

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

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

**MOTION TO COMPEL RESPONSES FROM NORANDA ALUMINUM;
MOTION FOR EXPEDITED TREATMENT AND
REQUEST FOR WAIVER OF 4 CSR 240-2.100(2)**

COMES NOW the Midwest Energy Users' Association ("MEUA"), pursuant to 4 CSR 240-2.090 of the Missouri Public Service Commission's Rules of Practice and Procedure, and for its Motion to Compel responses to Data Requests from Noranda Aluminum, Motion for Expedited Treatment and Request for Waiver of 4 CSR 240-2.100(2) respectfully states as follows:

1. PARTIES

1. Midwest Energy Users' Association is an unincorporated group of large commercial customers. Each of the members of MEUA takes electric service from AmerenUE under the Large General Service / Small Primary Service tariff. MEUA was granted intervention by the Commission in an order dated August 28, 2009.

2. Missouri Industrial Energy Consumers ("MIEC") is a group of large industrial consumers of AmerenUE. In an Application dated August 10, 2009, MIEC sought intervention on behalf of itself as an association and separately on behalf of its individual entities.¹ Among the individual entities named in that Application is Noranda Aluminum ("Noranda"). On August 26, 2009, the Commission issued its *Order Granting the Application to Intervene of Missouri Industrial Energy Consumers*. In that Order, the Commission ordered that "The Application to Intervene of the Missouri

¹ *Application to Intervene of Missouri Industrial Energy Consumers*, dated August 10, 2009, at page 1.

Industrial Energy Consumers, as individual entities and as an association, is granted.”²

Thus, pursuant to 4 CSR 240-2.010(11), Noranda Aluminum is a party to the above captioned proceeding.

II. BACKGROUND AND NORANDA’S POSITION

3. Given its status as a party to this case, Noranda filed rate design testimony, on January 6, 2010, that was separate and apart from the testimony filed by the remainder of the MIEC group. Unlike the rate design testimony of other parties, Noranda’s testimony did not consist of a class cost of service study. Rather, Noranda appears to base its rate design request on its alleged inability to compete in the global aluminum market as well as a claimed inability to remain viable without a significant rate decrease.

4. In its initial direct testimony, Noranda takes the unprecedented step of asking the Commission to establish a rate for the LTS class³ that is actually below its class cost of service.⁴ The fact that Noranda is seeking a below-cost rate is somewhat disguised. Noranda claims that it “needs a rate in the range of \$27 per MWH to compete with other aluminum smelters in the United States and globally.”⁵ Recognizing that it

² *Order Granting Application to Intervene of Missouri Industrial Energy Consumers*, issued August 26, 2009, at page 2 (emphasis added). See, Attachment 1.

³ Noranda Aluminum is the sole entity served under the Large Transmission Service (LTS) rate schedule.

⁴ It should be noted that Noranda filed revised direct testimony on February 11, 2010. In that testimony, Mr. Smith modifies Noranda’s position to a “rate consistent with Maurice Brubaker’s cost of service study filed on behalf of the Missouri Industrial Energy Consumers.” (Smith Revised Direct, at page 2). Recognizing that Mr. Brubaker at alternative proposals, it is unclear whether Mr. Smith now seeks to pay rates that equate to the \$117.6 million class cost of service in MEB-COS-5 or the \$111 million class cost of service in MEB-COS-8. More significantly, it is unknown whether Noranda would also then pay the overall system average rate increase granted in this case or whether it would be immune to any rate increase over this \$117.6 or \$111 million revenue level. Under many of these possible scenarios, Noranda would still be seeking a rate that is below its class cost of service. MEUA has issued data requests on the confusion inherent in Mr. Smith’s Revised Direct Testimony, but responses have yet to be forthcoming.

⁵ Smith Direct Testimony, filed January 6, 2010, at page 6.

currently pays electric rates that are approximately \$33.38 / MWH,⁶ Noranda is seeking a reduction of approximately 19% off of current rates.

