

1 STATE OF MISSOURI  
2 PUBLIC SERVICE COMMISSION

3  
4 TRANSCRIPT OF PROCEEDINGS

5  
6 Oral Argument

7  
8 March 3, 2010  
9 Jefferson City, Missouri  
10 Volume 21

11 In the Matter of Union Electric )  
12 Company d/b/a AmerenUE's )Case No. ER-2010-0036  
13 Tariffs to Increase its Annual )  
14 Revenues for Electric Service )

15  
16 MORRIS L. WOODRUFF, Presiding  
17 DEPUTY CHIEF REGULATORY LAW JUDGE  
18 ROBERT M. CLAYTON, III, Chairman,  
19 JEFF DAVIS,  
20 TERRY JARRETT,  
21 KEVIN GUNN,  
22 ROBERT S. KENNEY,  
23 COMMISSIONERS

24  
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1 P R O C E E D I N G S

2 JUDGE WOODRUFF: All right. Good morning,  
3 everyone. We're here for an oral argument regarding MUE's  
4 -- MEUA's motion to compel MIEC to respond to data  
5 requests and Noranda respond to data requests and the  
6 individual members of MIEC respond to data requests.  
7 This is Case No. ER-2010-0036.

8 Let's start the day by taking entries of  
9 appearance, beginning with MEUA.

10 MR. WOODSMALL: Good morning, your Honor.  
11 David Woodsmall appearing on behalf of Midwest Energy  
12 Users Association, and I've previously given my appearance  
13 to the court reporter

14 JUDGE WOODRUFF: Thank you. For MIEC?

15 MR. DOWNEY: Edward Downey, Bryan Cave,  
16 Jefferson City, Missouri.

17 JUDGE WOODRUFF: Thank you.

18 MR. ROAM: Hi. Brent Roam, Bryan Cave, St.  
19 Louis, Missouri.

20 JUDGE WOODRUFF: For Staff?

21 MR. DOTTHEIM: Steven Dottheim, Post Office Box  
22 360, Jefferson City, Missouri, 65102, appearing on behalf  
23 of the Staff of the Missouri Public Service Commission.

24 JUDGE WOODRUFF: Public Counsel?

25 MR. MILLS: On behalf of the public and Office

1 of Public Counsel, my name is Lewis Mills. My address is  
2 Post Office Box 2230, Jefferson City, Missouri, 65102.

3 JUDGE WOODRUFF: Does anyone else wish to enter  
4 an appearance? All right. Well, Mr. Woodsmall, you're  
5 representing MEUA. And these are your motions, so I'll  
6 allow you to get started. If you want to make a -- your  
7 argument and the Commissioners may interrupt with  
8 questions as they go along.

9 MR. WOODSMALL: Great. I've previously given  
10 out a packet, and I'll be going through those in order, so  
11 try not to mix those up.

12 Good morning. In preparing for this oral  
13 argument, I had a tough time organizing my presentation.  
14 Usually, when you present a Motion to Compel, you're  
15 asking the Commission to address one or two data requests.

16 In this case, we have approximately a hundred  
17 data requests that have not been answered. Given the  
18 scope of the objections, it was difficult for me to  
19 prepare a clear and concise statement of the issues for  
20 your consideration.

21 At the outset, however, I'd like to state that  
22 in my 18 years of practice before this Commission, I have  
23 never encountered such blatant disregard for legitimate  
24 discovery.

25 For instance, look at the 66 data requests asked

1 of Noranda. In that case, Noranda refused to answer a  
2 single question. In turning to Document No. 1, requests  
3 as simple as the production of a source document  
4 referenced in the schedule. You'll see Document 1, and  
5 you'll see the source document listed at the bottom.

6 CRU, an independent business analysis, when I  
7 asked for that source document, what I got back was an  
8 objection on the basis of attorney/client privilege.

9 Now, turning to the second document, you'll see  
10 CRU's web page. And look and see what CRU does. Leading  
11 authority for the world of metals. They talk about  
12 consultancy, highly focused consultancy. Nothing in there  
13 talks about attorney fees -- or attorney services.

14 Given this, I find it hard to believe -- I find  
15 it hard to fathom that any documents prepared by CRU are  
16 in any way privileged. Given, this is an egregious  
17 example, but there are other examples that are equally  
18 egregious.

19 A question like the qualifications of one of  
20 Noranda's expert witnesses was objected to on the basis of  
21 attorney/client privilege. In addition to these egregious  
22 examples, as I take you through the data requests and  
23 testimony, you're going to see a lot of circularity.

24 For example, when you look at Mr. Brubaker's  
25 testimony on behalf of MIEC, you will see him pointing to

1 Noranda. When you look at Noranda's testimony, you will  
2 see them pointing to Mr. Brubaker.

3 Finally, Mr. Brubaker apparently disavows any  
4 responsibility for certain parts of his testimony but  
5 claiming that it wasn't his idea, but instead, it was  
6 "a policy decision" made at MIEC.

7 Ultimately, this all becomes a bunch -- I'm  
8 sorry, Commissioner. You were looking at me.

9 COMMISSIONER DAVIS: I -- I'm just listening,  
10 Mr. Woodsmall.

11 MR. WOODSMALL: Okay. Sorry. Ultimately, this  
12 all becomes a bunch of he said, she said, they said. In  
13 the meantime, I'm trying to pick through and figure out  
14 the basis for all this testimony.

15 Clearly, you can see that these entities have  
16 engaged in a conscious effort to forestall any discovery  
17 and make it impossible for my client to criticize their  
18 positions and testimony.

19 That said, however, let's dig in. In addressing  
20 the data requests, I'm going to focus on four specific  
21 areas. First, I will address a large number of the  
22 Noranda requests. I will address the relevancy of those  
23 requests and explain why those requests have been -- have  
24 not been mooted by Noranda's change in position.

25 Second, I will show the relevancy of the

1 discovery on the various individual MIEC companies. At  
2 this point, you will also see the circularity of the  
3 various positions advanced by the MIEC group of companies.

4 Third, I will address the allegations that we  
5 are seeking to discover information that is protected by  
6 attorney/client privilege.

7 And fourth, I will discuss the suggestion made  
8 by MIEC that we cannot use data requests for the purpose  
9 of discovery on experts. So those are the four areas I'll  
10 discuss.

11 The first area is Noranda's data requests. They  
12 are the most voluminous and, therefore, natural place to  
13 start. In order to understand the data requests, however,  
14 and their relevancy, you first need to understand the  
15 positions advanced by MIEC, Mr. Brubaker and Noranda. I  
16 mentioned all three of them because it's not always clear  
17 which entity is responsible for which recommendation.

18 First, you have portions of Mr. Brubaker's  
19 revised direct testimony. At points in his testimony,  
20 Mr. Brubaker reflects expert positions. At one point in  
21 particular, however, Mr. Brubaker disavows any  
22 responsibility for his recommendation and points to  
23 individual MIEC members.

24 So let's turn -- first turn you to schedule  
25 MEBCOS-5, second to the last page. You can see the

1 results of Mr. Brubaker's class cost of service study.  
2 Over in Column 8, you can see his -- the ultimate results,  
3 and that shows that my client, a large general service,  
4 small primary customers class, should receive a reduction  
5 of 84.6 million dollars.

6 According to his study, they're currently paying  
7 rates that are \$85 million over cost. You can see the  
8 results for the other classes as well in Column 8.

9 COMMISSIONER DAVIS: Mr. Woodsmall, I'm sorry.  
10 Is this --

11 COMMISSIONER GUNN: This is Brubaker's  
12 testimony.

13 MR. WOODSMALL: Brubaker's testimony, your  
14 hand-out -- it was the third document in my hand-out.

15 COMMISSIONER DAVIS: Got it.

16 MR. WOODSMALL: I'm sorry.

17 COMMISSIONER DAVIS: That's okay.

18 MR. WOODSMALL: I brought a lot of hand-outs  
19 with me this morning. So what you have there are the  
20 results of his class of cost service studies, with the  
21 result being in Column 8 showing my clients are over cost  
22 by \$85 million.

23 How does Mr. Brubaker propose to fix this  
24 problem? At pages 36 and 37, Mr. Brubaker presents his  
25 recommendation. First, at page 36, line -- 36, lines 15



1 and 19 -- 15 through 19, Mr. Brubaker recommended that all  
2 classes be moved 20 percent of the way towards cost of  
3 service.

4 Then, however, Mr. Brubaker makes the unique  
5 recommendation of asking that Noranda's rates be moved  
6 entirely to its cost of service. That is found at page  
7 37, lines 7 through 10.

8 You see there, Column 3 -- referring to Column 3  
9 of Schedule MEBCOS-6 shows an adjustment to move the large  
10 transmission class of which Noranda is the sole member to  
11 its cost of service rather than 20 percent towards its  
12 cost of service. The only customer taking service on this  
13 rate is Noranda.

14 And then he continues on. Because of the unique  
15 circumstances faced by aluminum smelters, MIEC, not  
16 Mr. Brubaker, MIEC supports moving the large transmission  
17 class to its cost of service at this time. And you can  
18 see the implications of his move on Schedule MEBCOS-6.

19 Again, as I said, it was a two-step  
20 recommendation. The first step is contained in Column 2  
21 with the second step, the movement of -- Noranda entirely  
22 to their cost of service contained in Column 3.

23 So the result of that is while my -- my clients  
24 got a \$16.9 million movement in Column 2, they have to  
25 give back over a third of that to get Noranda to their

1 cost of service. So that's Mr. Brubaker's recommendation.  
2 Two-step approach.

3           Clearly, given Mr. Brubaker's recommendation,  
4 Noranda would be given very special treatment. Noranda  
5 would be given a rate that equals its cost of service,  
6 while my clients remained almost \$74 million over their  
7 cost of service.

8           What then is the basis for Mr. Brubaker  
9 recommending this special treatment for Noranda? At page  
10 37, as I pointed out, he cites, "The unique circumstances  
11 faced by aluminum smelters."

12           So my clients tried to inquire as to Mr.  
13 Brubaker's rationale for this recommendation. We asked  
14 him about "the unique circumstances." And you'll see then  
15 on the next document some data requests we submitted to  
16 Mr. Brubaker.

17           On the second page in Question 1.1(a) our very  
18 first question, Please discuss the unique circumstances as  
19 understood by Mr. Brubaker faced by aluminum smelters. If  
20 you go to the next page --

21           COMMISSIONER KENNEY: They answered that one,  
22 right?

23           MR. WOODSMALL: Yes. They did answer that one.  
24 Go to the next page, his only response is, For the unique  
25 circumstances, please refer to testimony submitted by

1 Noranda Aluminum.

2 This is the circularity problem that I talked  
3 about. He makes a recommendation, but he says it's not  
4 his. It's MIEC's. I asked him what's the basis for it?  
5 It's the testimony submitted by Noranda. It's a constant  
6 pointing to someone else. But as you can see, the basis  
7 for his recommendation is Noranda's testimony.

8 So in order to get to the basis for his  
9 recommendation, we must conduct discovery on Noranda. And  
10 that's what we did. We -- he wouldn't tell us what the  
11 exact unique circumstances were, so we went into Noranda's  
12 testimony. And you'll see part of that coming up.

13 In reviewing Noranda's testimony, we identified  
14 four factors that we believe formed the basis for  
15 Mr. Brubaker's recommendation. The first factor is  
16 Noranda's electric rates relative to its competitors.

17 Noranda claims it is paying an electric rate  
18 that is greater than its competitors. At page 6, I don't  
19 know if I got this -- yes. Flipping further back. I'm  
20 sorry. I didn't put it in the right order.

21 You'll see Mr. Smith's direct testimony. Again,  
22 this is the unique circumstances underlying Mr. Brubaker's  
23 recommendation. At page 6 of Mr. Smith's testimony, he  
24 claims -- you can see in the top -- in the first full  
25 complete paragraph, he claims that, "Noranda's rate is in

1 the highest quartile of any aluminum smelter in the United  
2 States."

3 This claim is repeated in the testimony of  
4 Mr. Fane, which I have provided you. In his direct,  
5 Mr. Fane claims that Noranda's electric rate in Missouri  
6 places it "among the highest cost smelters in the U.S."

7 The last page of Mr. Fane's testimony is a  
8 schedule discussing the rates of competitive -- the other  
9 competitor, Aluminum Smelters. In that, he details the  
10 cost for these other smelters.

11 So the cost of electricity to competitive  
12 aluminum smelters in play and apparently pivotal to  
13 Mr. Brubaker's recommendation to give Noranda a special  
14 electric rate.

15 When we started researching, though, the  
16 electric rates for aluminum smelters, we discovered  
17 something shocking, if you will. We determined that  
18 Noranda's claims were very misleading.

19 Contrary to the implications of Noranda's  
20 testimony, we found that aluminum smelters weren't  
21 actually paying an established rate that was lower than  
22 Noranda's. Rather, many aluminum smelters have electric  
23 rates that are -- that vary depending on the London Metal  
24 Exchange price of aluminum. So when the price of aluminum  
25 is low, those competitors have a lower cost of

1 electricity.

2           So look at the next sheet. This is a sheet of  
3 -- that I printed off the London Metal Exchange.  
4 Remember, their competitors, when the price of aluminum is  
5 low, their costs of electricity is low.

6           Look what happened to the price of aluminum.  
7 You can see there that a little over a year ago the price  
8 of aluminum tanked. It went down to a ten-year low. So  
9 it's not surprising their competitors with the cost of  
10 electricity that's tied to the price of aluminum have a  
11 lower cost of electricity.

12           We -- we tried to do discovery on this to find  
13 out, is it really a lower cost of electricity, or is it  
14 because of the cost of aluminum? And what would their  
15 cost of electricity be now given that the price of  
16 aluminum has rebounded, has gone back up, has doubled  
17 since that time?

18           We got no answers. All we got were objections.  
19 If you look at some of our data requests that are attached  
20 to our Motion to Compel, Data Requests 15 through 21, 32  
21 and 35 through 38, all of those are designed to challenge  
22 the accuracy of Noranda's claim that it pays a rate that's  
23 higher than their competitors.

24           Furthermore, all are relevant in that they  
25 address the alleged "unique circumstances" relied upon by

1 Mr. Brubaker. The second unique circumstance that we  
2 identified in Noranda's testimony is Noranda's overall  
3 profitability and competitiveness. This is broader than  
4 just their price of electricity. It's their overall  
5 profitability.

6 In his direct testimony, Mr. Smith claims that  
7 "Noranda needs a rate in the range of \$27 per megawatt  
8 hour." Absent such a rate, Mr. Smith claims that Noranda  
9 is unable "to compete with other aluminum smelters in the  
10 United States and globally."

11 In fact, Mr. Smith claims that an increase in  
12 this case "threatens Noranda's viability in southeast  
13 Missouri." So Noranda's competitive position, not just in  
14 the price of electricity, but overall has been put in  
15 play, and it's one of the unique circumstances underlying  
16 Mr. Brubaker's representation.

17 So we submitted several data requests designed  
18 to analyze Noranda's overall competitiveness and their  
19 viability. Interestingly, in it's Form S1 filed with the  
20 SEC just barely a month ago, Noranda's tune was very  
21 different than it was in this case.

22 You'll see a short excerpt of Form S1. And I'll  
23 tell you, this has been revised. Yesterday, they filed a  
24 new one, but it contains all of these -- all of this same  
25 information. So as of yesterday, they're still telling

1 the SEC something completely different than they're  
2 telling you.

3 COMMISSIONER KENNEY: Is this -- is this -- this  
4 Form S1, has Noranda put this into evidence or put this  
5 into --

6 MR. WOODSMALL: No, no. It's not in evidence.  
7 This is the basis for some of my data requests. And what  
8 it is is it's the form that's necessary for Noranda to  
9 issue its initial public offering.

