

**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.

STATEMENT OF THE CASE

1. This action is to determine: 1) what constitutes a just and reasonable revenue requirement for AmerenUE; and 2) how that revenue requirement should be allocated among AmerenUE's customer classes.

DISCOVERY SOUGHT BY MEUA'S MOTION

2. The information demanded in MEUA's First Set of Data Requests Directed to MIEC and that are the subject of its February 15, 2010 Motion to Compel are contentious and improper requests that seek information principally related to 1) Noranda Aluminum Inc.'s ("Noranda") inclusion into MIEC; and 2) MIEC's constituent members' legal strategy for supporting a lower rate for Noranda compared to the other members of MIEC.

INTRODUCTION

3. a. The Motion and Accompanying Requests violate 4 CSR 240-2.080 (7)(A) and Missouri Rules of Civil Procedure 55.03 because they are directed at an improper purpose. That is, they serve no function other than to harass the members of MIEC by implying a sinister "arrangement" among the members of MIEC and demanding detailed information about the

nature of the relationship between Noranda and other MIEC members, a topic that has no logical nexus with the issues in this case. (See MEUA's First Set of Data Requests at 1.5, 1.7, 1.10 and 1.11).

b. Further the Requests seek information that is not reasonably calculated to lead to the discovery of admissible evidence in violation of 4 CSR 240-2.090 and Missouri Rules of Civil Procedure 56.01 because they seek nebulous and irrelevant information in vague and overly broad terms about issues that have already been presented in painstaking detail by several expert witnesses in hundreds of pages of testimony.¹

c. Further, the Requests seek information that is protected by the attorney-client privilege in violation of 4 CSR 240-2.090 and Missouri Rules of Civil Procedure 56.01 because they call for MIEC's counsel's mental impressions, conclusions, opinions, and legal theories relating to the legal position held by the members of MIEC.

d. Moreover, it is not in the public interest for the Commission to establish a precedent of requiring the individual members of associations like MIEC, MEUA, Missouri Retail Associations, AARP, etc., to respond to discovery demands, especially those regarding issues developed in the testimony of their expert witnesses. Such an oppressive and burdensome precedent would counter Missouri's policy of judicial efficiency and would chill the ability of all consumer groups to jointly intervene in Public Service Commission matters on behalf of large segments of the rate-paying public.

e. Finally, MEUA's request for sanctions in Paragraph 12 of its Motion

¹ Between November 3, 2009 and February 11, 2010, the members of MIEC proffered their position regarding all of the issues in this case with detailed supporting analysis through the testimony of Michael Gorman, Greg Meyer, Jim Dauphinais, Jim Selecky and William Dunkel and Maurice Brubaker. Additionally, Noranda filed the additional testimony of Kip Smith, Keith Gregston, Henry Fayne, Adonis Yatchew, Joseph Haslag, Paul Coomes, Rick Earnheart, Rob Mayer, Steve Hodges and William Dunkel.

demonstrates MEUA's counsel's disregard of the Commission's Discovery Rules as it fails to comport with the plain language of 4 CSR 240-2.090(1) directing such motions to comply with the Missouri Rules of Civil Procedure. See Missouri Rules of Civil Procedure 55.03(c)(1)(A).

For the foregoing reasons, 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.

DISCUSSION

4. MIEC is comprised of the following corporations: Anheuser-Busch Companies, Inc., BioKyowa, Inc., The Boeing Company, Doe Run, Enbridge, General Motors Corporation, GKN Aerospace, Hussmann Corporation, JW Aluminum, Monsanto, Pfizer, Precoat Metals, Procter & Gamble Company, Nestlé Purina PetCare, Noranda Aluminum, Saint Gobain, Solutia and U.S. Silica Company.

5. In support of their opposition to the relief sought by AmerenUE in this case, the members of MIEC presented their position in the detailed testimony of 13 witnesses.

6. The testimony of MIEC's witnesses in this case offers in explicit detail the position of the MIEC as an association and all of its individual constituents with respect to revenue requirement issues and rate design issues.

7. Noranda is the only MIEC member to file separate testimony in its individual capacity.

I. MEUA's Data Requests are Directed at an Improper Purpose.

8. "The party seeking discovery shall bear the burden of establishing relevance." Missouri Rules of Civil Procedure 56.01(b)(1). Discovery requests "presented . . . for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the

cost of litigation” are strictly prohibited. Missouri Rules of Civil Procedure 55.03(b); *see also* 4 CSR 240-2.080 (7)(A).

9. At least five of MEUA’s eleven Data Requests are improper requests as they are directed at inappropriately harassing MIEC members by demanding information about Noranda’s “arrangement” with other MIEC members, a subject that has no bearing whatsoever on any of the issues in this case.

10. Three of MEUA’s Data Requests seek information expressly relating to Noranda’s “arrangement” with the other members of MIEC:

MEUA-1.5: Please provide all documents . . . which discuss the arrangement reached between MIEC and Noranda regarding the inclusion of Noranda within MIEC.

