BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union Electric Company, d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service.	)))	Case No. ER-2012-0166

MOTION FOR RECONSIDERATION AND
REQUEST FOR EXPEDITED TREATMENT

In accordance with 4 CSR 240-2.160(2), Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or "the Company") files this motion asking the Missouri Public Service Commission ("Commission") to reconsider the Order Resolving Issues Presented at Discovery Conference that was issued in this case on August 31, 2012. In addition, because the information sought by the data requests at issue is required to allow counsel to prepare for evidentiary hearings that are scheduled to commence on September 24, 2012, Ameren Missouri also requests expedited treatment of the Company's motion for reconsideration, as authorized by 4 CSR 240-2.080(16). In support of its motions, Ameren Missouri states as follows:

1. On July 25, 2012, the Company served several data request on the Missouri Industrial Energy Consumers ("MIEC") seeking information related to rate design testimony filed by Layle K. (Kip) Smith on behalf of Noranda Aluminum, Inc. ("Noranda"). The two data requests that are the subject of Ameren Missouri's motion sought the following information:

> DR 015 – Please provide copies of all annual and multi-year budgets and financial projections that Noranda has prepared for the New Madrid Smelter that encompasses [sic.] any or all of the years 2012 through 2015. Please identify all assumptions regarding Ameren Missouri's electric rates that were made and included in each such budget or financial projection.
>
> DR 020 – Has Noranda performed any studies or analyses or has it otherwise investigated the possibility of self-generating the electricity needed at the New Madrid Smelter or of obtaining that electricity from a source other than Ameren

> Missouri? If the answer to the preceding question is anything other than an unqualified "no," please provide copies of all such studies, analyses, and investigations, and all documents related to them, for the period January 1, 2007, through the present date.

2. In a letter dated August 2, 2012, MIEC timely filed objections to each of these and several other data requests. As stated in that letter, MIEC's objections to the responses sought for each or all of those data requests were:

- the information sought is overly broad, unduly burdensome, oppressive, cost-prohibitive, impractical, and/or impossible;
- the information sought is neither relevant, material, nor reasonably calculated to lead to the discovery of admissible evidence;
- the information is protected from discovery by the attorney-client privilege, the attorney work-product doctrine, or any other privilege or doctrine;
- the information sought is a trade secret, commercially sensitive, or confidential and the release of that information may be injurious; and
- the request is overbroad, vague, ambiguous, confusing, or fails to describe the information sought with sufficient clarity or specificity to enable a response.

3. Ameren Missouri sought the information requested in DRs 015 and 020 to determine the veracity and accuracy of certain statements that Mr. Smith made at pages 4-5 of his prepared rate design testimony in this case. In that testimony Mr. Smith alleges:

> Ameren's proposed rate increase threatens the viability of the New Madrid Smelter . . . Ameren Missouri's rate increase would erase the gains that the New Madrid Smelter has worked so hard to achieve, and would take the New Madrid Smelter in a direction that is not sustainable in the long term.

Based on these and other allegations regarding the purported effects of Ameren Missouri's proposed rate increase, Mr. Smith urges the Commission to adopt the recommendations of another MIEC witness, Maurice Brubaker, which include his support of a revenue requirement

that is substantially less than the one proposed by Ameren Missouri[1] and a rate design proposal that would exempt Noranda from any allocation of energy efficiency costs and would allocate to the Large Transmission rate class (where Noranda is the sole customer) a proportionally lower percentage rate increase – or even a potential rate reduction – compared to increases allocated to each of the Company's other rate classes.[2]

4. At the regularly-scheduled discovery conference on August 30, 2012, Ameren Missouri and MIEC were able to resolve all outstanding discovery disputes except for those involving DRs 015 and 020, which the Regulatory Law Judge took under advisement for resolution in a written order. In that order, which was issued on August 31, 2012, the judge overruled in part and sustained in part MIEC's objections to DR 015 and sustained all of MIEC's objections to DR 020.