10 So Noranda's looking to go public. And as part  
11 of that, they have to tell about their business, their  
12 competitive advantages, competitive disadvantages.

13 The first thing I'll tell you is if you go  
14 through all 267 pages of this thing, you're not going to  
15 see any statement that this case threatens Noranda's  
16 viability. That's the first thing I noticed.

17 But let's look at their overall competitive  
18 position. Because Noranda's telling you this threatens  
19 their viability relative to other competitors. Looking at  
20 just the one page that I pulled out of the S1, you could  
21 see how many times I circled the word advantage, the  
22 advantages they claim.

23 They claim an advantage related to the cost and  
24 supply of bauxite. They claim an advantage related to the  
25 cost and supply of aluminum. They claim an advantage

1 related to the reliability of electricity and claim "an  
2 advantage over aluminum smelters facing frequent power  
3 shortages or disruptions."

4 They claim an advantage associated with the  
5 transportation of bauxite and "advantageous geographic  
6 location" relative to downstream businesses, and, finally,  
7 a freight cost advantage.

8 So Noranda's claiming their viability is  
9 threatened. But yet, in this document, they're claiming  
10 all these competitive advantages. So we tried to look at  
11 that. That is the unique circumstance underlying Mr.  
12 Brubaker's recommendation.

13 We submitted Data Requests 4 through 13 and 27  
14 through 31, all designed to inquire as to Noranda's  
15 competitive standing, not only with regard to  
16 electricity --

17 COMMISSIONER KENNEY: I'm sorry. 4 through 13  
18 and what?

19 MR. WOODSMALL: 27 through 31.

20 COMMISSIONER KENNEY: And those are all designed  
21 to test the veracity of that statement that they were  
22 going to be placed at a competitive disadvantage?

23 MR. WOODSMALL: Right. Well, further than that,  
24 that their viability is threatened.

25 COMMISSIONER GUNN: Let me ask you a question



1 and -- and I don't -- because you brought it up on Point  
2 4, which -- which asks for consultants identified by -- by  
3 Data Request 1.1 on the Noranda stuff. Why do you think  
4 you're entitled to non-testifying consultants?

5 MR. WOODSMALL: I believe what we'll find is  
6 we're going to find class cost of service studies  
7 presented -- done for them by other consultants that show  
8 higher --

9 COMMISSIONER GUNN: Isn't that work product? I  
10 mean, isn't that -- isn't that protected? Don't they have  
11 a legitimate answer to that saying we're not offering that  
12 testimony, it's not part of the case, you're not entitled  
13 to it?

14 MR. WOODSMALL: I don't believe so. I don't  
15 see --

16 COMMISSIONER GUNN: In fact, in regular court  
17 you couldn't get it, would you?

18 MR. WOODSMALL: Well, I don't know. I don't --

19 COMMISSIONER GUNN: Non -- non-testifying  
20 experts are -- are usually off limits.

21 MR. WOODSMALL: If this was prepared for the  
22 attorney, I believe it would be attorney work product. I  
23 believe these documents -- if they were prepared by  
24 Mr. Johnston, perhaps.

25 COMMISSIONER GUNN: But if they were prepared as

1 part of a litigation strategy?

2 MR. WOODSMALL: Well, I believe they were  
3 probably prepared well before this case and prepared on  
4 behalf of Noranda.

5 COMMISSIONER GUNN: But it wasn't for -- in  
6 reparation for the litigation case?

7 MR. WOODSMALL: I don't know.

8 COMMISSIONER CLAYTON: Was there a privilege log  
9 supplied? Was there a privilege log supplied?

10 MR. WOODSMALL: No. And I'll get to that. All  
11 they did regarding attorney/client privilege was  
12 self-certify. They claimed it and said, That's the end of  
13 the inquiry. So we'll get to that.

14 But if I got that privilege log, I may be able  
15 to answer your question more direct. But depending on how  
16 that study was prepared, on whose behalf, who it was  
17 shared with, I may be entitled to it.

18 COMMISSIONER GUNN: Even though no testimony is  
19 being offered, they're not being called as witnesses and  
20 they -- I mean, it's just this -- I don't think you'd ever  
21 get that in a -- in a regular -- in a regular court  
22 proceeding, I don't know of any non-testifying experts  
23 that would -- that would -- their information would ever  
24 be discoverable.

25 MR. WOODSMALL: Depending on how it's been

1 preserved. If it was preserved as confidential, only for  
2 the attorney, I believe you're right. If it was prepared  
3 and given solely to Noranda, I -- I think I may be  
4 entitled to it. But I can't know that until I get the  
5 privilege log. And -- and I'll get to that.

6 So I've gone through all the data requests  
7 related to their overall competitiveness. That was the  
8 second unique circumstance.

9 The third one was their employment levels. They  
10 spent a lot of time in their testimony talking about the  
11 900 jobs that they provide in southeast Missouri. And I  
12 don't doubt that. And I don't doubt the importance of  
13 those jobs in southeast Missouri.

14 That said, in Data Request 49, I attempt to show  
15 that the benefits of Noranda's employment is very  
16 localized to a few counties in southeast Missouri.  
17 Noranda is asking Ameren customers, many as far away as  
18 Excelsior Springs, 396 miles from Noranda to -- to pick up  
19 the cost.

20 I wanted to show that the benefits of this  
21 employment is localized to southeast Missouri. So I asked  
22 Data Request 49, and that was objected to. That was the  
23 third unique factor.

24 The fourth one was property taxes. Again, what  
25 I'm attempting to show is the benefit of property taxes is

1 localized to southeast Missouri and that customers picking  
2 up the load in Excelsior Springs 400 miles away aren't  
3 receiving the benefits of those local -- those property  
4 taxes. That was my Data Request 50. Again, objected to.

5 So that -- those are the unique circumstances  
6 that I identified out of Noranda's testimony. They have  
7 since objected to many of them, claiming that they are no  
8 longer relevant because of Noranda's change in position.

9 And you'll see Mr. Smith's supplemental direct  
10 testimony, and you'll see how that changed their position.  
11 In it, one page --

12 COMMISSIONER GUNN: Can I go back here and ask  
13 you another question?

14 MR. WOODSMALL: Uh-huh.

15 COMMISSIONER GUNN: On Data Request 32, you  
16 asked them to provide a comparison of the costs. You  
17 asked them to essentially run scenarios in this case. The  
18 -- and -- and there's a difference here between whether  
19 they have scenarios.

20 But you're asking them to provide them under  
21 certain conditions that you lay out. Do you think it is  
22 appropriate in a discovery request to -- to require them  
23 to do work that they haven't done already?

24 MR. WOODSMALL: No. And I would have clarified  
25 that for them, but we never got there. If they've run

1 other scenarios, I want them. But --

2 COMMISSIONER GUNN: But that's not what you  
3 asked.

4 MR. WOODSMALL: I understand. If they have them  
5 done, I -- and I'll clarify it now. If they've done those  
6 scenarios, I think they're appropriate. I don't think  
7 that I can compel them to run scenarios.

8 COMMISSIONER GUNN: And you've asked a question,  
9 and I apologize for this, but you've asked -- and I'm just  
10 trying to cut through some of this stuff.

11 MR. WOODSMALL: Sure.

12 COMMISSIONER GUNN: You've asked in another one  
13 to have them give you a discussion. It's in Data Request,  
14 which is the second and it says, Provide a discussion of  
15 how this billing arrangement have changed with the  
16 addition of Noranda and MIEC.

17 Assuming that that is a -- that is a -- that  
18 it's a relevant question, why would they have to prepare a  
19 memo essentially for you? I mean, that's not really the  
20 purpose of discovery, is it? I mean --

21 MR. WOODSMALL: I -- maybe the -- the focus  
22 being on discussion, you know --

23 COMMISSIONER GUNN: You asked for it. I mean --  
24 so --

25 MR. WOODSMALL: What I'm looking for is to show

1    how the other MIEC members and Mr. Brubaker's firm has  
2    been enriched by the inclusion of Noranda.

3               COMMISSIONER GUNN:   Okay.   But that's -- but  
4    that discovery is to get you the documents, so you can  
5    draw those conclusions or not draw those conclusions in  
6    the litigation setting.   We're not requiring them to  
7    prepare new memorandum or documents for you in response to  
8    these discovery requests.   And that's -- is that what  
9    you're asking for?

10              MR. WOODSMALL:   It -- if they have documents  
11    that are responsive to how the billing arrangements have  
12    changed, I think I'm entitled to those.   I'm not --

13              COMMISSIONER GUNN:   And I haven't disagreed with  
14    you with that.   I'm asking you if you are asking them in  
15    any of these discovery requests to prepare or create new  
16    documents.

17              MR. WOODSMALL:   No.   No.

18              COMMISSIONER GUNN:   Okay.

19              MR. WOODSMALL:   If the documents are in  
20    existence, those are what I want.

21              COMMISSIONER GUNN:   Okay.   And that -- and that  
22    like clears up a bunch of questions that I have here.

23              MR. WOODSMALL:   Okay.

24              COMMISSIONER JARRETT:   Judge?   Judge, can I  
25    inquire?

1 JUDGE WOODRUFF: Sure.

2 COMMISSIONER JARRETT: I'd like to inquire of  
3 Mr. Dottheim real quick.

4 MR. WOODSMALL: Sure.

5 COMMISSIONER JARRETT: Mr. Dottheim, on data  
6 requests, doesn't Staff all the time ask for companies to  
7 give you information or develop scenarios? These are data  
8 requests. They're not interrogatories.

9 MR. DOTTHEIM: Yes. We ask companies to develop  
10 scenarios. Commissioner, I'm not sure if -- if you're  
11 referring to in particular -- what I'm thinking of in  
12 particular when that involves some, for example, computer  
13 software, some running of some analysis that the Staff  
14 independently cannot run because the -- the software is  
15 proprietary or what have you.

16 We don't -- we haven't licensed it or obtained a  
17 license ourselves. In some instances, we do, and we can  
18 run our own scenarios. We usually are able to work out a  
19 situation where a company will run the software of the  
20 program with -- with our input, and we'll build into the  
21 case that they recover their costs of -- of running those  
22 scenarios.

23 But it's not infrequent when we ask a company  
24 just to develop an analysis which they haven't done that  
25 they will object to the Staff data request. So there are

1 various gradations or levels to I think what you may be  
2 inquiring about.

3           For example -- and maybe production costing  
4 model. The Staff now has a production costing model, and  
5 we try to benchmark them, our model against the company's  
6 model. That's where -- a situation where we may ask the  
7 company if they have a different model to run inputs or --  
8 or what have you.

9           Commissioner, I don't know if that even remotely  
10 comes -- comes near to what you're asking.

11           COMMISSIONER JARRETT: I guess -- I guess my  
12 question is, is Staff's position, then, that data requests  
13 aren't just for documents that have already been prepared?  
14 It -- they can also be used to ask parties to run models  
15 or give analysis beyond what they have?

16           MR. DOTTHEIM: Yes. Depending upon -- depending  
17 upon the situation. I don't, Commissioner, know if you're  
18 -- you're also inquiring as to the form of discovery that  
19 we use data requests as opposed to interrogatories or --  
20 or depositions.

21           There -- there is -- there is case law specific  
22 to the Commission dealing with interrogatories and -- and  
23 data requests that address the Commission's own rule under  
24 -- under Chapter 2 as far as that being a valid form of  
25 discovery and the Commission under the Public Service



1 Commission law being unique in -- in State Government  
2 because of the Public Service -- Public Service Commission  
3 law as far as its powers and Chapter 536 supplementing the  
4 Public Service Commission law.

5           Again, Commissioner, I'm not sure if I'm coming  
6 anywhere close to answering your questions.

7           COMMISSIONER JARRETT: Well, yes, you are. I'm  
8 just trying to establish -- the dialogue between  
9 Commissioner Gunn and Mr. Woodsmall seemed to indicate  
10 that we were limited to just -- in discovery in our cases  
11 to just documents that they already have, and I --

12           MR. WOODSMALL: Maybe I need to clarify that.

13           MR. DOTTHEIM: It -- and we will --  
14 commissioner --

15           COMMISSIONER JARRETT: If I mischaracterized  
16 you, I'm sorry.

17           COMMISSIONER GUNN: I was just trying to figure  
18 out what you were asking for. I mean, if he was asking  
19 for them to run those scenarios, then that's a question we  
20 need to take up.

21           MR. DOTTHEIM: One last thing. We will ask --  
22 we will use data requests even asking the company to set  
23 up meetings with company personnel for -- for interviews  
24 or -- or -- or for discussions. And those meetings may  
25 result in submitting data requests to the -- to the

1 company.

2 Or we may after the meeting do a write-up of --  
3 of the meeting asking the company to -- to verify what we  
4 thought we were told.

5 MR. WOODSMALL: I think the rub here concerns an  
6 issue that I'll address in Point 44. And that is MIEC has  
7 claimed that I can't use data requests on an expert, that  
8 I'm limited to depositions.

9 And the case law clearly indicates that that's  
10 wrong, that the Commission is unique and that unique  
11 powers and you can do data requests, that you've approved  
12 those in rules.

13 So I can do discovery on an expert, and I can do  
14 it via data requests, and just as you would in a  
15 deposition, ask an expert, for instance, what would be the  
16 price of electricity if the price of aluminum doubled? I  
17 can do that in a data request.

18 That data request, I believe, was addressed  
19 solely at Noranda, not an expert. I can't ask Noranda as  
20 a non-expert to do an analysis. I can ask that of an  
21 expert, though. So I -- I think that may be the  
22 distinction, whether you're asking for an analysis done by  
23 an expert versus just a party.

24 COMMISSIONER DAVIS: Mr. Woodsmall, what's --  
25 what's the case that supports that position on the -- on

1 data request?

2 MR. WOODSMALL: It's in my response to the  
3 Motion to Compel. It's a Southwestern Bell case, 645  
4 South --

5 COMMISSIONER DAVIS: Okay. I've got your  
6 response to Motion to Compel here. And what's the --  
7 what's the difference between a data request and  
8 interrogatory? Because you can send interrogatories.

9 MR. WOODSMALL: In that -- in that case, the  
10 case reference from the Court of Appeals, there is no  
11 difference.

12 COMMISSIONER GUNN: Okay.

13 MR. WOODSMALL: The Court of Appeals labels it  
14 as interrogatories, but then they reference Rule 4 CSR  
15 240-2.090 -- I think it's 2.090 -- that is specific to  
16 data requests. So they're using the word interrogatory  
17 and data request synonymously.

18 COMMISSIONER GUNN: But there is a body of law  
19 which gives us more authority to Commissioner Jarrett's  
20 point than -- than just what a typical -- typical  
21 litigation would have.

22 MR. WOODSMALL: Yes.

23 COMMISSIONER GUNN: We have more authority than  
24 under the Missouri Rules of Procedure.

25 MR. WOODSMALL: You are not limited. And that

1 case specifically stands for that. Southwestern Bell  
2 challenged the use of data requests. And I'll just go  
3 ahead and object now.

4 COMMISSIONER KENNEY: Let me ask that question  
5 because I want to be clear about that because I'm looking  
6 at your -- your response. The Southwestern Bell case  
7 stands for the proposition that data requests are  
8 appropriate.

9 MR. WOODSMALL: Yes.

10 COMMISSIONER KENNEY: Generally. Does it stand  
11 specifically for the proposition that data requests  
12 directed to an expert are appropriate? Because that's --  
13 because that's a subtle distinction, but it's important  
14 because I don't think anybody's arguing that data -- that  
15 we have data requests that are appropriate. Are they  
16 appropriately directed at an expert?