MEUA-1.7: Please identify the individual that . . . is most knowledgeable regarding any arrangements made between MIEC and Noranda regarding the inclusion of Noranda within MIEC.

MEUA-1.11: Please provide all documents . . . which discuss the positions to be taken in this case by Noranda.

(MEUA’s First Set of Data Requests Directed to MIEC, attached hereto as Exhibit 1).

11. Without mentioning Noranda by name, at least two other MEUA Data Requests are clearly directed at the nature of the “arrangement” between Noranda and the other members of MIEC in this case:

MEUA-1:10: Has [Company name] . . . ever filed testimony or taken a position regarding the appropriate electric rate for an aluminum smelter?

MEUA-1:4: Please identify all cases . . . in which [Company name] has advocated for a below cost rate for a particular class or customer.

12. MEUA’s Motion to Compel fixates on the nature of the relationship between Noranda and the other MIEC members, an issue wholly outside the scope of this proceeding. The rhetorical questions posited in Paragraph 7 of the Motion betray the true intent of MEUA’s

improper Data Requests:

Why would this association representing large industrial customers choose to grant favorable treatment to one single entity? Is the recommendation to give special rate treatment to Noranda solely that of the association or do all the individual entities, all parties to this proceeding, accede in this recommendation? Why are the individual members of MIEC hesitant to publicly state that they are willing to give Noranda a below cost rate? And, most importantly, what, if any, consideration was given by Noranda to MIEC, or the individual entities, in order to convince MIEC to make this rate concession?

MEUA's Motion to Compel, ¶ 7.

13. While the answers to these questions may be fascinating to MEUA's counsel, they have nothing at all to do with the subject matter of this litigation.² Furthermore the questions appear to accuse Noranda and the other MIEC members of conducting some covert and illicit scheme. Such implications raised in MEUA's Motion to Compel are baseless and result in Data Requests that are improper in violation of Missouri Rules of Civil Procedure 55.03(c) and 4 CSR 240-2.080 (7)(A). Thus, MEUA's Motion to Compel with respect to requests 1.4, 1.5, 1.7, 1.10 and 1.11 should be denied.

II. MEUA's Data Requests are not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

14. "The provisions for discovery by written interrogatories are liberal but they are not unlimited. . . . [I]nterrogatories should call for specific relevant facts and not be repetitious. They should not call for opinions or the conclusions of the person interrogated or require him to resort to speculation or conjecture as to what is intended." *State ex rel. Hof v. Cloyd*, 394 S.W.2d 408, 411 (Mo. 1965).

15. "[T]he trial court is not compelled to laboriously sift through a bulk of

² Prior to this litigation, MEUA's counsel represented Noranda in similar rate case litigation. In or around May, 2009, Noranda terminated its relationship with MEUA's counsel and joined MIEC. The Motion and Data Requests appear to be directed at harassing and oppressing MEUA's counsel's former client and its co-MIEC members.

interrogatories containing improper questions in order to find those which are germane to the case. If, upon examination, a set of interrogatories appears to contain a substantial number of inappropriate questions, or is otherwise subject to meritorious objection, it is within the trial court's discretion to strike the entire set from the files. . . ". *State ex rel. Williams v. Vardeman*, 422 S.W.2d 400, 409 (Mo. App. 1967).

16. The members of MIEC proffered multiple witnesses who filed hundreds of pages of detailed testimony to articulate their joint position in the case. Maurice Brubaker, for example, filed approximately 108 pages of analysis and testimony communicating the position of MIEC and its constituent members with respect to the issues in this case.

17. Other than Noranda, no MIEC member filed any separate testimony in this action.

18. Under the circumstances, none of the information sought in MEUA's 11 data requests are reasonably calculated to lead to the discovery of admissible evidence. Rather they are overly broad, vague and open-ended questions directed at discovering information wholly immaterial to this proceeding. As stated above, MEUA Data Requests 1.4, 1.5, 1.7, 1.10 and 1.11 are all directed at gaining information about the nature of the relationship between Noranda and the other MIEC members. As such, these Requests are immaterial and improper. Likewise, MEUA's additional Data Requests 1.1, 1.2, 1.3, 1.6, 1.8 and 1.9 seek information not reasonably calculated to lead to the discovery of admissible evidence. Specifically Data Requests 1.1, 1.2, 1.3 and 1.6 are immensely broad and vague queries into matters that have been described in painstaking detail in Maurice Brubaker's testimony.

