

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

In the matter of Union Electric,)	
d/b/a AmerenUE's Tariffs to)	Case No. ER-2010-0036
Increase Its Annual Revenues for)	Tariff Nos. YE-2010-0054
Electric Service)	

**MISSOURI INDUSTRIAL ENERGY CONSUMERS' SUGGESTIONS IN
OPPOSITION TO MIDWEST ENERGY USERS' ASSOCIATION'S
MOTION TO COMPEL**

Missouri Industrial Energy Consumers ("MIEC"), and its constituent members submit their opposition to Midwest Energy Users' Association's ("MEUA") Motion to Compel filed February 26, 2010.

DISCOVERY SOUGHT BY MEUA'S MOTION

1. MEUA seeks to compel responses to six of twenty-four Data Requests (1.2, 1.4, 1.5, 1.6, 1.13 and 1.22) in its First Set of Data Requests to Maurice Brubaker, dated January 29, 2010.

INTRODUCTION

2. On January 29, 2010, MEUA served its First Set of Data Requests to Maurice Brubaker, one of MIEC's retained expert in this case.

3. On February 6, 2010, MIEC objected to all such Data Requests but also answered all such requests except Data Requests 1.2, 1.4, 1.5, 1.6, 1.13 and 1.22.

4. On February 26, 2010, MEUA filed a Motion to Compel Responses to these six Data Requests.

5. MEUA's Motion and the six Requests that are the subject of its Motion 1) violate 4 CSR 240-2.090 and Missouri Rule of Civil Procedure 56.01(b)(4) by seeking information that may be discovered only by deposition; 2) violate 4 CSR 240-2.090 because they were directed at

a non-party; and 3) seek information not reasonably calculated to lead to the discovery of admissible evidence; and 4) are unduly burdensome.

DISCUSSION

A. MEUA's Data Requests Violate 4 CSR 240-2.090

6. MEUA's Data Requests 1.2, 1.4, 1.5, 1.6, 1.13 and 1.22 violate 4 CSR 240-2.090 and Missouri Rule of Civil Procedure 56.01(b)(4) by seeking information that may be discovered only by deposition.

7. Commission Rule 4 CSR 240-2.090 titled "Discovery and Prehearings," expressly adopts The Missouri Rules of Civil Procedure as they relate to discovery, stating: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court."

8. The Missouri Rules of Civil Procedure outline what information may be discovered from experts and also the exclusive means by which that information may be discovered. The first sentence of Missouri Rule of Civil Procedure 56.01(b)(4) indicates that discovery from experts may be obtained "only" by those means expressly stated in the Rule. The Rule states that a party may obtain, by serving an interrogatory on another party, the identity of the party's expert witness and a statement as to "the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee." The Rule further states that the "facts and opinions to which the expert is expected to testify" may be obtained "only" by deposition.

9. None of MEUA's twenty four data requests are confined to merely seeking the identity of Maurice Brubaker, a statement of the general nature of the subject matter on which he is expected to testify, and his hourly deposition fee. On the contrary, the requests seek extensive

and detailed expert calculations, analysis and opinions as well as accounting information, and documents relating to MIEC's retention of Mr. Brubaker. As such, all of MEUA's Data Requests, in addition to being objectionable on other grounds described below, improperly seek information that may be obtained only by deposition pursuant to 4 CSR 240-2.090 and 56.01(b)(4). As such, neither Mr. Brubaker nor MIEC was under any obligation to supply responses to any of these Data Requests. However, as a gesture of good faith, and without waiving any objections, Mr. Brubaker fully responded to eighteen of the Data Requests, and refused to supply responses (but for objections) to only six of the Requests.

10. MEUA's Motion to Compel fails to offer a single rule, citation or even argument to support its contention that the discovery it seeks is warranted. The closest the MEUA comes to supporting its Motion is its unsupported conclusion in paragraph 6 of its Motion:

As revealed by their Objections, MIEC has no legally recognized basis to deny responses to each of these six data requests. As such, MIEC should be compelled to respond, in full, to each of these data requests.

MEUA's Motion to Compel, at ¶ 6.

11. The MEUA's conclusion conflicts with this Commission's own rules and Missouri Rule of Civil Procedure 56.01(b)(4) in that they clearly and unambiguously prohibit MEUA from discovering the information it seeks through Data Requests, as such information may be discovered only by deposition. Therefore, MEUA's Motion to Compel should be denied.