17 MR. WOODSMALL: I don't -- I don't believe that  
18 that case referenced just data requests to an expert.

19 COMMISSIONER KENNEY: So is there a case that  
20 stands for the proposition that data requests directed to  
21 an expert are appropriate versus just taking that expert's  
22 deposition?

23 MR. WOODSMALL: I don't -- I don't believe so.  
24 But I can --

25 COMMISSIONER KENNEY: So then why -- then why

1 don't you just depose Mr. Brubaker and ask him to produce  
2 his entire file? Wouldn't that give you the items that  
3 you're -- and I'm dealing specifically with the -- with  
4 the data requests directed at Mr. Brubaker.

5 I'm setting aside the 63 directed at Noranda and  
6 the 11 directed to the MIEC members. I want to just  
7 specifically focus on the data requests directed to  
8 Mr. Brubaker. Why don't you just depose him and tell him  
9 to produce his entire file? And would that not get you  
10 all the information that you're asking for?

11 MR. WOODSMALL: It would be very inefficient.  
12 And I'll tell you why.

13 COMMISSIONER KENNEY: Okay.

14 MR. WOODSMALL: The Southwestern Bell case  
15 specifically references the Commission's ability to use  
16 data requests and talks specifically about the convenience  
17 of the Commission.

18 Commission cases involve primarily expert  
19 witnesses. You have very few fact witnesses. You're  
20 dealing -- when you get to the Ameren case, I'll bet you  
21 every witness that takes the stand will be an expert  
22 witness. So you're talking about discovery virtually  
23 solely on expert witnesses.

24 The Commission, when they did data requests,  
25 recognized that it's more convenient and it's more

1 efficient if parties can do data requests on those  
2 experts, narrow the inquiry, and then if they want to, do  
3 a deposition.

4 But depositions, blind depositions without any  
5 type of discovery on something like this is not efficient.  
6 And I believe that's why the Commission originally came  
7 out with their rule on data requests. And that's why the  
8 Southwestern Bell court upheld it.

9 COMMISSIONER KENNEY: Okay.

10 MR. WOODSMALL: Moving on, so I've gone through  
11 the four unique circumstances. And Noranda claims that  
12 their revised testimony, supplemental testimony, has made  
13 all of my data requests moot.

14 So let's look at the supplemental direct  
15 testimony. You'll see there --

16 JUDGE WOODRUFF: Mr. Woodsmall, if I can  
17 clarify, they haven't said that all your data requests are  
18 moot, have they?

19 MR. WOODSMALL: They've objected to every data  
20 request.

21 JUDGE WOODRUFF: But they haven't said all of  
22 them are moot, have they?

23 MR. WOODSMALL: They said the six that they were  
24 going to answer were subsequently objected to on the basis  
25 that they were now moot.

1 JUDGE WOODRUFF: Okay.

2 MR. WOODSMALL: Yeah. So they -- they've  
3 claimed mootness. If you look there at his testimony, it  
4 says how their position changed. They are no longer  
5 seeking a rate that's below cost.

6 Instead, they seek a rate consistent with the  
7 cost of service. But that doesn't change any of  
8 Mr. Brubaker's testimony. It doesn't change his second  
9 step of his recommendation to give them -- them alone a  
10 cost base rate.

11 It doesn't change the fact that he relied upon  
12 the unique circumstances in Noranda's testimony. It  
13 doesn't change any of that. If I'm allowed -- they're  
14 relying on Mr. Brubaker's testimony. I need to be allowed  
15 to inquire on that testimony.

16 JUDGE WOODRUFF: Mr. Woodsmall, are they still  
17 talking about a -- is Noranda still requesting a \$26 rate?

18 MR. WOODSMALL: That's another source of -- I --  
19 \$27. I submitted a data request on that that they  
20 objected to yesterday. So there may be another Motion to  
21 Compel. They say they're going to give me an answer, so I  
22 haven't done a Motion to Compel. But I don't know yet.

23 JUDGE WOODRUFF: Okay.

24 MR. WOODSMALL: So the change in Noranda's  
25 position as reflected in their supplemental direct

1 testimony doesn't change in any way the relevancy of my  
2 inquiries.

3 I note it is supplemental direct. It is not  
4 revised direct. Their initial testimony is still pending  
5 out there. They haven't replaced it. They haven't thrown  
6 it away. So I'm allowed inquiry on a party on their  
7 positions as reflected in that testimony.

8 That's the entirety of my discussion on the  
9 Noranda data request, 66 of them.

10 COMMISSIONER GUNN: Can I ask a question on one  
11 of them, 14?

12 MR. WOODSMALL: I don't have them with me.

13 COMMISSIONER GUNN: It says, As a residence,  
14 does Mr. Ernhardt receive electric service from AmerenUE?

15 MR. WOODSMALL: It's a very simple question.  
16 You'll notice at every local public hearing that you go  
17 to, everybody is questioned, Are you a resident or do you  
18 take service from AmerenUE?

19 All I'm attempting to do there -- Mr. Ernhardt  
20 is a witness, a union witness presented by Ameren. All  
21 I'm attempting to know is when -- whether Mr. Ernhardt is  
22 willing, as a residential customer, to pick up a greater  
23 share of costs so that Noranda can get their lower rate.  
24 That's all I'm trying to show.

25 If he's not a customer, then I know it's a lot



1 easier for him to say they should get it because he's not  
2 footing any of the bill. You ask it at every local public  
3 hearing. They objected to it.

4 The second group was the relevancy of the MIEC  
5 individual company data requests. You'll remember  
6 Mr. Brubaker's testimony, he makes a two-step  
7 recommendation. The first step moves all classes 20  
8 percent towards their cost of service.

9 The second step, the controversial step, moves  
10 Noranda entirely to their cost of service while other  
11 classes are stuck paying higher rates to accommodate  
12 Noranda.

13 As I pointed out before, if you look at  
14 Mr. Brubaker's testimony, page 37, lines 12 through 13,  
15 this isn't his recommendation. He says, This is a  
16 recommendation of MIEC.

17 In response to a data request, Mr. Brubaker  
18 confirms that this decision to move Noranda to its cost of  
19 service was "a policy decision of MIEC." So you have an  
20 expert witness disavowing any responsibility for this  
21 recommendation. He's pointing to MIEC. I now need to do  
22 discovery on MIEC.

23 And this is the circularity I was talking about.  
24 Mr. Brubaker relies on Noranda for his unique  
25 circumstances. He can't answer any questions about them.

1 He's relying on MIEC for the decision to move Noranda to  
2 its cost of service. Again, he can't answer any questions  
3 about them. Each party points to the other.

4 To these parties, this testimony is nothing but  
5 a big shell game. They are constantly trying to hide the  
6 responsible policy-making party from any parties.

7 Anyway, given that Mr. Brubaker was dispelling  
8 any responsibility for this decision, we submitted data  
9 requests to the individual MIEC members. As indicated in  
10 my pleadings, each of these MIEC members are parties to  
11 this case.

12 They intervene collectively and as individual  
13 entities, so they are parties. The inquiries are designed  
14 to gain relevant information, and that information is not  
15 privileged. Therefore, each of the MIEC entities should  
16 be compelled to respond to the question.

17 Instead, each of these entities seek to hide  
18 between the MIEC facade. Each of these entities knows  
19 that it would be damning for them to publicly acknowledge  
20 that they voluntarily consented to Noranda's initial  
21 request of a rate that is below Noranda's cost of service.

22 Furthermore, these entities know that it would  
23 be further damning to publicly acknowledge agreement to  
24 Mr. Brubaker's discriminatory recommendation. As such,  
25 each own tries to hide behind MIEC.

1           For instance, General Motors, an entity in MIEC,  
2   would not want parties in the state of Michigan to  
3   understand that General Motors agrees that under certain  
4   circumstances it's okay to toss out cost of service  
5   rate-making in favor of political preferences.

6           So they're trying to hide. They don't want that  
7   to become public. They don't want to be outed that they  
8   are in favor of this type of rate-making in this case. So  
9   they attempt to hide behind MIEC.

10          Unfortunately for them, they each individually  
11   intervened in this case. As such, responses are  
12   appropriate and should be compelled.

13          The third issue was the attorney/client  
14   privilege, and we kind of touched on that earlier. And  
15   this is more of an over-arching issue raised -- because it  
16   was raised in each of the three Motions to Compel.

17          They claim at various points attorney/client  
18   privilege. As indicated in my response filed for Monday,  
19   attorney/client privilege is an exception to the stated  
20   public policy preference for full disclosure. That is the  
21   public policy, full disclosure.

22          As such, case law indicates that the exception  
23   should be "strictly construed." And that's in my -- in my  
24   document, in my pleading. When analyzing the  
25   applicability of the privilege, Courts look to see if the

1 alleged communication was transmitted in "confidence."

2           Confidence is a necessary prerequisite to  
3 attorney/client privilege. Courts have found that  
4 privilege is waived where the communication is made in  
5 front of another party.

6           In this case, the Civil Rules of Procedure  
7 provide that the Commission, as well as my clients, are  
8 entitled to information adequate "to prevent others to  
9 assess the applicability of the privilege or work product  
10 doctrine."

11           Such information would include -- would include  
12 a log of all written communications and the parties  
13 present for those communications. It is likely, I  
14 believe, that there are significant -- a significant  
15 number of communications that copied Mr. Brubaker in his  
16 firm.

17           As indicated in my pleading, Missouri statutes  
18 recognize a lot of privileges. They recognize spousal  
19 privileges, ministers, doctors, CPAs. There is no  
20 privilege for an expert economist. As such, the  
21 privileged nature of these communications would have been  
22 waived, and I'm entitled to full disclosure of those  
23 communications.

24           At the least, Counsel should be reminded that  
25 the attorney/client privilege is not a matter of

1 self-certification. Rather, in making such objection, it  
2 is incumbent upon them to gather the information and  
3 provide redacted copies of that communication. Counsel's  
4 not complied with the Missouri Rules of Civil Procedure,  
5 and they should be compelled to comply.

6           The fourth area was the use of data requests on  
7 experts. And we've -- again, we've touched upon this a  
8 little bit. Counsel asserts that the Missouri Rules of  
9 Civil Procedure limits discovery on expert witnesses to  
10 depositions.

11           And I talked about the Southwestern Bell case.  
12 A case from 1982, the Missouri Court of Appeals considered  
13 a similar argument and said, "Commission proceedings are  
14 considerably different from and vastly more complicated"  
15 than other type of proceedings. As such, the Court found  
16 that the use of data requests was appropriate and  
17 permitted by statute.

18           So you have express authority for data requests.  
19 It's contained in the Commission's rules. That's what was  
20 approved. So express authority. Not only has the Court  
21 found that data requests are appropriate. MIEC has  
22 expressly and implicitly agreed to their use.

23           In the Joint Motion to Establish Procedural  
24 Schedule, the parties, including MIEC, Noranda and each of  
25 the individual MIEC members, expressly acknowledge the use

1 of data requests and agreed to set dates for responses for  
2 those data requests.

3 As such, MIEC has expressly recognized their  
4 use. More importantly, MIEC has implicitly recognized  
5 their use by relying on this discovery procedure. And  
6 this is the last document I'll show you.

7 This is, on the first page, a data request from  
8 MIEC, my clients. And you'll see there, Data Request No.  
9 -- No. 2 directly -- directly at my data -- my -- my  
10 expert witness, Mr Chris.

11 When Mr. Chris nevertheless agreed, directed at  
12 my expert witness. So they're doing data requests of an  
13 expert witness, but they're claiming I can't.

14 If you look to the data requests they've done on  
15 Ameren, and this is just one I picked out, their 19th set,  
16 a data request directed at an expert of Ameren, Mr. John  
17 F. Wiedemeyer, constantly asks him questions about his  
18 testimony.

19 So it's been expressly approved by the Court,  
20 it's been expressly acknowledged by MIEC, and it's been  
21 used by MIEC repeatedly throughout this case. Therefore,  
22 it is -- it is disingenuous and inequitable for MIEC to  
23 claim that data requests are not appropriate and then use  
24 that very same discovery device.

25 Moreover, I would note that in certain data

1 requests, Noranda objects because it asserts that my  
2 requests should have been addressed to a witness -- to an  
3 expert.

4           For instance, in response to Data Requests 15,  
5 17, 18 and 19, Noranda objected by claiming "The data  
6 request is not directed to the proper party as expert  
7 witnesses would be better able to provide this  
8 information." So in their own objections in places, they  
9 don't want to answer. They direct me to the expert  
10 witness.

11           When I ask the expert witness, they object  
12 saying I can't ask it of the expert witness. Again, it's a  
13 circularity, and it's a bunch of finger pointing with no  
14 one wanting to take responsibility for the decisions.

15           This is indicative of the shell game being  
16 played by these parties. You direct a data request at a  
17 party, and they object because it should be addressed to  
18 an expert witness. You address a data request to an  
19 expert witness, and they object because you can't do it.

20           Those are the four points. In conclusion, that  
21 was all I wanted to discuss today. I'm available to  
22 answer questions about any specific data requests.

23           I would ask you to recognize the game being  
24 played here by MIEC, Mr. Brubaker and Noranda. You ask a  
25 request of one, they point you to another. You ask a

1 question of another, and they point you to still another.

2           It's been virtually impossible to find the party  
3 responsible for the decisions and recommendations made in  
4 this testimony. I am confident that you will compel  
5 responses to these data requests.

6           In your order, I ask for several things. This  
7 is what I'm hoping you will do today. First, I ask that  
8 you compel responses by 5:00 p.m. on Friday. In most  
9 cases, Counsel and the parties have had these requests for  
10 up to five weeks already.

11           They don't need additional time. They've had  
12 sufficient time to gather this information in the event  
13 the Commission sustains my motion. Don't let them  
14 further attempt to delay my preparation by asking for more  
15 time for responses. So that's the first thing. I want  
16 responses by 5:00 on Friday.

17           Second, I will -- I have noted previously my  
18 concern that they are continuing to play these games. I  
19 received more objections yesterday. I'm waiting to hear  
20 their responses. But if it's anything like I've seen in  
21 the past, there's going to be another Motion to Compel  
22 coming.

23           Unless you put strong language in your order,  
24 you will be confronted with another Motion to Compel. I  
25 ask that you put strong language in your order telling



1     them that you're not going to countenance this type of  
2     behavior.

3                 Third, I would ask you to delegate the authority  
4     to the presiding officer or other individual to rule on  
5     any further Motions to Compel.

6                 While I appreciate the Commission moving  
7     expeditiously on this matter, the hearing is rapidly  
8     approaching. It's a week and a half away. The hearing  
9     starts. By delegating such authority, the Commission can  
10    be assure that had any further recalcitrance will be  
11    addressed promptly.

12                Ultimately, I only ask that the -- these -- I  
13    only ask that these parties be enlightened to the fact the  
14    Commission will not countenance any further disregard for  
15    their rules and legitimate discovery requests. Thank you.

16                JUDGE WOODRUFF: Thank you, Mr. Woodsmall.  
17    Response from MIEC?

18                COMMISSIONER DAVIS: Can I -- can I go to  
19    Mr. Dottheim because -- before I forget before  
20    Mr. Woodsmall --

21                JUDGE WOODRUFF: Go right ahead.

22                COMMISSIONER DAVIS: Mr. Dottheim, you've been  
23    here for a long time, haven't you?

24                MR. DOTTHEIM: Yes.

25                COMMISSIONER DAVIS: Sometime after the

1 Mayflower landed?

2 MR. DOTTHEIM: Yes.

3 COMMISSIONER DAVIS: Okay. Looking at  
4 Mr. Woodsmall's questions regarding Noranda's joining of  
5 MIEC -- let's go back to the formation of META. Did Staff  
6 send data requests to the companies that were members of  
7 META -- and I could go to Mr. Mills, too -- and did the  
8 company respond to those requests, did the respective  
9 companies that were joining META, and what were those  
10 requests? If you made data requests, I'd like to get a  
11 copy of those data requests filed.