5. With regard to DR 015, the judge's written order acknowledges that "Ameren Missouri has an interest in assessing the on-going financial health of the New Madrid smelter in light of Noranda's claim that the future viability of the plant is threatened by Ameren Missouri's proposed rate increase," but concludes that the Company's interest in determining the assumptions about electric rates that Noranda included in its budgets and projections "is outweighed by Noranda's interest in protecting from disclosure its strategies and positions in those cases."[3]

6. With regard to DR 015, although the order found that the question of whether Noranda may choose to pursue an alternative source to satisfy its need for electricity is "marginally relevant" to the question of whether the New Madrid Smelter will remain financially

[1] Direct testimony of Maurice Brubaker (revenue requirement) p. 3, lns. 1-10.
[2] Direct testimony of Maurice Brubaker (rate design) p. 4, lns 3-12; Schedule MEB-COS-7.
[3] Order Resolving Issues Presented at Discovery Conference (August 31, 2012) at p. 3.

viable, it further found that disclosure of information regarding alternative sources of electricity "could put Noranda at a competitive disadvantage in future contract negotiations with Ameren Missouri."[4] Weighing those competing interests, the judge concluded that Ameren Missouri's request to overrule MIEC's objections and to compel a response to DR 020 should be denied.[5]

7. The Commission's rules – specifically 4 CSR 240-2.090(1) – state that in Commission cases "[d]iscovery may be obtained under the same conditions as in civil actions in the circuit court." Rule 56.01, Missouri Rules of Civil Procedure, sets out general principles governing discovery in the circuit courts, and in subsection (b) of that rule states, in relevant part, as follows:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.
>
> It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

8. In decisions interpreting both the general principles and specific rules governing discovery in the circuit court found in Rule 56, Missouri's appellate courts have held that:

- "[t]he modern trend has been to broaden the scope of discovery to the end that litigants may have the opportunity to ascertain and present at the trial all the material facts not protected by privilege." *State ex rel. Iron Fireman Corp. v. Ward*, 173 S.W.2d 920, 922 (Mo. banc 1943);

- "Courts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is 'relevant' to the proceedings and subject matter of the case not protected by privilege." *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992);

[4] *Id*. at p. 4.
[5] *Id*.

- "The discovery process' purpose is to give the parties access to relevant, non-privileged information . . ." *State ex rel. American Standard Ins. Co. v. Clark*, 243 S.W.3d 526, 529 (Mo. App. 2008);

- "The purposes of discovery are to eliminate concealment and surprise [citation omitted], to aid the litigants in determining the facts prior to trial [citation omitted], and to provide the litigants with access to proper information with which to develop their respective contentions and to present their respective sides of the issues framed by the pleadings." *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App. 1985); and

- "The purposes of discovery are to eliminate concealment and surprise, to aid litigants in determining facts prior to trial, and to provide litigants with access to proper information with which to develop their respective contentions and to present their respective sides on issues framed by the pleadings . . . Discovery is a search for facts, in testimony and documents or other things, within the exclusive knowledge or possession of one party to another in anticipation of litigating a pending action in court." *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 869 (Mo. App. 1986).

9. As the case law cited above makes clear, discovery rules do not require a party to disclose privileged communications. But that is not – and should not become – an issue in this instance, because there is no legally recognized claim of privilege that Noranda legitimately can assert with regard to the information Ameren Missouri seeks through DRs 015 and 020. Under Missouri law, the attorney-client privilege only protects confidential communications between an attorney and his client that are made with reference to pending or contemplated litigation and for the purpose of securing legal advice.[6] And the attorney work product privilege only shields from discovery materials (including the thoughts and mental processes of an attorney) that are prepared by or for a party in anticipation of litigation or in preparation for trial.[7] But none of the reasons or principles underlying either of those privileges applies here. The information sought by Ameren Missouri was not prepared by or for an attorney in anticipation of, or to prepare for, litigation or for the purpose of giving legal advice to a client. Instead, the information requested

[6] *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 (Mo. App. 2008).
[7] *Id*., pp. 547-48.

in DRs 015 and 020 was created by Noranda, or by outside consultants hired by Noranda, in the ordinary course of business for regular business purposes. Therefore, the information sought is not privileged.

10. Based on the case law discussed above, the Regulatory Law Judge's findings and rulings regarding DRs 015 and 020 are contrary to the legal rules and principles governing discovery. The two Ameren Missouri data requests at issue in this motion seek only to obtain from Noranda relevant or material facts or information that are not protected by any recognized privilege but are necessary to allow the Company to prepare its case to address and rebut positions taken and arguments made by Mr. Smith. Unless Ameren Missouri can obtain the information it seeks from Noranda the Company will be unable to defend itself against Mr. Smith's claim that the proposed rate increase threatens the viability of the New Madrid Smelter. That will require the Company – and ultimately the Commission – to accept Noranda's claim as fact without any meaningful inquiry into whether Mr. Smith's statements are true. Such a result is contrary to the purposes of both discovery and the hearing process itself, which are intended to allow a litigant to test evidence offered by an opponent and independently determine whether that evidence is truthful and accurate. Denying Ameren Missouri the information it seeks from Noranda through DRs 015 and 020 also violates the Company's due process right to meaningfully and effectively confront witnesses who offer testimony and evidence against its interests.