19. For example, Request 1.1 asks, "Does [Company name] believe that electric rates should be based on cost?" This Request is exceedingly vague as it fails to contemplate any of the circumstances in this case. Each of the companies receiving these Data Requests have

offered a detailed description of their position about the basis of electric rates as they apply to the specific instances of this case. An individual company's abstract "belief" about the general basis of electricity costs cannot lead to any admissible evidence in this case. Similarly, Request 1.2 asks, "Under what circumstances would [Company name] agree that a below cost rate is appropriate for a particular class or customer?" Again, this question, as it pertains to the issues in this particular case, has already been answered in laborious detail by the members of MIEC in the testimony of more than a dozen witnesses. Request 1.3 asks for "the individual at [Company name] that is most knowledgeable to testify on [Company name's] position on class cost of service / rate." Again, even if there were such a person at these companies, the MIEC members have retained and proffered voluminous testimony of experts in the field of rate design to state their position on class cost of service / rate. Request 1.6 seeks each company's "position regarding the appropriate rate for the AmerenUE LTS class." Like the others, this Request seeks information that has been fully and thoroughly analyzed and described in the testimony of MIEC's witnesses.

20. Requests 1.8 and 1.9 are equally unlikely to lead to the discovery of admissible evidence as they seek information that bears no relevance whatsoever to the issues in this case. Request 1.8 asks for the identity of "all jurisdictions in which [Company name] receives electric service" and "the service provider in each jurisdiction." Some MIEC members likely receive electric service in multiple counties of all 50 states and several foreign countries from dozens of providers. MEUA can demonstrate no reasonable relationship between the information it seeks in this Request and the issues in this case. Similarly Request 1.9, which calls for the "rate schedule under which [Company name] takes electric service," seeks information that has no logical bearing on the issues in this current proceeding and is not likely to lead to the discovery

of admissible evidence.

21. Because MEUA cannot bear its burden of establishing the relevance of any of its eleven Data Requests, as is required under Rule 56.01 through 4 CSR 240-2.090, MEUA's Motion to Compel should be denied with respect to Data Requests 1.1 through 1.11.

III. MEUA's Data Requests Seek Information Protected by the Attorney Client Privilege.

22. The attorney-client privilege applies to communications between privileged persons, made in confidence, for the purpose of seeking, obtaining, or providing legal assistance for the client. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *see also Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc). The importance of the attorney-client privilege is to encourage "the full and frank presentation of legal advice to corporations, which helps to insure that corporations will act within the law." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997). "Where an attorney represents "a group of joint clients comprised of distinct corporate entities that share[] a common interest," the distinct corporate entities are entitled "to the joint client privilege." *Jordan (Bermuda) Inv. Co. v. Hunter Green Invs. Ltd.*, 2006 U.S. Dist. LEXIS 69127 (S.D.N.Y. Sept. 27, 2006). "When co-clients and their common attorneys communicate with one another, those communications are 'in confidence' for privilege purposes. Hence the privilege protects those communications from compelled disclosure to persons outside the joint representation." *Teleglobe Communs. Corp. v. BCE, Inc. (In re Teleglobe Communs. Corp.)*, 493 F.3d 345, 363 (3d Cir. Del. 2007); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2).

23. At least two of MEUA's Data Requests seek information that is protected from discovery by the attorney client privilege. MEUA Request 1.11 seeks "all documents, e-mail, or notes within [Company name's] control or possession which discuss the positions to be taken in

this case by MIEC or Noranda.” This Request on its face seeks the legal strategy, thoughts, opinions and mental impressions of MIEC’s counsel. Such a request blatantly violates Missouri Rules of Civil Procedure 56.01 and 4 CSR 240-2.090. MEUA Data Request 1.6 also improperly seeks privileged information: “Please provide all documents, emails, or notes within [Company name’s] control or possession which discuss the arrangement reached between MIEC and Noranda regarding Noranda’s inclusion in MIEC.” In addition to being directed at an improper purpose and seeking wholly immaterial information, this request also seeks the thoughts, strategies and mental impressions of MIEC’s counsel, and is thus improper.

24. Because MEUA’s Data Requests seek information that is protected from discovery by the attorney client privilege, MEUA’s Motion to Compel responses to Data Requests 1.6 and 1.11 should be denied.

IV. Requiring the Individual Members of Associations to Respond to Discovery Requests is not in the Public Interest.

25. Associations like MIEC, MEUA, Missouri Retailers Association, AARP, etc., serve an important role in Commission proceedings by representing the interests of large segments of the rate-paying public through joint testimony. Requiring the individual members of these associations to become embroiled in the discovery process, especially when they have proffered expert testimony representing their position, is a waste of time, money and Commission resources. As a practical matter, requiring individual association members to become involved in the discovery process creates intolerable burdens on the parties. Such a policy would be contrary to Missouri’s interest in judicial economy and efficiency, and would create an undue and unnecessary burden for the Commission and all parties involved. Moreover, such a burdensome and oppressive process would chill the ability of associations to intervene on behalf of their members, as members would be reticent to engage in long and contentious

discovery disputes. Such a precedent is not in the public interest and should not be established as a result of MEUA's Motion and improper Data Requests.

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 INTERVENOR MIEC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail this 22nd day of February to each person on the Commission's official service list in this case.

/s/ Diana Vuylsteke