12 MR. DOTTHEIM: In this case, Commission or --

13 COMMISSIONER DAVIS: Yes. Well, with -- with  
14 regard to -- with regard to this -- to this argument here  
15 because, I mean, at least to me, there could be --  
16 Mr. Woodsmall could be asking some analogous questions  
17 that, you know, were -- were issued to utilities and that  
18 utilities responded to in a similar situation.

19 MR. DOTTHEIM: Yeah. I'm not aware of the Staff  
20 submitting data requests to META in this --

21 COMMISSIONER DAVIS: Not META. Well, of course,  
22 META wasn't a party. But you submitted them to the  
23 companies.

24 MR. DOTTHEIM: Yes. We submitted most  
25 definitely data requests to -- to AmerenUE in this case.

1 COMMISSIONER DAVIS: Uh-huh.

2 MR. DOTTHEIM: And I --

3 COMMISSIONER DAVIS: I'm talking about data  
4 requests -- I don't remember when META was formed. I  
5 would guess 2003, 2000 --

6 MR. DOTTHEIM: I'm sorry, Commissioner. Are you  
7 asking if we've ever submitted data requests to META?

8 COMMISSIONER DAVIS: No. If you've ever  
9 submitted data requests to the utilities --

10 MR. DOTTHEIM: Okay.

11 COMMISSIONER DAVIS: -- regarding their --

12 MR. DOTTHEIM: Oh.

13 COMMISSIONER DAVIS: -- participation in META.

14 MR. DOTTHEIM: Offhand, I don't know. But I can  
15 -- I can check to whether that's ever occurred and submit  
16 something to the -- to the Commission. Are you interested  
17 if -- if the utilities have ever objected or if we  
18 received responses and if we've --

19 COMMISSIONER DAVIS: I would be -- I would be --  
20 I would be -- I would be interested in that, I think,  
21 because I can't imagine Staff or Office of Public Counsel  
22 not asking utilities questions about their participation  
23 in META.

24 MR. MILLS: Well, Judge, if I may -- and I'm not  
25 sure this is really responsive to your -- to your

1 question, Commissioner. But in this case, we did ask a  
2 data request of META, and META objected on the basis that  
3 they are not a party, although they have filed a brief and  
4 they have submitted sworn testimony. They never actually  
5 normally applied for intervention. They've alleged that  
6 they are not a party and they don't have to answer.

7 COMMISSIONER DAVIS: Okay.

8 MR. MILLS: That's where it sits right now.

9 COMMISSIONER DAVIS: But, Mr. Mills, as the  
10 Office of Public Counsel, have you ever sent the companies  
11 themselves data requests about their participation in  
12 META?

13 MR. MILLS: I cannot recall having done that. I  
14 know in -- for example, in rule-making discussions, round  
15 tables about rules, we sometimes ask questions about the  
16 -- the -- whether or not a particular person is speaking  
17 for META, speaking for a company in particular or whether  
18 all the companies agree with META's position.

19 And the topic does come up, and it's discussed.  
20 But I don't recall having asked data requests in the  
21 specific case about it.

22 COMMISSIONER DAVIS: Okay. Well, in -- in  
23 previous cases, I mean, you'd be aware -- you get copies  
24 of all of Staff's data requests, don't you?

25 MR. MILLS: I have -- I have access to all of

1     that.

2                   COMMISSIONER DAVIS:  You have access.  You don't  
3     necessarily look at --

4                   MR. MILLS:  I don't necessarily read them all in  
5     all cases, but I can -- I can --

6                   COMMISSIONER DAVIS:  Because they can run into  
7     the thousands.

8                   MR. MILLS:  Yeah.  They're available on EFIS,  
9     and I can look at them.  I don't necessarily get copies of  
10    all of them in all cases.

11                  COMMISSIONER DAVIS:  Okay.  Now, let me go back,  
12    Mr. Woodsmall -- I'm sorry.  Mr. Downey and Mr. Woodsmall,  
13    with regard to the questions of attorney/client privilege  
14    with regard to -- to certain documents, I mean, would it  
15    -- would it be your position that we should have an  
16    in-camera review of those documents to determine if they  
17    -- I mean, because you make this allegation about  
18    Mr. Brubaker and -- and not having privilege so that would  
19    somehow defeat the privilege of their attorney/client  
20    communications or whatever.

21                  I mean, so would it be -- are you just saying  
22    give me the documents and let me see them?  Or are you  
23    saying there should be an in-camera review?  Or what are  
24    you -- what are you saying?

25                  MR. WOODSMALL:  I guess to clarify that, my

1 first response is, Give me the log, give me the redacted  
2 documents and let me see those. That may be sufficient.

3 To the extent that I believe they've redacted  
4 information or they've waived that -- that privilege, I  
5 would ask at that point in time for a Special Master. And  
6 the Commission has done that. The Commission did it in  
7 the Wolf Creek cases, and they did it in the recent KCP&L  
8 prudency case. So there is precedent for the Commission  
9 to appoint someone, not necessarily the presiding officer  
10 because he's going to oversee this case, but appoint  
11 another ALJ to review and determine the viability of that  
12 privilege.

13 So that may be some point down the road. But  
14 right now, just the log and the redacted communications.

15 COMMISSIONER DAVIS: Okay. All right. Thank  
16 you. I'm sorry, Mr. Downey.

17 JUDGE WOODRUFF: Proceed, Mr. Downey.

18 MR. DOWNEY: Good morning. I appreciate the  
19 opportunity to have oral argument on this. And I, too,  
20 struggled with how to get my hands around all of this and  
21 present these issues to you in -- in an organized fashion.

22 I think I've come up with a proposal where I  
23 will address each and every issue on the Motion to Compel  
24 and the objections that we raised to the discovery  
25 requests.

1                   But before I get into that, I want to address a  
2   couple of things Mr. Woodsmall both did and said. I do  
3   not intend to testify about the merits of the case. I  
4   don't intend to argue the merits of the case. If I had  
5   wanted to, I'm not sure I'd be competent to do either of  
6   those. I am going to focus only on the -- the issue at  
7   hand, which is the objections.

8                   Right out of the gate, Mr. Woodsmall used as an  
9   example of our blatant disregard of the rules his request  
10   to Noranda, 1.51. That request asks Noranda to provide a  
11   copy of all CRU documents relied on by Mr. Fane in  
12   creating Exhibit HWF-1.

13                  Mr. Fane is an expert. We objected that this is  
14   not the correct way to depose an expert. It's not blatant  
15   disregard. That's actually recognition of your  
16   regulations and the Rules of Civil Procedure, which I  
17   brought both for the argument today.

18                  Your Rule 4 CSR 240-2.090 right out of the gate  
19   incorporates the Rules of Civil Procedure. It says,  
20   Discovery may be obtained by the same means and under the  
21   same conditions as in civil actions in the Circuit Court.

22                  So then we turn Rule 56.01. It says, Here's  
23   what you can do via any discovery means other than  
24   deposition when it comes to experts. You can ask for the  
25   identity and qualifications of the expert. You can ask

1 for the general nature of the subject matter of his or her  
2 testimony. And you can ask for his or her hourly  
3 deposition fee.

4 Then you, once you know the deposition fee, can  
5 decide whether or not you want to expend your resources to  
6 depose that expert. You don't have the option under these  
7 rules of making the other party depose their expert at  
8 their expense for you by simply asking interrogatories,  
9 data requests or whatever.

10 Southwestern Bell Telephone is a -- that case is  
11 a case I read very carefully. And as Commissioner Kenney  
12 points out, it simply says, DRs are appropriate. And my  
13 clients have never said that DRs are not an appropriate  
14 discovery mechanism. They just are not an appropriate  
15 discovery mechanism for anything that you seek to discover  
16 about an expert other than these three things that I just  
17 mentioned that are listed under Rule 56.01.

18 COMMISSIONER KENNEY: So in the absence of a  
19 specific Commission rule, our -- general Rules of Civil  
20 Procedure would apply?

21 MR. DOWNEY: That's the way I read your  
22 regulations.

23 COMMISSIONER KENNEY: And the Southwestern Bell  
24 case, you probably read it more carefully than I, I'm  
25 looking at it now, simply allows that the Commission is



1 allowed to promulgate additional rules to supplement  
2 whatever is in the APA or whatever is in the Missouri  
3 Rules of Civil Procedure, correct?

4 MR. DOWNEY: That's the way I read Southwestern  
5 Bell.

6 COMMISSIONER KENNEY: So then let me ask you  
7 this question: And I appreciate the fact that you're not  
8 arguing the merits of the case and we're just going to  
9 talk about the discovery issue at hand. Why did your  
10 client not provide a privilege log?

11 MR. DOWNEY: That's another point I was going to  
12 make. There's no DR that requests a privilege log.

13 COMMISSIONER KENNEY: But the Rules of Civil  
14 Procedure say that if you're going to assert a privilege  
15 based on attorney/client privilege that you're supposed to  
16 supply information -- there's no duty on the objected --  
17 or the requesting party to request a privilege log. It's  
18 the objecting party's obligation to provide enough  
19 information to ascertain the validity of your objection,  
20 correct?

21 MR. DOWNEY: If you determine that the other  
22 objections made to the same DRs do not apply and that the  
23 only objection that -- that you think applies our  
24 objection that it's attorney/client and you require a  
25 privilege log, then -- then, certainly, we'll have to

1 produce that.

2 But there are -- there are only, I think, a  
3 handful of DRs where we raised the attorney/client  
4 privilege. And for all of those DRs, we've raised all  
5 sorts of additional objections that I think are  
6 well-founded objections.

7 COMMISSIONER KENNEY: So are you saying that you  
8 don't have to provide a privilege log until and unless the  
9 Judge or the fact finder in the case determines that the  
10 other objections are inapplicable?

11 MR. DOWNEY: Well, it seems to me that --  
12 actually, I don't know enough to -- to really answer that  
13 question. I -- I know when I propound my discovery, I  
14 always have a specific question that says, If you claim a  
15 privilege, I need to know these, you know, six or seven  
16 things. Okay.

17 COMMISSIONER JARRETT: Mr. Downey, I have a  
18 question. Did I hear you correctly when you said that  
19 it's inappropriate to ask the party to address questions  
20 about their expert witnesses, I mean, as far as the  
21 information?

22 MR. DOWNEY: I -- I think you heard me  
23 correctly. What I was saying and maybe I didn't say it --

24 COMMISSIONER JARRETT: Say it again if you  
25 would.

1           MR. DOWNEY: Yeah. I will. The Rules of Civil  
2 Procedure say there are three things you can ask for other  
3 than in a deposition, and I laid those out, the identity  
4 and qualifications of the expert, the hourly deposition  
5 fee of the expert and then the general nature of the  
6 subject matter upon which the expert is going to testify.

7           Anything else that you want out of that expert,  
8 you have to obtain by deposition. And what -- what has  
9 happened here is the MEUA has essentially determined what  
10 areas of inquiry it would go into on a deposition. And  
11 instead of incurring the expense itself of taking the  
12 deposition, it's basically just served those questions on  
13 my client so that my clients can basically depose their  
14 expert and then -- then answer the requests.

15           COMMISSIONER JARRETT: Okay. Who is Mr. Chris?

16           MR. DOWNEY: He is -- as I understand it, he's  
17 the only witness who has testified on behalf of the MEUA.

18           COMMISSIONER JARRETT: All right. And he is an  
19 expert witness? Mr. Woodsmall, you could answer that.

20           MR. WOODSMALL: We're presenting him as an  
21 opinion witness. So he makes opinions. So we will -- the  
22 Commission will ultimately make that decision. But it is  
23 our --

24           COMMISSIONER JARRETT: He's being offered as an  
25 expert witness?

1 MR. WOODSMALL: Absolutely.

2 COMMISSIONER JARRETT: All right. Well, MIEC  
3 served Data Request MIEC 1-2 to Midwest Energy Users  
4 Association regarding the testimony of Mr. Chris from  
5 lines 17 of page 7 through line 15 of page 8.

6 Would Mr. Chris nevertheless agree that the  
7 results of MIEC's recommendation as set forth in Columns 4  
8 and 5 of each of pages 1 through 4 of revised Schedule  
9 MEB-COS-7 provide a more favorable outcome to the large  
10 GS/small primary class than does the recommendation of any  
11 other party filing testimony on this issue?

12 Is -- is that the name of the witness and the  
13 qualifications like you said? Isn't -- aren't you asking  
14 MEUA questions about their expert witness's testimony?

15 MR. DOWNEY: It sounds like it. I'm not  
16 familiar with -- with that particular DR that -- to which  
17 you're referring.

18 COMMISSIONER JARRETT: It more than sounds like  
19 it. It is.

20 MR. DOWNEY: Okay. And it very well may be  
21 objectionable if they objected, just like a number of the  
22 24 DRs proposed to Mr. Brubaker were objectionable. We --  
23 we objected. But we still answered 18 of the 24.

24 COMMISSIONER JARRETT: So if they're  
25 objectionable, why didn't -- why didn't MIEC submit those

1 if they knew they were objectionable?

2 MR. DOWNEY: Pardon me again?

3 COMMISSIONER JARRETT: Why did MIEC submit that  
4 if your position is that that's not discoverable? Why  
5 would you submit a frivolous data request?

6 MR. DOWNEY: Well, I don't know. It may have  
7 been answered. And -- and I don't blame Mr. Woodsmall's  
8 client for trying to short-circuit things, especially in a  
9 case like this.

10 COMMISSIONER JARRETT: Well, I'm not talking  
11 about Mr. Woodsmall. I'm talking about MIEC's data  
12 request.

13 MR. DOWNEY: And I certainly wouldn't blame the  
14 MIEC for doing the same thing if Mr. -- whoever received  
15 that DR objects and they object on the basis of the Rules  
16 of Civil Procedure, well, then, we would have to take a  
17 deposition.

18 COMMISSIONER JARRETT: Yeah. But you're not  
19 answering my question. You just told me that this is  
20 objectionable, and you know it's objectionable. So why  
21 did you submit it knowing it was objectionable?

22 MR. DOWNEY: I wasn't involved in submitting  
23 that, so I don't know. Perhaps whoever submitted it  
24 didn't -- didn't think about this issue.

25 COMMISSIONER JARRETT: All right. I don't have

1 any further questions on that. Thank you, Mr. Downey.

2 MR. DOWNEY: With regard to the issues in front  
3 of the Commission right now, there are 11 DRs submitted to  
4 each of the 17 MIEC members other than Noranda. There are  
5 66 DRs submitted to Noranda. They number 63, but -- but  
6 DR 1.32 actually has four separate questions. There are  
7 four DRs labeled or numbered 1.32.

8 In addition, in Round 2, there are two DRs to  
9 Noranda. In Round 3, there are three more DRs to Noranda.  
10 And then you have 24 DRs directed at Mr. Brubaker. Almost  
11 every DR was objected to. But many of the DRs were  
12 answered nevertheless, and you would not get that flavor  
13 from reading the briefing in this case.

14 There is no DR that MIEC or Noranda did not  
15 either timely object to or answer. So under Rule 61,  
16 there is no claim or cause even for submitting a request  
17 for sanctions.

18 There are three Motions to Compel, compel  
19 answers to six of the 24 questions to Brubaker that  
20 Mr. Brubaker did not answer, compel answers to the 11 DRs  
21 to the MIEC members, and to compel answers to many of the  
22 DRs submitted to Noranda.