B. MEUA's Data Requests Violate 4 CSR-2.090

12. MEUA's Data Request Violate 4 CSR-2.090 because they were directed to a non-party, an expert witness.

13. Regulation 4 CSR 240-2.090 contemplates that Data Requests may be served only on parties. The rule states, “The party to whom data requests are presented shall answer the requests” 4 CSR 240-2.090(2) (emphasis added). Neither the Commission’s Rules nor the Missouri Rules of Civil Procedure permit a party to serve Data Requests (or their equivalent) on non-parties, in this case an expert witness. Maurice Brubaker is not a party to this proceeding, but rather an expert witness retained by MIEC. Thus, MEUA’s Data Requests, titled “First Set of Data Requests from MEUA to Maurice Brubaker (MIEC)” appear to violate 4 CSR 240-2.090(2). Therefore, MEUA’s Motion to Compel should be denied.

C. MEUA’s Data Requests are not Likely to Lead to Admissible Evidence

14. At least three of MEUA’s Data Requests are not likely to lead to the discovery of admissible evidence in violation of Missouri Rule of Civil Procedure 56.01(b)(1).

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

16. MEUA’s Data Request-1.22 states: “Please describe in detail Noranda’s reaction upon being notified that Mr. Brubaker’s class cost of service study included a misallocation of income taxes.” Other than satisfying MEUA’s curiosity, this Request serves no purpose. Moreover, there are no circumstance under which Mr. Brubaker’s response to this Request could lead to the discovery of admissible evidence.

17. Similarly, MEUA’s Data Request 1.2 seeks an enormous amount of information relating to MIEC’s retention of Mr. Brubaker that is not likely to lead to the discovery of admissible evidence. MEUA’s Data Request 1.2 is quoted below in its entirety:

- a) Please provide a full accounting of the compensation Brubaker and Associates has received, to date, for its participation in this proceeding.
- b) Please provide a break-down of this compensation by particular activity. For instance, break-down by revenue requirement versus class cost of service activities.
- c) Please provide an estimate for all remaining costs associated with Brubaker and Associates' participation in this proceeding.
- d) Please provide a full accounting of the compensation Brubaker and Associated has received, to date, from Noranda associated with its participation in this proceeding.
- e) Please provide a break-down of this compensation received from Noranda, to date, by particular activity. For instance, break-down by revenue requirement versus class cost of service.
- f) Please provide any contract or other documents detailing the arrangement for billing of legal or professional services to the individual members of MIEC. Please provide a discussion of how this billing arrangement has changed with the addition of Noranda to MIEC.

The information sought in this request (with the possible exception of the information sought in part 'a') is immaterial to this proceeding as it has no bearing on the issues in this case. Even if the information sought in part 'a' was likely to lead to the discovery of admissible evidence, MEUA may not discover this information in a Data Request, as demonstrated above, but may discover the information only by deposition or at trial.

18. Also, MEUA's Data Request 1.13 seeks citations to "every case in which Mr. Brubaker has recommended or agreed to a below-cost rate for a particular customer or class." This Request appears to be predicated on MEUA's continued misconception that Mr. Brubaker recommended or agreed to a below-cost rate for a particular class in this case. Mr. Brubaker has not recommended nor agreed to a below-cost rate for a particular class in this proceeding, as is clearly demonstrated in his testimony and in multiple pleadings by MIEC in this proceeding. As such, the Request seeks information that has no bearing on the issues in this case.

D. MEUA's Data Requests are Unduly Burdensome

19. Even if MEUA's Data Requests 1.2, 1.4, 1.5, 1.6, 1.13 and 1.22 sought discoverable information, any probative value of a response would be outweighed by the MIEC's and Mr. Brubaker's burden in furnishing it under *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App. E.D. 1985) and this Commission's ruling in Case No. TO-2000-667 (denying a motion to compel because the probative value of the information sought was outweighed by the burden to the party from whom it was sought).

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

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

21. Maurice Brubaker's testimony in this case is already over 100 pages long. It is extensive and thorough and offers detailed analysis of the issues in the case. The information sought in MEUA's Data Requests 1.2, 1.4, 1.5, 1.6, 1.13 and 1.22 would require an exorbitant amount of further analysis and calculation, as well as additional research, drafting and compiling of information, all at the expense and MIEC. Much of the information sought cannot meet the minimum relevance threshold of admissibility; and even if relevant, it would be of such minimal probative value in this case that it does not merit the effort required to amass it. Therefore, these Data Requests are unduly burdensome, and MEUA's Motion to Compel should be denied.

CONCLUSION

For all the reasons set forth above, MIEC respectfully requests that the Commission deny MEUA's Motion to Compel, and order MEUA to pay all costs and attorneys fees associated with MIEC's opposition to MEUA's Motion and improper Data Requests.

Respectfully submitted,

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ATTORNEYS FOR MIEC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail this 2nd day of March to each person on the Commission's official service list in this case.

/s/ Diana Vuylsteke