5. The fact that Noranda is seeking a rate that is below its class cost of service only becomes apparent when compared against the class cost of service testimony of Maurice Brubaker. In his revised testimony, Mr. Brubaker claims that the cost of service for the LTS class is \$117.6 million.⁷ Therefore, if the Commission grants Noranda's request of a "rate in the range of \$27 per MWH," then the LTS class would only generate revenues of \$112.6 million.⁸ Compared to Mr. Brubaker's class cost of service study of \$117.6 million, Noranda is seeking a rate that is \$5 million (4.25%) below its actual cost of service.⁹ Ultimately, Noranda's CEO claims that, without the requested concessions, the "viability" of the Noranda smelter is threatened.¹⁰

6. In its Direct Testimony, Noranda attempts to provide its justification for its novel request. Throughout the remainder of its testimony, Noranda discusses the number of employees at the Noranda smelter, the amount of property taxes paid to New Madrid County, and its economic importance to the southeast Missouri region. Furthermore, in a schedule attached to the testimony of Mr. Fayne, Noranda attempts to demonstrate that its cost of electricity is significantly higher than the rates paid by other

⁶ In his Direct Testimony, Mr. Brubaker notes that Noranda currently pays annual revenues of \$139.2 million (MEB-COS-7) on total electric usage of 4,170,226 MWH (page 16, Table 1). Therefore, Noranda pays an electric rate of approximately \$33.38 / MWH.

⁷ Brubaker Revised Direct, filed February 3, 2010, at Schedule MEB-COS-5. In that schedule, Mr. Brubaker shows that his class cost of service study demonstrates that the LTS class revenues should be reduced by \$21.6 million from the current revenues of \$139,156,000.

⁸ \$27.00 / MWH * 4,170,226 MWH = \$112,596,102.

⁹ Of course, this estimate is very conservative. If the Commission were to reject Mr. Brubaker's class cost of service study in favor of the study performed by either OPC, Staff or AmerenUE (all of which show a higher class cost of service for the LTS class), Noranda's request becomes more appalling.

¹⁰ Smith Direct, at page 7.

American aluminum smelters.¹¹ In fact, Noranda claims that its “rate is in the highest quartile of any aluminum smelter in the United States.”¹²

III. DATA REQUESTS AND OBJECTIONS

7. As mentioned, Noranda’s testimony requests novel rate treatment. While clarification of its modified position is necessary, Noranda appears to be seeking either: (1) a rate that is below cost or (2) a rate that would require a significant rate reduction while avoiding any allocated share of the rate increase resulting from this case. Recognizing that Noranda’s position would leave other non-residential rate classes significantly above their cost of service, especially the LGS / SP class, MEUA issued its first set of Data Requests to Noranda, consisting of 63 questions, on February 1, 2010. (Attachment 1). Without identifying every data request, those Data Requests generally fall into one of several categories. MEUA sought information regarding: (1) the identification of all consultants retained by Noranda and a copy of any analyses conducted by those consultants (DR Nos. 1-4); (2) the assumptions underlying any study supporting Noranda’s claim that it “needs a rate in the range of \$27 per MWH” (DR Nos. 5-13); (3) the rates paid by competing aluminum smelters (DR Nos. 15-21, 32, and 35-37); (4) the compensation received by Noranda’s witnesses (DR Nos. 23-26; 53-63); (5) the localized nature of Noranda’s employment and property tax benefits (DR Nos. 49-50) and (6) reconciliation of Noranda’s position with statements made in its IPO registration (DR Nos. 22, 27-31, and 33-34).

8. On February 5, 2010, Noranda returned its objections to MEUA’s Data Requests. (Attachment 2). In that document, Noranda objected to virtually every data

¹¹ Fayne Direct Testimony, filed January 6, 2010, at Exhibit HWF-1.

¹² Smith Direct, at page 6.

request. While Noranda indicated that it would provide responses to certain data requests, Noranda subsequently objected to the remainder of these MEUA data requests. (Attachment 3). Thus, Noranda objected to each and every data request issued by MEUA and failed to provide a single answer.