23 So far, you have eight briefs. Hopefully, you  
24 won't receive any more briefs on these motions. Most of  
25 these DRs, we submitted multiple objections. From the

1 briefing, you -- what you're going to find is that the  
2 MEUA picks the objection they most want to respond to and  
3 ignores the other objections.

4           So we may object that something is far beyond  
5 the scope of discovery because it will not lead to  
6 anything relevant in this case. We may also object that  
7 something is attorney/client. You might see in the  
8 briefing that only one of our objections is addressed. I  
9 hope to address them all today.

10           At -- at issue here, really, is Mr. Brubaker's  
11 revised testimony where he advances a 20 percent move to  
12 class cost of service for all the classes, modified to  
13 move Noranda to class cost of service immediately.

14           He prepared an exhibit to show how the  
15 Commission could set rates if it determined to grant  
16 Noranda's since withdrawn request that it receive a \$27  
17 per megawatt hour rate. But he did not advocate that  
18 rate, nor did the MIEC advocate that rate. And I -- and I  
19 think that's a fact that Mr. Woodsmall did not recognize.

20           There is a schedule attached to Mr. Brubaker's  
21 testimony that determines if you were to grant that \$27  
22 rate, here's how that rate could be spread out over all  
23 the cases.

24           Mr. Brubaker also has a schedule that suggests  
25 how a \$300 million rate increase to Ameren would be spread

1 out over all the classes. He didn't advocate that either.  
2 What Mr. Brubaker advocated was a move for Noranda to cost  
3 of service.

4 While Noranda did initially request a \$27 per  
5 megawatt hour rate, it has withdrawn that rate. Contrary  
6 to Mr. -- what Mr. Woodsmall said, that fact has been very  
7 clearly established in such -- responses to subsequent  
8 DRs, in particular, DR 2.1 and 2.2.

9 The DRs and the responses are prominently  
10 mentioned in our opposition brief to the Motion to Compel  
11 for Noranda, nevertheless, in the reply brief. The MEUA  
12 again ignores that fact.

13 So the \$27 rate is simply not requested by any  
14 party in this case. It's wholly outside the scope of  
15 discovery. It's irrelevant. Yet the MEUA is requesting  
16 my clients to perform all sorts of studies and  
17 calculations regarding a \$27 rate that's -- that no one is  
18 requesting.

19 The discovery at issue here in these motions  
20 were precipitated by three things, basically, that seem to  
21 be of interest to the MEUA. One is Noranda's joinder of  
22 the MIEC. Two, the MIEC's support of a cost of service  
23 rate from Noranda at this time. And, three, Noranda has  
24 since withdrawn requests for the below cost rate.

25 The discovery has utterly nothing to do with



1 revenue requirement. And, really, the question for you  
2 today is whether or not any of this discovery that my  
3 clients have not already answered -- and keep in mind,  
4 some of these requests to compel are to compel answers to  
5 DRs that my clients have already answered.

6 The question here today is whether any of these  
7 unanswered DRs are at all relevant to rate design in this  
8 case. First, the discovery from the MIEC members. That's  
9 11 DRs to each member other than Noranda.

10 Our primary objection to that discovery is that  
11 it's beyond the scope of discovery. It's not going to  
12 lead to any admissible fact -- any fact that anyone would  
13 care about. In fact, I wonder how Mr. Woodsmall would do  
14 anything with the information other than to just chuck it  
15 in the trash can.

16 COMMISSIONER DAVIS: Well, wait, Mr. Downey.  
17 Can I -- can I -- can I -- back up here. I mean, I know  
18 you're an intermittent visitor here at the Commission, so  
19 are you familiar with the MGE case that is about to  
20 conclude?

21 MR. DOWNEY: I am not. And if this has to do  
22 with the customer cards --

23 COMMISSIONER DAVIS: I was going to ask that.

24 MR. DOWNEY: You had mentioned something --

25 COMMISSIONER DAVIS: Omniscient.

1                   MR. DOWNEY:  -- at the agenda meeting, and we  
2   furiously were trying to figure out what that was about.  
3   And, unfortunately, we don't know.

4                   COMMISSIONER DAVIS:  You don't know.  Okay.  
5   Okay.  Well -- you know, can I -- Mr. Woodsmall, you are  
6   -- you're astute of Commission activities, are you not?

7                   MR. WOODSMALL:  I'm still a student.  Yes.  I  
8   haven't graduated.

9                   COMMISSIONER DAVIS:  Okay.  All right.  You --  
10  did you observe the -- the MGE discussions about customer  
11  comment cards and --

12                  MR. WOODSMALL:  Yeah.  I wasn't an active  
13  participant, but yes.

14                  COMMISSIONER DAVIS:  Do you recall that those  
15  comment cards were -- were, I believe, admitted to show  
16  the mental state of the customers?

17                  MR. WOODSMALL:  You're right.  And I believe  
18  this is analogous.  And I'll explain that.  I believe --  
19  if that's where you're going.

20                  COMMISSIONER DAVIS:  That's what I was trying to  
21  get to.  Mr. Mills --

22                  MR. WOODSMALL:  The state of mind was relevant  
23  to those witnesses in those cases.  The state of mind of  
24  Mr. Brubaker is relevant in this case.  And his state of  
25  mind is, in some part, reflected in the data requests that

1 I'm trying to get at here.

2 As I told you, his second recommendation to --  
3 to take Noranda to cost of service is not even his  
4 recommendation. It was compelled on him, if you will, by  
5 MIEC. He tells us that in that data request. He says  
6 it's a policy decision.

7 SO I'm trying to ask data requests to find the  
8 -- the basis for that and -- and find how that affects his  
9 state of mind. You'll see other data requests going to  
10 his compensation. I'm trying to determine how much  
11 Mr. Brubaker has been enriched by Noranda joining MIEC and  
12 how that may have affected his state of mind because,  
13 certainly, he didn't make the same recommendation in the  
14 last two cases.

15 In the last two cases, he made a one-step  
16 recommendation to move all classes towards their cost of  
17 service. Suddenly, Noranda joins MIEC, Noranda enriches  
18 his pocket. And he's willing to take a second step to  
19 move Noranda entirely to the cost of service.

20 COMMISSIONER GUNN: There are two questions  
21 here. And it's an interesting point, and I think state of  
22 mind is an interesting point. But the question is -- is  
23 whether -- the secondary question is -- is, rather, if  
24 state of mind is relevant is whether the DRs is the  
25 appropriate format to find out what state of mind is or

1     whether a deposition is appropriate.

2                   MR. WOODSMALL:   And -- and I -- there is  
3     certainly some debate on that.   And I believe Mr. Downey  
4     is wrong.   One, he -- he's used those same data requests.  
5     So --

6                   COMMISSIONER GUNN:   But that's -- that's two  
7     wrongs don't make a right.   So just the fact that somebody  
8     else did something wrong doesn't necessarily mean that you  
9     couldn't object and be upheld on that -- on that opinion.  
10    So the law -- if it's appropriate, it's appropriate.   If  
11    it's not appropriate, it's not appropriate.

12                  MR. WOODSMALL:   All I'm saying it's inequitable  
13    for him to raise it.   That said, I believe Southwestern  
14    Bell states that that data requests are okay.   If  
15    Southwestern Bell was merely designed to say that  
16    interrogatories are okay, why did the Commission even come  
17    up with data requests?

18                  MR. ROAM:   If I may -- may interject just  
19    briefly, the discussion about the merits of data requests  
20    to experts, Brubaker -- Mr. Brubaker answered 18 in  
21    explicit detail offering extensive analysis to that -- to  
22    -- to 18 of the 24 data requests served on an expert.

23                  He objected to the most egregious of those data  
24    -- of those data requests.   Our argument is that there is  
25    a scope -- even if data requests were appropriate to be

1 served on an expert, it -- they don't substitute for a  
2 deposition. There's -- they're not limitless. The scope  
3 of discovery to an expert witness is not limitless. And  
4 so with respect to --

5 COMMISSIONER KENNEY: Well, that's not your best  
6 argument. I mean, if they're appropriate, they're  
7 appropriate. I mean, if -- be careful because if you're  
8 going to concede to those 18 that it's appropriate, it's  
9 appropriate.

10 MR. ROAM: We're not conceding that they're  
11 appropriate. Nevertheless, despite their impropriety, he  
12 answered in explicit detail 18 of them and objected to  
13 only the most egregious and the ones that had the littlest  
14 to do with the issues in this case.

15 So I -- I don't think that -- I -- I don't think  
16 that an over-emphasis on that particular issue is going to  
17 -- is going to be that fruitful because there are only six  
18 that he objected to.

19 MR. DOWNEY: Commissioner Kenney, to answer your  
20 question, all -- and it may be clarify a point. There  
21 were objections made to all 24.

22 COMMISSIONER KENNEY: Right.

23 MR. DOWNEY: Okay? Without waiving the  
24 objections, Mr. Brubaker answered 18 of them.

25 COMMISSIONER KENNEY: In the spirit of

1 cooperation and out of the kindness of his heart and such?

2 MR. DOWNEY: Spirit of cooperation.

3 COMMISSIONER KENNEY: Right. Is there a joint  
4 defense in common interest agreement that's reduced to  
5 writing somewhere?

6 MR. DOWNEY: We've -- and you asked that  
7 question last week as well. And we did a lot of research  
8 on that.

9 COMMISSIONER KENNEY: You did research on  
10 whether it exists or not or ---

11 COMMISSIONER DAVIS: Either there is one or  
12 there isn't one.

13 COMMISSIONER KENNEY: Right.

14 MR. DOWNEY: There is one, but none is required  
15 because all of the clients are represented by the same  
16 attorney.

17 And in the footnote to one of our briefs, we lay  
18 out the cases that discuss the -- the difference between  
19 the joint defense situation privilege and the --

20 COMMISSIONER KENNEY: Common interests?

21 MR. DOWNEY: Yeah. Common interests.

22 COMMISSIONER KENNEY: No. And I don't -- a  
23 writing isn't required. And I -- and I know the case law  
24 says that and -- but -- but it's -- it's helpful. And in  
25 the absence of a written agreement, is there -- is there

1 -- is there any party that can provide an affidavit that  
2 says that the parties intended the common interest  
3 agreement to apply and that they were going to work  
4 cooperatively?

5 Because an oral agreement is equally as  
6 applicable. But as it stands right now, all we have is  
7 the self-representations of MIEC that such a privilege  
8 exists.

9 MR. ROAM: May I interject on this one?

10 JUDGE WOODRUFF: You need to use your  
11 microphone.

12 MR. ROAM: I'm sorry. Do I need to push the  
13 button?

14 CHAIRMAN CLAYTON: While he's dealing with the  
15 microphone, I'm going to -- it would be my inclination  
16 that we work this through to conclusion and delay agenda  
17 from starting. Is there any objection from my colleagues  
18 of doing that?

19 COMMISSIONER KENNEY: I have none.

20 COMMISSIONER GUNN: No.

21 CHAIRMAN CLAYTON: We'll call upstairs. Please  
22 continue, and we'll -- we'll work through until the  
23 conclusion of the oral argument.

24 MR. ROAM: If I can just clear up -- get the  
25 microphone to work.

1 JUDGE WOODRUFF: I think it's working.

2 MR. ROAM: Do I hold it down?

3 MR. MILLS: No.

4 MR. ROAM: So there is the joint defense  
5 doctrine and the community of interest doctrine with a lot  
6 of overlay on this.

7 There is a different doctrine that applies in  
8 this case, and that's the co-client doctrine or the joint  
9 defendant doctrine, which is unique and different from the  
10 joint defense doctrine.

11 The joint defense doctrine and the community of  
12 interest doctrine applies when there are multiple parties  
13 who have retained multiple attorneys and those multiple  
14 attorneys are allowed to exchange information with each  
15 other without waiving the privilege.

16 In this case, multiple parties have retained  
17 only one attorney. It's a -- it's a different doctrine?  
18 I --

19 COMMISSIONER KENNEY: So the joint defense and  
20 common interest doctrine, those two doctrines are  
21 inapplicable?

22 MR. ROAM: We don't reach -- we don't have to  
23 reach those doctrines because in this case, it's a joint  
24 -- they are joint defendants or joint parties. Co --

25 COMMISSIONER KENNEY: But the case as you guys



1 set out in your footnote went to the joint defense and  
2 common interest doctrine, not the co-defendant doctrine.

3 MR. ROAM: The footnote describes -- I think  
4 Teleglobe is the best case on point to describe the  
5 difference between the co-client -- the co-client doctrine  
6 -- or let's just call it the joint defendant doctrine or  
7 the joint client doctrine and the joint defense doctrine.

8 So the joint defense doctrine and the community  
9 of interest doctrine, those contemplate multiple parties  
10 with multiple attorneys, separately retained attorneys  
11 that are allowed to communicate with each other without  
12 waiving the privilege.

13 In this case, that's not the -- that's not the  
14 situation. All of the parties have retained one attorney.  
15 So there's not a requirement that there's an agreement  
16 between the separate parties because they have -- they've  
17 all retained one -- one counsel.

18 It's -- Teleglobe can describe it much more --  
19 but the -- but the judge in that case basically says, We  
20 don't reach the joint defense or the -- or the community  
21 of interest doctrine when multiple parties retain single  
22 counsel.

23 COMMISSIONER KENNEY: What's the citation for  
24 that case?

25 MR. ROAM: That's the Teleglobe -- let me see.

1 Which -- I'm trying to remember which reply this is in.

2 COMMISSIONER KENNEY: Do you see -- do you see  
3 which -- which reply that's in? Or sorry. Which  
4 opposition that's in?

5 COMMISSIONER DAVIS: Well, while we're -- while  
6 we're looking for that, can I --

7 MR. DOWNEY: It's page -- I'm sorry.

8 COMMISSIONER DAVIS: Go ahead, Mr. Downey.

9 MR. DOWNEY: Page 11 of our opposition to the  
10 Noranda Motion to Compel, Footnote 3.

11 COMMISSIONER GUNN: Can you read that to us?  
12 Can you read us the cite?

13 MR. DOWNEY: Pardon me?

14 COMMISSIONER GUNN: Can you read us the cite,  
15 the cite to Teleglobe?

16 MR. DOWNEY: It looks like it's 493 Fed 3rd 345  
17 at page 363.

18 MR. ROAM: It -- the same principles can be  
19 found in the third restatement of law governing lawyers,  
20 Section 75.2.

21 JUDGE WOODRUFF: If you want to go ahead,  
22 Mr. Downey.

23 MR. DOWNEY: Commissioner Kenney, I don't want  
24 to -- I know you're reading the footnote now. I don't  
25 want to beat a dead horse here, but Southwestern Bell

1 Telephone does not address the issue here, which is  
2 whether DRs preempt Rule 56.01.

3 That seems to be the argument that MEUA is  
4 saying is because the Commission has allowed for DRs, the  
5 use of DRs, you can use DRs in lieu of depositions to  
6 obtain opinions and facts held by experts.

7 COMMISSIONER KENNEY: And it's, therefore, your  
8 assertion that there aren't any -- that you can't obtain  
9 discovery of an expert through DRs?

10 MR. DOWNEY: Yes. My -- my opinion is --

11 COMMISSIONER KENNEY: That's a general  
12 proposition.

13 MR. DOWNEY: Southwestern Bell doesn't address  
14 it.

15 COMMISSIONER KENNEY: Sure.

16 MR. DOWNEY: Second of all, you turn to your  
17 regulation. Your regulation incorporates the Rules of  
18 Procedure. You look at Rule of Procedure 56.0(b)(4), and  
19 it says, This is the only way you can get information from  
20 experts if the other side objects.

21 I mean, you can -- if the other side doesn't  
22 object, and produces it, well, obviously, then, you know,  
23 it can be viable.

24 COMMISSIONER JARRETT: Judge, may I inquire of  
25 Mr. Dottheim and Mr. Mills?

1 JUDGE WOODRUFF: Sure.

2 COMMISSIONER JARRETT: The type of -- does Staff  
3 routinely ask the company clarifying questions of its  
4 expert's testimony?

5 MR. DOTTHEIM: Yes.

6 COMMISSIONER JARRETT: Mr. Mills, do you do  
7 that?

8 MR. MILLS: Absolutely. For 22 years, both from  
9 a practitioner's point of view and from ruling on Motions  
10 to Compel the Bench, I have never heard this argument  
11 before. We have always used data requests as a tool for  
12 discovery of expert witnesses in lieu of depositions,  
13 which are unwieldy and costly and, particularly, when  
14 have you as many parties as there are involved in  
15 Commission cases, exceptionally unwieldy and costly.

16 Data requests have always been, in my  
17 experience, used in lieu of depositions rather than, you  
18 know, as MIEC is suggesting here that you can take them up  
19 to a point and then suddenly there's a cut-off and you  
20 have to go to a deposition. We've always used them as --  
21 as they've been used in this case.

22 COMMISSIONER JARRETT: Mr. Dottheim?

23 MR. DOTTHEIM: Yes, Commissioner. And I think  
24 probably I should ask for some time myself because there  
25 is more than the Southwestern Bell case. I can cite the

1 Commissioners to another case law, statutory provisions  
2 that address this matter.

3 And this is -- as I think the Commissioners  
4 sense or know, this has extremely broad implications for  
5 where this oral argument is going.

6 COMMISSIONER DAVIS: In either direction.

7 MR. DOTTHEIM: Yes. Yes. And -- and there --  
8 there is more case law than the Southwestern Bell case.  
9 And, in fact, the -- the Commission has even touched upon  
10 this in a -- in a certain manner in an order it issued in  
11 December of last year.

12 And I'm glad to see that Mr. Fischer is in the  
13 room who represents Kansas City Power & Light and KCP&L  
14 Greater Missouri Operations Company.

15 The Commission issued an order in December of  
16 last year on a discovery matter in -- in File No.  
17 ER-2009-0089 regarding the use of data requests, which I  
18 I'd also like to address and would suggest that the  
19 Commissioners, when you ultimately issue your ruling, you  
20 might want to refer back to that case because I'm also  
21 going to suggest that I'm not really sure that you got  
22 that ruling correct.

23 I'd like to -- I'd like to -- I'd suggest that  
24 you take a little different look at it. In fact, these  
25 other matters that I'd like to go into, I actually had

1    been preparing something to file with the Commission in a  
2    separate case. And I had not anticipated that I would be  
3    offering to use it in -- in this proceeding.

4               But if I may beg everyone's patience and with --  
5    when Mr. Downey or at the appropriate time, I'd like to  
6    address some matters myself.

7               COMMISSIONER JARRETT: Well, thank you,  
8    Mr. Dottheim and Mr. Mills. I appreciate your answers to  
9    my question. And, Judge, thank you for your indulgence.

10              JUDGE WOODRUFF: Back to Mr. Downey.

11              MR. DOWNEY: Okay. The specific 11 DRs to each  
12    MIEC member, a number of them request a below cost of  
13    service rate, which no one is requesting at this time.  
14    DRs 1.2 and 1.4. Answers have no bearing on any issues in  
15    the case.

16              Noranda no longer seeks a below cost rate. I  
17    think the MEUA misunderstands Mr. Brubaker's testimony in  
18    any event because Mr. Brubaker advocated a cost of service  
19    for Noranda.

20              Some of the DRs seek to question whether the  
21    individual clients support the positions taken on their  
22    behalf in this case. Yet their position is already clear.

23              Brubaker's testimony on behalf of the MIEC and  
24    the members is very clear that rates should be based on  
25    cost of service. See pages 3 and 4 of his testimony. Yet

1 DR 1.1 asked if rates should be based on cost. It's  
2 simply busy work for our clients to respond to something  
3 like that when the record is so clear.

4 The Brubaker testimony and DR responses are  
5 clear that the MIEC agreed to a moot cost of service for  
6 Noranda.

7 DRs 1.6 and 1.10 seek to know the MIEC member's  
8 position on the appropriate rate for Noranda and whether  
9 the MIEC member has ever taken a position alone or as part  
10 ever a group on the appropriate rate for the aluminum  
11 smelter. Again, not -- not relevant to any issue in this  
12 case.

13 Some of the DRs seek to know the circumstances  
14 under which Noranda joined the MIEC. Those would be 1.5,  
15 1.7 and 1.11. Again, simply not relevant to any issue in  
16 the case.

17 Brubaker's responses to DRs actually does show  
18 that his recommendation to move Noranda to cost was based  
19 upon three things. Electricity is a very high cost of  
20 Noranda's production, high percentage of the cost of its  
21 production, the closure of domestic smelters and that  
22 product demand is down while the supply is up.

23 Again, given -- given those responses, further  
24 responses to 1.5 and 1.7 and 1.11 really serve no purpose  
25 in the case.

1           Other DRs seek information simply not relevant  
2 to the case. 1.8 and 1.9 seek to identify all  
3 jurisdictions and the service provider in the jurisdiction  
4 where each MIEC member receives electric service and the  
5 rate schedule under which it receives a service under --  
6 from Ameren.

7           Again, none of that is relevant to any issue in  
8 this case. And for many of these clients that do business  
9 domestically in many, many jurisdictions and world-wide,  
10 this would be an oppressive DR to even respond to.

11           COMMISSIONER GUNN: But if -- if the purpose is  
12 to determine whether they have taken positions different  
13 from the position that they're taking in this case, for  
14 impeachment purposes, isn't that a relevant inquiry?

15           MR. DOWNEY: We would submit it's -- it's not.  
16 I mean, you can impeach their position. But whether they  
17 have or haven't taken a similar position in another  
18 case --

19           COMMISSIONER GUNN: Is irrelevant?

20           MR. DOWNEY: That's our position.

21           COMMISSIONER DAVIS: Well -- and, Mr. Downing,  
22 let me go back to 1.3. Please identify the individual at  
23 the company that is most knowledgeable to testify on  
24 company names, position on class cost of service/rate.  
25 And -- so you don't think it's -- you don't think it's



1 appropriate that Mr. Woodsmall should be able to -- to  
2 bring in somebody from -- from each industrial consumer  
3 and ask them questions about -- about their position?

4 MR. DOWNEY: I -- I think, certainly, those two  
5 areas of -- of this case, cost of service, rate design,  
6 obviously, those are expert witness areas. You've got a  
7 lot of experts testifying.

8 What they're -- in addition to that being not  
9 germane to the case, what they're asking for, in my  
10 opinion, is expert witness designations for non-testifying  
11 experts. Again, they're -- in my opinion, they're asking  
12 for your advisors.

13 COMMISSIONER GUNN: But they're asking for  
14 corporate representatives from parties.

15 COMMISSIONER DAVIS: Who is the client? I mean,  
16 if the client's the company, there's still got to be  
17 somebody that says yes or no.

18 MR. DOWNEY: There is someone that says yes or  
19 no. But -- but what you're saying here is please identify  
20 the person at your company that has the most expertise in  
21 this area so that we can examine them.

22 And yet, that -- that person would be -- I mean,  
23 if they are an expert, if there is someone that has that  
24 expertise, they're not a testifying expert because they  
25 haven't been designated as such. They -- they could be an

1     advising expert. But, again, under the Rules of Civil  
2     Procedure, you can't seek their identity or their  
3     information.

4                 COMMISSIONER GUNN: If you qualify them as  
5     expert. But if you qualify them as parties, you can --  
6     you can ask for them to --

7                 COMMISSIONER KENNEY: Like a 30-B6 deposition.  
8     Just designating the person at the company that can  
9     testify as to X, Y, Z matters. How is that not  
10    appropriate?

11                MR. DOWNEY: I think it's appropriate,  
12    certainly, for facts. But these are ex -- these are areas  
13    of expert inquiry.

14                COMMISSIONER GUNN: So you're telling -- you're  
15    arguing that -- that a -- when a company is asked about  
16    class cost of service -- they're not saying that this  
17    person has to be the most knowledgeable of anyone else.  
18    They're saying, Who is the most knowledgeable out of you  
19    as a party that could testify on this stuff? You're  
20    saying that that person doesn't exist anywhere except as  
21    an expert?

22                MR. DOWNEY: No. I -- certainly, there are  
23    people that exist.

24                COMMISSIONER GUNN: So that's what the question  
25    is asking. The question is asking who is the person in

1 your company that is the most knowledgeable?

2 MR. DOWNEY: Okay. Perhaps we anticipated the  
3 next question, which is what are their opinions on this?

4 COMMISSIONER GUNN: You always get in trouble  
5 when you assume what the next question is. I mean --

6 COMMISSIONER KENNEY: Is that question any  
7 different than what would be required under a 30-B6  
8 deposition, as you understand? I mean, is that any  
9 different than just asking what you would ask any other  
10 corporation any other sort of civil litigation, designate  
11 the person at your corporation that is most knowledgeable  
12 about the issues that -- the facts that are at issue in  
13 this case.

14 MR. DOWNEY: What -- the distinction I make is  
15 in one case you're asking about facts. And in the other  
16 case, perhaps we anticipated you're asking for opinions.

17 COMMISSIONER GUNN: But the -- but the question  
18 doesn't make that distinction, does it?

19 MR. DOWNEY: I understand. The question asks  
20 for the identity. There's also -- there's a number of  
21 questions that talk about a below cost of service rate.  
22 And Mr. Woodsmall says, Well, you -- you've got a second  
23 step in the process under Mr. Brubaker's testimony. It's  
24 -- first move everybody 20 percent closer to rates -- cost  
25 of service. Then move Noranda to cost of service.

1           He says because it's a second move, all of his  
2   questions about -- about below cost of service and \$27  
3   rate are somehow germane to the -- to the case. They're  
4   simply not. He did not ask, you know, what supports your  
5   move to cost of service for Noranda?

6           Actually, he did ask that question, and that  
7   question in different DRs was answered. DR 1.11 is the  
8   last one I'll address. To me, when you look up the  
9   definition of work product in Black's Law dictionary, you  
10   see a picture of the type of information that is sought  
11   under 1.11. You know, please provide all of your -- your  
12   -- the lawyers' mental impressions about the positions  
13   taken on the case. So that's obviously objectionable. I  
14   know we have a lot of --

15           COMMISSIONER JARRETT: Mr. Downey, I didn't -- I  
16   want to ask, 1. 11, please provide all documents, e-mail  
17   or notes within the company's name, control or possession  
18   which discuss the positions to be taken in this case by  
19   MIEC or Noranda.

20           Now, I understand maybe some of those documents  
21   are between attorney and client, but maybe not all of  
22   them. He's not asking for just the ones that go to the  
23   attorneys. If there's internal documents from one of the  
24   companies between the President and the Comptroller, that  
25   may not be covered by the attorney/client privilege.

1                   MR. DOWNEY: We're talking work product, which  
2 is a tad bit different than attorney/client privilege.  
3 And I've got my -- my expert in the back of the room,  
4 which is why I brought him here today. It still can be  
5 work product if it's prepared in anticipation of  
6 litigation by the client.

7                   COMMISSIONER JARRETT: Maybe or maybe not. I  
8 don't know.

9                   MR. ROAM: If I could just weigh in on it just  
10 very briefly, that the -- the work product doctrine states  
11 that all documents made by or for a party in anticipation  
12 of litigation are going to be considered work product.

13                   So even if they're not communications between an  
14 attorney and a client, if they're prepared in anticipation  
15 of litigation by or for a party, then they're going to be  
16 --

17                   COMMISSIONER JARRETT: Right. But we're not  
18 going to know that without a log, are we?

19                   MR. ROAM: Right.

20                   COMMISSIONER JARRETT: I have no further  
21 questions.

22                   MR. ROAM: I think -- I think that by virtue of  
23 the way the question is deemed, the positions to be taken  
24 in this case, the question itself almost defines work  
25 product. So it's asking for documents that have been made

1 in preparation for this case.

2 JUDGE WOODRUFF: Go ahead, Mr. Downey.

3 MR. DOWNEY: I'm going to skip to the Brubaker  
4 discovery request just because there -- there are a few of  
5 them, and we can get through them quicker.

6 There were 24 DRs submitted to Brubaker. All of  
7 them were object to. Eighteen of them were nevertheless  
8 answered. The Motion to Compel deals with the remaining  
9 six. Those are DRs 1.2, 1.4, 1.5, 1.6 and 1.22.

10 Again, we believe that all of that discovery  
11 goes beyond the three areas that Rule 56.01 allows you to  
12 go into other than through a deposition. That was the  
13 basis of our objection. We think under Rule 56.01, that's  
14 a valid objection.

15 COMMISSIONER KENNEY: So assuming that they  
16 decided to take Mr. Brubaker's deposition, you wouldn't  
17 object to those questions and instruct your -- your expert  
18 not to answer, right? I mean, it's -- otherwise, it's  
19 information they can otherwise get.

20 MR. DOWNEY: Well, I think for purposes of  
21 speeding this up, there were other objections to those DRs  
22 in addition to that one. It's just that particular  
23 objection covered all these six DRs.

24 If -- if they're asking Mr. Brubaker for  
25 something that's totally, you know, beyond the scope of

1 this proceeding in his testimony --

2 COMMISSIONER KENNEY: I mean, invoices  
3 presumably would be in the file that they would request in  
4 the process of taking his deposition, right?

5 MR. DOWNEY: Yes.

6 COMMISSIONER KENNEY: Which would be the  
7 questions that are contemplated by 1.2?

8 MR. DOWNEY: Yes. I would assume that --

9 COMMISSIONER KENNEY: And that wouldn't  
10 otherwise be objectionable?

11 MR. DOWNEY: I think you're correct there.

12 COMMISSIONER KENNEY: Okay.

13 MR. DOWNEY: Okay. Moving to Noranda --

14 COMMISSIONER KENNEY: What about 1.4, cases in  
15 which he has testified? A list of cases, that would  
16 typically be something that would be included in his CV or  
17 his whatever listing of qualifications, right?

18 MR. DOWNEY: Yes. I would agree with that.

19 COMMISSIONER KENNEY: So some of these probably  
20 wouldn't fit squarely within any other objection. Would  
21 you agree with me on that?

22 MR. DOWNEY: I would agree.

23 COMMISSIONER KENNEY: Okay.

24 MR. DOWNEY: Okay. Moving to the 66 DRs  
25 proposed to Noranda, I'm not going to have time to discuss

1 every objection to every one of these, so I'm going to try  
2 and lump them into groups. DRs 1.5 through 1.13, 1.41 and  
3 1.43 all address the since withdrawn request for a below  
4 cost rate. We -- we believe those DRs are wholly  
5 irrelevant and beyond the scope of discovery.

6 The MEUA argues that the change in position of  
7 Noranda is not relevant because Noranda now seeks a cost  
8 of service rate. Again, it's the second move as the MEUA  
9 points to it. But all of these requests go to a below  
10 cost of service rate. They don't go to the second move of  
11 Mr. Brubaker with regard to cost of service.

12 DRs 1.1 through 1.4 and 1.48 seek work product  
13 regarding the identities and opinions of non-testifying  
14 experts. I think Commissioner Gunn asked questions about  
15 that earlier in the proceeding. And -- and under Rule  
16 56.01, I don't think that's appropriate.