11. Ameren Missouri's DR 015 will promote the objectives of the discovery process by allowing the Company to examine budgets and financial projections through 2015 to see if Noranda anticipates that its New Madrid Smelter will be profitable during that period. But in addition to the budgets and projections themselves – which the Regulatory Law Judge already

has ordered Noranda to produce – the Company must also have access to the assumptions regarding the cost of electricity that Noranda included in those budgets and projections. Only by analyzing both Noranda's budgets and projections regarding the overall profitability of the New Madrid Smelter and the assumptions that were included in those budgets and projections regarding the cost of electricity will Ameren Missouri, and the Commission, be able to determine if Mr. Smith's testimony regarding the viability of the smelter is accurate or just hyperbole.

12. The information sought in the Company's DR 020 also will aid in resolving questions regarding the veracity and accuracy of Mr. Smith's testimony. If, as he claims, Ameren Missouri's proposed rate increase poses a threat to the viability of the New Madrid Smelter, one would expect Noranda to have looked into alternative means for acquiring the energy it needs to operate the smelter, including options for self-generation. If Noranda has done so, the Company should be able to review those studies. Conversely, if Noranda has not looked into the possibility of self-generation, it should be required to say so in response to Ameren Missouri's data request. But however Noranda responds, that response will provide information that is useful and relevant to the determination of whether Mr. Smith's significant and serious claim in the current case is accurate and truthful.[8]

13. As for the Regulatory Law Judge's findings that the information necessary to fully respond to Ameren Missouri's data request is proprietary or confidential, those finding

[8] At page 4 of his order, the Regulatory Law Judge discusses the fact that a portion of the information sought by Ameren Missouri in DR 020 was produced in response to a similar data request that was served on MIEC by another party in the Company's last rate case. But he discounts the significance of that disclosure by noting that the Noranda's testimony in that case differs from the testimony filed by Mr. Smith in the current case. His conclusion, however, is a distinction without a difference, because although the testimony in the two cases differs, the information that Ameren Missouri seeks in its data request is just as relevant to the issue of whether the Company's proposed rate increase threatens the viability of the New Madrid Smelter as it was to issues raised in the prior rate case.

ignore the fact that the Commission has a rule to deal with such concerns. 4 CSR 240-2.135 allows a party to designate sensitive information as "proprietary" or "highly confidential" and prescribes restrictions on who may view such information and how it can be used. More specifically, Subsection (16) of that rule specifically states that information designated "proprietary" or "highly confidential" cannot be used or disclosed "for any purpose other than preparation for and conduct of *the proceeding for which the information is provided*." (emphasis added) Consequently, the Regulatory Law Judge's concerns that disclosure of the information sought by the Company could disadvantage Noranda in future cases or negotiations are unfounded.

14. The Commission also should note that Subsection (5) of the rule allows a party who believes it requires protective measures more rigorous than those prescribed in the rule to propose such measures through a motion that explains how the information can be disclosed while protecting the interests of the disclosing party. But nowhere does the Commission's rule state or suggest that a party can avoid production of otherwise discoverable information simply by designating that information as "proprietary" or "highly confidential." Under the rule, if Noranda or MIEC believed the Commission's rules would not adequately protect the information the Company seeks from Noranda, then one or both of those parties had an affirmative duty to bring that concern to the Regulatory Law Judge's attention and to propose measures that Noranda believes would be adequate. Ameren Missouri should not be penalized because Noranda and/or MIEC failed to follow the clear requirements of the Commission's rule.

WHEREFORE, for all the reasons stated in this motion, the Commission should reconsider the Regulatory Law Judge's order denying, in whole or in part, Ameren Missouri's request to compel MIEC to fully and completely respond to the Company's DRs 015 and 020.

Each of those data requests is reasonable in scope and is reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the information that Ameren Missouri seeks is not protected by any legally recognized claim of privilege, and any legitimate concerns that Noranda may have regarding the confidentiality of the information can adequately be dealt with under the Commission's rules. The Commission should, therefore, issue an order overturning the Regulatory Law Judge's decision and compelling Noranda to fully and completely respond to the data requests at issue, and to do so no later than the close of business on September 19, 2012. Disclosure by that date is necessary to allow Ameren Missouri to review the information so that it can be used for purposes of preparing cross-examination or as the Company may otherwise deem appropriate in the preparation and presentation of its case in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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