IV. RATIONALE UNDERLYING CERTAIN DATA REQUESTS

9. On January 15, 2010, Noranda filed Amendment No. 3 to its Form S-1 with the SEC. That form, a necessary prerequisite to Noranda's planned initial public offering (IPO), reveals a number of facts which either contradict Noranda's current claims or at least cast those claims in a different light. In that filing, Noranda notes that

Our New Madrid smelter has entered into a long-term power supply contract through May 2020, ensuring the secure supply of power. This contract gives Noranda an advantage over aluminum smelters facing frequent power shortages or disruptions. In addition, **our power costs are not linked to LME aluminum prices**, unlike the power costs of some of our competitors, particularly in North America.¹³

Thus, while claiming that its cost of electricity in Missouri is significantly higher than other domestic aluminum smelters, Noranda fails to disclose that most, if not all of the remaining domestic aluminum smelters have electric rates that are based upon the London Mercantile Exchange (LME) price of aluminum.

In the last half of 2008, the price of aluminum suddenly dropped by 60% to a seven year low.¹⁴ Therefore, any competitors which had their price of electricity linked to the LME price of aluminum experienced a decrease in their cost of electricity. For some reason, Noranda failed to inform the Commission that this sudden drop in the price of aluminum was the primary, if not sole, reason underlying its claim that its electric rate "is in the highest quartile or any aluminum smelter in the United States. For this reason,

¹³ Noranda Amendment No. 3 to Form S-1, filed with the SEC on January 15, 2010, at page 4.

¹⁴ http://www.lme.com/aluminium_graphs.asp

MEUA asked Noranda several questions (DR Nos. 15-21, 32, and 35-37) to more accurately gauge the accuracy of its claim regarding its electric rate relative to any competitors.

10. In its testimony, Noranda attempts to tie its continued “viability” solely to its price of electricity. Noranda’s SEC filing, however, paints an entirely different competitive story. In that SEC filing, Noranda claims a number of competitive advantages relative to other aluminum smelters. For instance, Noranda claims competitive advantages resulting from several factors:

(1) The reliability of Noranda’s electric supply;

Our New Madrid smelter has entered into a long-term power supply contract through May 2020, ensuring the secure supply of power. This contract gives Noranda an advantage over aluminum smelters facing frequent power shortages or disruptions.¹⁵

(2) Noranda’s geographic proximity to the supply of alumina;

New Madrid is strategically located as the closest Midwest facility to the supply of alumina. It is also located in an area with abundant sources of electrical power.¹⁶

and (3) the reliability of its upstream aluminum and bauxite supplies as a result of the fact that it purchases both from an upline affiliate.

We believe that this cost advantage in rising markets and the security of our bauxite and alumina supply provide us with a competitive advantage versus aluminum producers that are dependent on LME price indexed alumina supplies.¹⁷

Just as the Commission should consider “all relevant factors” when establishing a utility’s revenue requirement, it should all consider all relevant factors when considering Noranda’s competitiveness relative to other domestic aluminum smelters. In its

¹⁵ Noranda Amendment No. 3 to Form S-1, filed with the SEC on January 15, 2010, at page 90.

¹⁶ Noranda Amendment No. 3 to Form S-1, filed with the SEC on January 15, 2010, at page 94.

¹⁷ Noranda Amendment No. 3 to Form S-1, filed with the SEC on January 15, 2010, at page 90.

testimony, Noranda seeks to have the Commission focus solely on its cost of electricity (albeit without even informing the Commission of the impact of the LME price of aluminum). If the Commission is tempted to base electric rates on a consumer's competitive position, it should consider all relevant factors when assessing that competitive position. In Noranda's case that should include consideration of: (1) Noranda's cost of bauxite (Data Request No. 27); (2) Noranda's cost of alumina (Data Request No. 28); (3) the reliability of Noranda's electric supply (Data Request No. 29); and (4) the benefits of its geographic position (Data Request Nos. 30 and 31).

11. As can be seen, given the issues raised by Noranda in the context of its Direct Testimony, each of the Data Requests is "reasonably calculated to lead to the discovery of admissible evidence (Rule 56.01 of the Missouri Rules of Civil Procedure). And, each of the Data Requests only seeks information that is not otherwise privileged. For these reasons, responses should be compelled from Noranda.

12. Finally, MEUA notes that the Commission rules recognize that sanctions are appropriate where a party abuses the discovery process.¹⁸ MEUA asserts that Noranda has no good faith basis for their objections to the MEUA discovery. Rather, especially recognizing that Noranda has objected to each and every data request, it is apparent that such objections are solely designed for the purpose of delay and to hinder another party's ability to prepare for trial. For this reason, MEUA suggests that sanctions are appropriate. At a minimum, the Commission should recognize Noranda's blatant disregard for Commission rules and remember such disregard when considering any future requests for intervention.

¹⁸ 4 CSR 240-2.090(1).

V. COMPLIANCE WITH RULE

13. Consistent with Commission Rule 4 CSR 240-2.090(8)(A), counsel certifies that he has complied with all rule prerequisites to the filing of this Motion. Specifically, counsel has conferred by telephone with counsel for MIEC / Noranda on February 10. Furthermore, consistent with 8(B) of that same rule, counsel participated in a telephone conference with the presiding officer on February 11. As such, this Motion is ripe for consideration by the Commission.

VI. MOTION FOR EXPEDITED TREATMENT

14. Pursuant to 4 CSR 240-2.080, MEUA seeks expedited treatment for this Motion. Consistent with that request, MEUA asks that the Commission rule on this matter at its regularly scheduled agenda session on March 3, 2010 with an Order compelling responses from Respondents by March 5, 2010. MEUA asks for this treatment because the evidentiary hearing in this matter is scheduled to commence on March 15. Action by this date will allow counsel to send additional clarifying discovery as well as engage in any necessary depositions. Consistent with this request and in order to allow the Commission to process this request at its March 3 agenda meeting, MEUA asks that any response be filed by February 26. This will allow MEUA to file a response, if necessary, in time to be reviewed by the Commission.

15. This Motion was filed as early as reasonably practical. Noranda's objections were received on February 4. Recognizing that Noranda indicated that it would provide responses to certain questions, counsel did not want to file this Motion to Compel until those responses were received on February 12. Ultimately, Noranda did not respond to any responses, but, rather, objected to the remainder of MEUA's data

requests. In addition, as required by the Commission's rule, counsel was required to engage in a telephone conversation with counsel as well as a subsequent telephone conference with the presiding officer. As such, this Motion and the request for expedited treatment are timely and appropriate.

VII. REQUEST FOR WAIVER

16. 4 CSR 240-2.100 provides limits on a party's ability to seek a subpoena to compel a witness' attendance at a deposition. Subsection 2 of that rule provides: "Except for a showing of good cause, a subpoena or a subpoena duces tecum shall not be issued fewer than twenty (20) days before a hearing." Therefore, since the hearing in this matter is scheduled to commence on March 15, the latest a subpoena could be sought would be February 23. Recognizing that Noranda has blatantly disregarded all discovery up to this point in time, counsel has been unable to prepare for or schedule a deposition of Noranda's witnesses. For this reason, MEUA asserts that good cause has been shown for the Commission to waive 4 CSR 240-2.100 and permit the issuance of subpoenas at any time up to the commencement of the hearing in this matter.

WHEREFORE, MEUA respectfully requests that the Commission: (1) act on this matter in an expedited fashion; (2) issue its Order compelling responses to Data Requests from Noranda; and (3) waive the requirements of 4 CSR 240-2.100(2) and allow subpoenas and depositions of Noranda witnesses any time up to the commencement of the hearing in this matter. Further, MEUA requests that the Commission issue any orders in the way of sanctions that it deems appropriate and reasonable.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



David L. Woodsmall, MBE #40747
428 E. Capitol, Suite 300
Jefferson City, Missouri 65101
(573) 635-2700
Facsimile: (573) 635-6998
Internet: dwoodsmall@fcplaw.com

ATTORNEY FOR THE MIDWEST ENERGY
USERS' ASSOCIATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: February 21, 2010