17 Similarly, 1.53 through 1.62 seeks the  
18 information about the total compensation paid to the  
19 experts. Again, that's appropriate for deposition, not  
20 for interrogatories or DRs.

21 1.5 through 1.13, 1.33, 1.41 and 1.43 all seek  
22 information relating to, again, Noranda's request for a  
23 \$27 rate. That request has been withdrawn. It's not  
24 germane to the case.

25 1.15 through 1.19 seek opinions from testifying



1 experts and did not do so through depositions. Again,  
2 56.01. 1.20 and 1.21 seek information related to a  
3 privileged settlement communication at a prehearing  
4 conference. That's objectionable.

5 1.27 through 1.32 and 1.35 seek comparisons,  
6 analyses, projections and forecasts that are beyond the  
7 scope of the issues in the case. They would be unduly  
8 burdensome and time consuming to generate and are the  
9 types of complex analysis compiled by expert witnesses.  
10 Essentially, the MEUA is asking our clients to perform  
11 their studies for them.

12 1.36, they've sought to compel responses to  
13 1.36, 1.37 and 1.38. Those have all been answered  
14 already. 1.44 and 1.48, again, seek privileged  
15 attorney/client communications.

16 1.14, 1.22 through 1.26, 1.34, 1.39, 1.44, 1.46,  
17 47, 49, 50 and 63 all seek information outside the scope  
18 of discovery in this case. Does it matter if lay witness  
19 Ernhardt obtained service from Ameren? Does it matter how  
20 many employees Noranda has in each county of the state?  
21 Does it matter how much property tax Noranda pays for each  
22 county versus how much property tax it pays in total?

23 COMMISSIONER DAVIS: You don't think that  
24 matters?

25 MR. DOWNEY: The dollars by county?

1                   COMMISSIONER DAVIS: You don't think that  
2 matters?

3                   MR. DOWNEY: I don't think that's germane to the  
4 issues in this case, no. Noranda did offer testimony that  
5 it pays substantial property taxes that -- that -- that  
6 support the economy. But how much tax it pays to each  
7 county, I would submit that is not germane.

8                   COMMISSIONER DAVIS: Okay. Well, Mr. Downey,  
9 let me -- let me see if I can't help you focus here. My  
10 understanding is that Noranda says they want a special  
11 rate.

12                   What I heard Mr. Woodsmall say is maybe they are  
13 entitled to a special rate, but that special rate should  
14 only apply to southeast Missouri, places where they  
15 potentially could have employees living, paying taxes  
16 where they pay taxes, where they buy their supplies, et  
17 cetera.

18                   And -- and you may want to argue that, you know,  
19 there are only nine aluminum smelters left in the country  
20 or whatever, and that, you know, it's an issue of national  
21 security, nation-wide importance that we have one, and,  
22 therefore, they need this rate. And that's fine.

23                   But, you know, if Mr. Woodsmall wants to make  
24 that argument, I mean, don't you think that he should be  
25 entitled to that factual information?

1           MR. DOWNEY: You -- what you said was southeast  
2 Missouri. And the interrogatories or DRs don't ask about  
3 southeast Missouri. They say, We want to know -- we want  
4 you to categorize which county your employees live in, not  
5 just southeast Missouri because I think that the record's  
6 already clear how many employees they have in southeast  
7 Missouri, how much property tax.

8           COMMISSIONER DAVIS: Right.

9           MR. DOWNEY: The next DR is going to say, Please  
10 give the names of each and every employee and the one  
11 after that say we want their Social Security numbers. I  
12 mean --

13           COMMISSIONER GUNN: Here's what you can't do.  
14 You can't make objections to questions based on questions  
15 that you assume are going to come later. And that's --  
16 you've made that argument two or three times. And -- and  
17 the question's either relevant or it's not.

18           Mr. Woodsmall made a fairly compelling argument  
19 that said that they are -- that under an economic  
20 development rate that's applicable to Noranda that you  
21 should know the scope of that economic development in the  
22 State of Missouri. And, therefore, to determine whether  
23 or not it's localized is an appropriate line of inquiry.

24           So I think -- I think that's the point is  
25 whether or not the -- you believe it's relevant that

1 Noranda has an economic development benefit only in a  
2 limited scope of the state or across the State if Noranda  
3 is making the argument that they deserve -- they deserve  
4 an economic development rate.

5           You've made the argument two or three times  
6 about questions that are coming later, and those aren't  
7 before us. I mean, we need to focus on whether or not the  
8 questions that are asked are relevant. And -- and I  
9 think, you know, it's a really -- the information they're  
10 asking for doesn't appear right now for this to be unduly  
11 burdensome to determine what I think Mr. Woodsmall made  
12 was a fairly compelling argument that it's a worthwhile,  
13 albeit short determination and inquiry into the company's  
14 position.

15           MR. DOWNEY: I understand. We're not  
16 anticipating the next question here. Our objection is  
17 that the -- the level of detail you want by county for  
18 property taxes and -- and number of employees was  
19 irrelevant versus southeast Missouri.

20           COMMISSIONER DAVIS: Mr. Downey, what would you  
21 say if I told you that it is my recollection that similar  
22 data had been provided to the State Legislature in the  
23 past by Noranda?

24           MR. DOWNEY: I would have no response to that.  
25 I wouldn't know.

1                   COMMISSIONER DAVIS: Okay. But if they could  
2 produce it for the State Legislature, then they could  
3 certainly produce it for the Public Service Commission,  
4 could they not?

5                   MR. DOWNEY: I'm not -- actually, I assume they  
6 could produce it. The objection isn't that they can't.  
7 The objection was that it wasn't germane to the issues in  
8 the case just as, you know, what the executive stock  
9 options provide, what their compensation is.

10                  Every location anywhere where Noranda buys  
11 electricity, we want the identity of that location. We  
12 want the identity of the provider. It's not limited at  
13 all in scope. None of that seems relevant to us to rate  
14 design.

15                  JUDGE WOODRUFF: Mr. Downey, since you mentioned  
16 stock options, I do have one brief question.

17                  MR. DOWNEY: Sure.

18                  JUDGE WOODRUFF: Who is Mr. Scota?

19                  MR. DOWNEY: He is -- he's an executive with the  
20 company. I forget the exact title.

21                  JUDGE WOODRUFF: Okay. And --

22                  MR. DOWNEY: He may be Vice President or CFO.

23                  JUDGE WOODRUFF: Okay. And he did not provide  
24 testimony in this case; is that right?

25                  MR. DOWNEY: As far as I know, he has not.

1           MR. WOODSMALL: Your Honor, just to interject  
2 real quick, I had -- shortly after sending that, I  
3 realized Mr. Scota had not provided testimony. I -- it's  
4 mistakenly in here, but I had sent an e-mail to Ms.  
5 Vuylsteke saying I withdrew those two questions, so I am  
6 not seeking responses to those. Those were inadvertent.

7           JUDGE WOODRUFF: It would certainly be helpful  
8 for all the parties to inform the Commission if -- if  
9 these questions had been withdrawn because --

10          MR. WOODSMALL: Those are the only two.

11          JUDGE WOODRUFF: All right. Thank you.

12          MR. DOWNEY: The Commission has not been shy  
13 about asking questions. Are there any other questions of  
14 me? Thank you.

15          JUDGE WOODRUFF: All right. I'll let Public  
16 Counsel and Staff jump in here if they want to.

17          THE COURT REPORTER: Excuse me. I need to  
18 change paper real quick.

19          JUDGE WOODRUFF: All right. Take a short break.

20          COMMISSIONER JARRETT: Can we take a little  
21 break?

22          JUDGE WOODRUFF: All right. We'll come back at  
23 10:30.

24          (Break in proceedings.)

25          JUDGE WOODRUFF: All right. Let's go back on

1 the record. Before we took a break -- yes, sir.

2 MR. ROAM: Judge, before MEUA has an opportunity  
3 to reply, could we have maybe 30 seconds or just one  
4 minute to clarify one point that was stated in the -- in  
5 our -- in our --

6 JUDGE WOODRUFF: Go right ahead.

7 MR. ROAM: Okay. The -- this Commission cited  
8 State of Missouri, ex. rel. Sarah Ann Heiser versus  
9 Margaret Noland. It's Citation 692 SW to the 325. All of  
10 our -- all of our data, all of our objections, an  
11 over-arching objection to all of the data requests is that  
12 they were unduly burdensome to our client and that the  
13 information sought was so tangential to the issues of rate  
14 design -- many of them were so tangential to the issues of  
15 rate design that the burden of creating and producing them  
16 outweighs the -- the value, the probative value of the  
17 request -- or of the information.

18 And I just want to read from that case. And it  
19 says that the determination of the appropriate boundaries  
20 of discovery requests involve the pragmatic task of  
21 weighing the conflicting interests of the interrogator and  
22 the respondent.

23 Therefore, in ruling to -- upon objections to  
24 discovery requests, trial judges must consider not only  
25 questions of privilege, work product, relevance and

1 tendency to lead to the discovery of admissible evidence,  
2 but they should also balance the need of the interrogator  
3 to obtain the information against the respondent's burden  
4 in furnishing it. Included in this burden may well be the  
5 extent of an invasion of privacy.

6 That last line is actually not that germane to  
7 this case. But I would submit that this case -- and to  
8 the extent the Commission has an opportunity to just look  
9 over it, I think that this case speaks to the -- the  
10 discovery dispute at issue here.

11 Much of -- much of the information requested  
12 would create -- would require MIEC -- the individual  
13 constituents of MIEC to generate analyses, reports,  
14 calculations additional information that even if it were  
15 germane, we would submit it's overly burdensome in this  
16 case. And the information that it would produce would  
17 just be tangential, if relevant at all.

18 JUDGE WOODRUFF: All right. Did Staff or Public  
19 Counsel wish to make a brief statement at this point?

20 MR. MILLS: Judge, on my behalf, I really don't.  
21 I interjected a couple of times during the course of the  
22 questioning. I think I've made the points in response to  
23 questions from the Bench that I want to. If there are any  
24 other questions, of course, I'd be happy to answer them.  
25 But I don't have anything to volunteer at this point.



1                   COMMISSIONER JARRETT: Judge, I have a question.  
2   Mr. Mills?

3                   MR. MILLS: Yes.

4                   COMMISSIONER JARRETT: What do you think about  
5   the idea of having a Special Master appointed to go  
6   through these one by one with the parties?

7                   MR. MILLS: I think the use of a Special Master  
8   is particularly appropriate, I think, for privileged  
9   information. I think that's a -- a very -- I wouldn't say  
10  routine, but a common use of a Special Master.

11                  Another reason I think that you might want to  
12  consider using a Special Master is because having done  
13  some of these, they're extraordinarily time consuming for  
14  -- for the Administrative Law Judge.

15                  And I think just to share the burden, you may  
16  want to consider using a Special Master as well just  
17  because -- particularly when you've got a situation like  
18  this in which there are roughly a hundred data requests at  
19  issue with many different overlapping and sometimes  
20  separate objections to each, it could easily take days and  
21  days and days simply to sort through where you are.  
22  So I think the use of a Special Master is a very good  
23  idea.

24                  COMMISSIONER JARRETT: Thank you, Mr. Mills.

25                  COMMISSIONER GUNN: Can I -- I just want to --

1   you made it pretty clear, but I just want to ask a  
2   clarifying -- you know, just to say it again. You believe  
3   that DRs to experts is perfectly appropriate, and you  
4   actually believe that it's appropriate in lieu of -- of a  
5   deposition than any information that could be gleaned from  
6   a deposition not objectionable would -- would be allowed  
7   to be substituted with a DR request?

8               MR. MILLS: Yes. That's absolutely correct.  
9   And I think if you look at Commission's Rule 2.090, the  
10   first paragraph talks about the Civil Rules. The second  
11   paragraph talks about data requests. And there really is  
12   not necessarily a tie or a lead-in for one that says the  
13   use of DRs are, of course, subject to the use of -- the  
14   DRs in paragraph 2 in 2.090. There's nothing in there  
15   that says that they're limited by the use of a tariff --  
16   interrogatories as used in the Civil Rules.

17              MR. ROAM: If I can interject, paragraph 2  
18   contemplates DRs being served on parties. Every reference  
19   in paragraph 2 to -- and I'm not familiar with, you know,  
20   Commission proceedings. But paragraph 2 of that rule  
21   contemplates DRs being served on parties.

22              It -- it doesn't say anything about the  
23   proprietary of them being served on expert witnesses, for  
24   what it's worth. That's -- that's the language of the  
25   rule.

1           MR. MILLS: And that may be so. And, certainly,  
2 the practice has been for many years that you either  
3 submit them directly to an expert or you submit them to a  
4 party who then farms them out to the expert, and the  
5 expert answers them.

6           And in either event, the answers come from the  
7 experts rather than -- for example, most of these, you  
8 know, cases of the -- the parties have numerous experts.  
9 Some are experts in one area, some in another.

10           And many times, the proponent of a data request  
11 doesn't specify a particular expert, but the respondent to  
12 the data request figures out which expert is most  
13 appropriate, and that expert does answer the data request  
14 and signs it as provided in the rule.

15           COMMISSIONER GUNN: And so, essentially, you're  
16 saying that the practice has been that you do these DRs  
17 instead of taking a live deposition.

18           MR. MILLS: Exactly. Exactly.

19           COMMISSIONER GUNN: All right. Thanks.

20           JUDGE WOODRUFF: Mr. Dottheim?

21           MR. DOTTHEIM: Yes. There are a few things I'd  
22 like to -- to address. Earlier, I made reference to a --  
23 a ruling by the -- the Commission in File No.  
24 COMMISSIONER-2009-0089 that addressed in part data  
25 requests.

1           The ruling in that case is regarding in part  
2 relating to the use of data requests in a non-contested  
3 proceeding versus a contested proceeding. But I -- I -- I  
4 think there is still great relevance. And I think that  
5 the powers of the Commission even in non-contested  
6 proceedings is greater than what is stated in -- in that  
7 -- that order.

8           I actually have copies of that order with me.  
9 And for convenience, I can distribute copies to the  
10 Commissioners and the parties.

11           JUDGE WOODRUFF: Thank you. Go ahead.

12           MR. DOTTHEIM: And it's a December 9, 2009,  
13 Order regarding Staff's Motion to Compel in File No.  
14 COMMISSIONER-2009-0089.

15           And in that proceeding, Judge -- Regulatory Law  
16 Judge Harold Stearley, I do believe, did function in part  
17 as a Special Master. So the Commission has proceeded in  
18 that -- that manner even in a rather recent situation.

19           And I'd like to probably refer the commissioners  
20 to -- to page 6 where there is the excerpt of the  
21 Commission's rule on data requests. It doesn't contain  
22 the -- the -- the times for which data requests are  
23 required to be responded in or objected to. And there is  
24 -- their excerpt, it's Section 386.450 where I believe the  
25 Commission found that it had the authority in

1 non-contested proceedings to use data requests. I -- I  
2 think -- and excuse me.

3 Judge Woodruff, I don't know if you were going  
4 to say something or ask me something?

5 JUDGE WOODRUFF: No.

6 MR. DOTTHEIM: I'm sorry. I -- I think the --  
7 the Southwestern Bell case that's been referred to a  
8 number of times today, which is -- which is 645 Southwest  
9 Second 45, refers to other statutory provisions which I  
10 think, frankly, are as applicable in -- in non-contested  
11 proceedings as in contested proceedings.

12 And the -- Southwestern Bell case was a  
13 contested proceeding. It was a Southwestern Bell rate  
14 increase case. I thought Mr. Downey might even make note  
15 that it was a telecommunications case as opposed to an  
16 electric case.

17 But the Court in that -- in that case found that  
18 the particular provision under Chapter 392 for  
19 telecommunications has a counterpart in Chapter 393 for  
20 electric, gas, water and sewer corporations.

21 And in particular, the provisions that the --  
22 the Western District Court of Appeals found that the  
23 Commission had authority to utilize data requests are  
24 Sections 386.410.1, 392.210.1 and 393.140(9).

25 And 386.410.1 states in part, In all

1 investigations, inquiries or hearings, the Commission or  
2 Commissioner shall not be bound by the technical rules of  
3 evidence.

4 Of course, the Commission is bound by the  
5 fundamental rules of evidence. Oftentimes, when attorneys  
6 quote to the Commission that section, they don't make the  
7 distinction between the technical rules and the  
8 fundamental rules of -- of evidence.

9 393.140(9) and Section 392.210.1 are almost  
10 identical. But I'll -- I'll read the pertinent language  
11 from the section that applies to electric utilities,  
12 393.140(9).

13 The Commission may require of all such gas,  
14 electric -- electrical, water and sewer corporations or  
15 persons specific answers to questions upon which the  
16 Commission may need information.

17 And, of course, under Section 386.240, The  
18 Commission may authorize any person employed by it to do  
19 or perform any act, matter or thing which the Commission  
20 is authorized by this chapter to do or perform.

21 So those are the -- the sections in particular  
22 that the Southwestern Bell Court in 1982 found persuasive.  
23 The Western District Court of Appeals also noted that  
24 rather -- that rather than the provisions of the  
25 Administrative Procedures Act controlling, Sections

1 393.140(9), 392.210.1 and 386.410.1 are special statutory  
2 provisions directed solely to proceedings before the  
3 Public Service Commission which are considerably different  
4 from and vastly more complicated than the type of  
5 proceedings involved in Chapter 536.

6 In fact, the Court commented that "The authority  
7 under Section 386.410-1 for the Commission to adopt its  
8 own rules of procedure seems to be a rather un -- uncommon  
9 grant to an administrative agency.

10 There are other cases which I -- I previously  
11 alluded to, which are not cited in the Southwestern Bell  
12 case. One of those cases is what I refer to as the first  
13 UCCM case, which deals with Callaway 1 as opposed to the  
14 fuel adjustment clause. And it's a citation State, ex  
15 rel, Utility Consumers Council of Missouri, Inc., the  
16 Public Service Commission, 562 Southwest Second 688, 693,  
17 Footnote 11, St. Louis District, Missouri Court of  
18 Appeals, 1978.

19 The Western -- excuse me. The St. Louis  
20 District Court of Appeals said, "Chapter 36, the Missouri  
21 Administrative Procedures Act, supplements Chapter 386  
22 regulating the Public Service Commission except where in  
23 direct conflict with it. See Patterson v. Thompson, 277  
24 Southwest Second 314, 317(5)(MOAP 1955). Thus, procedures  
25 delineated in Chapter 536 for a hearing and for the

1 presentation of evidence during a hearing apply unless a  
2 contrary provision exists in Chapter 386.

3 Well, of course, the various references to  
4 Chapter 386, the Commission's statutes are also in 392 and  
5 in 393. When the Public Service Commission was created,  
6 there wasn't a 386 and a 392 and a 393.

7 The reviser of statutes notes that for Section  
8 386.010 that makes reference to this chapter shall be  
9 known as the Public Service Commission law. The reviser  
10 notes that the reference to chapter is taken from RSMO  
11 1939 and includes all of Chapter 386 and 393.110 to  
12 393.290, which the reviser notes then that 393.140(9) is  
13 included within those sections that are part of the Public  
14 Service Commission law.

15 So those are other cases that I would like to  
16 note for the -- the Commission. I can submit this in  
17 writing. I would think for -- before the end of the day,  
18 if the Commission would like or if that would be -- if  
19 that would be --

20 COMMISSIONER DAVIS: That would be helpful,  
21 Mr. Dottheim.

22 JUDGE WOODRUFF: Thank you. Mr. Woodsmall?

23 MR. WOODSMALL: I'm going to be very brief. I  
24 know you guys have work to do. Four quick matters.  
25 First, Commissioner Davis asked about discovery on META.



1 I would note that in previous cases, all the cases that  
2 I've been involved in, META has never been a party, which  
3 would be -- so discovery there would be completely  
4 different because MIEC and the individual members are all  
5 parties here.

6 Secondly, they say that the \$27 rate that they  
7 requested has been withdrawn. Well, that's interesting  
8 because Mr. Brubaker has a schedule at the very back of  
9 his revised testimony in which he does that exact thing.  
10 He gives Noranda a rate based upon revenues of  
11 111 million. That equates to \$27 per megawatt hour.

12 So it's still in his testimony. Even if it has  
13 been withdrawn, he has explicitly stated in his discovery  
14 that his recommendation is based upon that testimony,  
15 including that discussion of the \$27 dollars. So it's  
16 still the basis -- even though Noranda has dropped it,  
17 it's still the basis of his recommendation.

18 Third, the discussion about the joint defense  
19 agreement, I don't deny that it may exist. And it may  
20 apply here. My only point is it can be waived. And if  
21 the communications were made in a non-confidential manner  
22 in front of third parties, it can be waived.

23 Fourth point goes to the use of depositions and  
24 the use of data requests of on experts. I would note that  
25 the Missouri Rules of Civil Procedure have a provision

1     which call for "depositions upon written questions."

2                 That seems to be what this is. So data requests  
3     in this case on experts would seem to be analogous to  
4     depositions upon written questions. I've never done  
5     depositions upon written questions. I don't know how they  
6     would differ from interrogatories. But I would note that  
7     the Missouri Rules of Civil Procedure do provide for them.

8                 That was all I had unless you have any  
9     questions. Thank you for --

10                JUDGE WOODRUFF: Thank you, Mr. Woodsmall.

11                MR. WOODSMALL: Thank you for taking your time  
12     this morning.

13                JUDGE WOODRUFF: All right. Thank you. With  
14     that, we are adjourned. Oh, Mr. Dottheim.

15                MR. DOTTHEIM: I'm sorry. Just one thing for  
16     clarification. I don't want to leave the impression that  
17     the Staff does not conduct depositions. Staff does depose  
18     witnesses. The Staff tends to rely on data requests. But  
19     the -- the Staff will depose experts.

20                And I -- I'm trying to think, frankly, offhand  
21     of when the Staff has submitted a data request in, for  
22     example, a rate case that has not gone to -- to an expert.  
23     And offhand, I can't think of a -- of a -- of a situation.  
24     There may be a situation in an investigation or customer  
25     complaint of a case. But -- but there are certainly many

1 cases in particular rate proceedings where the data that  
2 is being inquired into is produced and is within the --  
3 the knowledge of individuals that are deemed to be  
4 experts.

5 CHAIRMAN CLAYTON: Judge, may I? I just want to  
6 follow up. And I meant to do this earlier from both  
7 Mr. Dottheim and Mr. Mills. Mr. Woodsmall earlier made a  
8 statement of what he wanted to see in our order. And this  
9 isn't your all's fight. This is a fight between  
10 intervenors on discovery issues.

11 But I wanted to ask both of you, is there  
12 anything that you hope to see in this order in terms of  
13 future implications in how the Commission finds, just very  
14 quickly?

15 MR. DOTTHEIM: Well, I would --

16 CHAIRMAN CLAYTON: The answer could be no, too.

17 MR. DOTTHEIM: Well, the answer is -- and I  
18 think I've tried to indicate this, and I think the  
19 Commission have indicated -- have indicated that they are  
20 very mindful that their ruling in this matter could have  
21 or will have broad implications, and it -- it is not just  
22 limited to the discovery disputes that are literally  
23 before the Commission for a decision at the moment.  
24 It has carry-over for all parties.

25 And I think, as Mr. Woodsmall indicated, it has

1 carry-over for -- for MIEC's and Noranda's discovery of --  
2 of AmerenUE or any utility where they intervene and seek  
3 to actively participate.

4 CHAIRMAN CLAYTON: I understand that completely,  
5 and that's why I'm asking. In terms of those  
6 implications, what would be Staff's priorities for -- for  
7 how the Commission rules on -- in this dispute?

8 MR. DOTTHEIM: I -- I think along -- along the  
9 lines of what I've attempted to set as I have detailed the  
10 procedures that the Staff has followed for many years and  
11 would seek to continue to follow, and that is to use data  
12 requests in discovery of experts and non-experts.

13 Again, as far as discovery by the Staff, the  
14 vast ponderance of -- of discovery is of -- of experts. I  
15 -- I think it's -- there is not much discovery that does  
16 not involve experts outside of consumer services, customer  
17 complaints, cases of -- of that -- of that nature.

18 CHAIRMAN CLAYTON: Okay. Thank you. Do you  
19 have anything you want to add to that?

20 MR. MILLS: Yeah. Briefly, in terms of  
21 priority, I think what Mr. Dottheim has talked about is  
22 probably most important. Two other items. One is that  
23 discovery is intended to be broad, and the presumption is  
24 that -- that most discoveries should be answered rather  
25 than most discoveries should be objected to and that the

1 -- and the third thing is that privilege should be narrow  
2 and is as surgically precise as possible that you don't  
3 say, you know, whole documents, whole reams of paper are  
4 privileged. But if you assert a privilege, you have to  
5 assert specifically what is privileged and why.

6 CHAIRMAN CLAYTON: Thank you.

7 COMMISSIONER GUNN: Can I have one follow-up?  
8 Does that extend to non-testifying experts, retained but  
9 non-testifying? Does the Staff have the same position?  
10 And does Public Counsel have the same position?

11 MR. MILLS: I don't have a position on that --  
12 on that issue. I've never really even thought about that.

13 MR. DOTTHEIM: It is not unusual for objections  
14 to be raised regarding non-testifying experts. And the --  
15 the Staff has looked at those situations very closely. I  
16 don't know that I would want to make a broad statement in  
17 -- in any direction.

18 We are always very concerned as to how  
19 information might attempt to be shielded or prevented to  
20 be provided. But by the -- by the -- by the same token,  
21 we do recognize that there are privileges.

22 COMMISSIONER GUNN: And that's as far as you  
23 want to go?

24 MR. DOTTHEIM: That's -- that's as -- that's as  
25 far as I want to go at this time.

1 COMMISSIONER GUNN: All right. Thank you.

2 JUDGE WOODRUFF: All right. Well, thank you all  
3 very much. Then we are --

4 COMMISSIONER DAVIS: Judge, whoa, whoa, whoa,  
5 whoa, whoa, whoa.

6 JUDGE WOODRUFF: Sorry.

7 COMMISSIONER DAVIS: Can I inquire of you for a  
8 moment?

9 JUDGE WOODRUFF: Sure.

10 COMMISSIONER DAVIS: We've got -- we've got  
11 three orders on this issue on today's agenda. And we've  
12 got, you know, numerous responses on -- on each series of  
13 data requests. And I'm just -- help me for the record  
14 figure out how you -- how you define, you know, which ones  
15 to recommend to us to accept or reject?

16 JUDGE WOODRUFF: I just looked at the  
17 information that was provided by the parties before today.

18 COMMISSIONER DAVIS: Okay. All right. Thank  
19 you, Judge.

20 JUDGE WOODRUFF: All right. Thank you.

21 CHAIRMAN CLAYTON: Since we're -- since we're on  
22 the record, that is a good point. It was my intention for  
23 agenda later on today that we would try to take up and  
24 address these.

25 And now we've got some information that's going

1 to be filed here, I think, before the end of the day,  
2 which kind of throws a wrinkle in that plan. I guess it  
3 would be helpful to get an idea of additional time the  
4 Commissioners need in working through each of these. Some  
5 of them, I need a little more time to look at them. I'm  
6 not saying in terms of days, but in terms of hours.

7 We have a very lengthy agenda. Maybe we could  
8 go upstairs, work through everything else, recess and then  
9 come back this afternoon, address the issues associated  
10 with this in -- in terms of voting out orders. Is there  
11 an objection to taking up the orders today?

12 It would be helpful to get some guidance since  
13 we have parties here before us what -- what they should  
14 anticipate. If you're ready to go, then we just go  
15 upstairs, and we'll just take them up one by one.

16 COMMISSIONER DAVIS: Mr. Chairman, with the ones  
17 -- when the ones that the Judge has -- has got that he's  
18 recommended that we -- that we do those requests for, in  
19 Mr. Woodsmall's Motion to Compel, I am -- I'm fine with  
20 all of those.

21 I need some time to look through some of the  
22 things that were discussed here today. And, I mean, I can  
23 probably be ready if we recess until late this afternoon.  
24 But on -- on those where he's recommended rejecting, those  
25 are the ones that I am particularly concerned that I want

1 to -- want to go through and spend a little more time.

2 CHAIRMAN CLAYTON: And there have been some  
3 additional revisions of the Judge's orders that have been  
4 passed out. We have three separate orders to address. As  
5 I understand it, the -- the order specific to the member  
6 companies, the order specific to MIEC and the order  
7 specific to -- to Noranda.

8 What -- I guess why don't I propose this, that  
9 we go upstairs. Let's get through everything else on  
10 agenda. We'll come back to these, see if we have  
11 consensus on any of the orders that are out there.

12 For example, Commissioner Davis said he's good  
13 with some of the recommendations. If we can find  
14 consensus and move forward on that order, we will.  
15 Otherwise, we'll recess and come back later on today. And  
16 if we find some -- we've got the votes to move them, we'll  
17 do it. If we don't, we'll come back at another time.

18 JUDGE WOODRUFF: Commissioner Clayton, I just  
19 want to clarify. You're not suggesting that we reconvene  
20 these proceedings?

21 CHAIRMAN CLAYTON: Right. No, no, no, no, no.  
22 Recess the agenda. Recess the agenda meeting.

23 JUDGE WOODRUFF: Okay.

24 MR. DOTTHEIM: This is a rare situation for me.  
25 I -- I think that I can actually submit this document



1 early this afternoon because I actually have -- have it  
2 almost complete for a different reason. So I --

3 CHAIRMAN CLAYTON: Hate to ask why.

4 MR. DOTTHEIM: So -- so I don't -- I don't know  
5 if that -- that helps the Commissioners' schedule.

6 CHAIRMAN CLAYTON: What time do you think you'd  
7 be able to -- not to put pressure on you. Just give me --

8 MR. DOTTHEIM: I don't think any later than  
9 2:00.

10 COMMISSIONER DAVID: 2:00?

11 CHAIRMAN CLAYTON: We'll start talking about it  
12 this morning. And at 2:00, we'll come back and revisit  
13 them.

14 MR. DOTTHEIM: A good chance earlier than that.

15 CHAIRMAN CLAYTON: All right. Is there anything  
16 objection to that? Everybody square?

17 JUDGE WOODRUFF: Okay. With that, then, this  
18 proceeding is adjourned, and we'll take up the matter in  
19 agenda.

20 (The proceedings were concluded at 11:10 a.m. on  
21 March 3, 2010.)

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## 1 REPORTER'S CERTIFICATE

2

3 STATE OF MISSOURI )  
 )ss.  
4 COUNTY OF OSAGE )

5

6 I, Monnie S. Mealy, Certified Shorthand Reporter,  
7 Certified Court Reporter #0538, and Registered  
8 Professional Reporter, and Notary Public, within and for  
9 the State of Missouri, do hereby certify that I was  
10 personally present at the proceedings as set forth in the  
11 caption sheet hereof; that I then and there took down in  
12 stenotype the proceedings had at said time and was  
13 thereafter transcribed by me, and is fully and accurately  
14 set forth in the preceding pages.

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20 Monnie S. Mealy, CSR, CCR #0539

21 Registered Professional Reporter

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