. Noranda and MIEC did not address this data request in their April 18 response, but their objection letter asserts that this information is protected by the attorney-client privilege.

The disclosure of the name of a person who is most knowledgeable about Noranda's position on an issue is not protected by any privilege and may allow MEUA to target future discovery requests to obtain relevant information from the person identified. The Commission will grant the motion to compel as to data request 1.28.

Motion to Strike Testimony

MEUA suggests that as an alternative to its motion to compel, the Commission simply strike the testimony offered by Noranda as a sanction for Noranda's failure to

provide discovery and because Noranda is not a party to this case. Contrary to MEUA's assertion, Noranda is a party to this case, aside from its membership in MIEC. Furthermore, Noranda's objections to MEUA's data requests have not, to this point evidenced a pattern of refusal to engage in discovery sufficient to justify the extreme sanction of striking testimony. The Commission will deny the motion to strike testimony.

THE COMMISSION ORDERS THAT:

1. The Midwest Energy Users' Association's Motion to Compel is denied as to data request numbers 1.13, 1.14, 1.15, 1.17 and 1.27.
2. The Midwest Energy Users' Association's Motion to Compel is granted as to data request numbers 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, 1.19, 1.20, 1.21, 1.22, 1.23 1.24, 1.25, 1.26, and 1.28.
3. Noranda shall answer those data requests no later than April 22, 2011.
4. The Midwest Energy Users' Association's Motion to Strike is denied.
5. This order shall become effective immediately upon issuance.

(S E A L)

BY THE COMMISSION



Steven C. Reed
Secretary

Gunn, Chm., Clayton, Davis, Jarrett,
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge