

**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)	

REPLY TO OBJECTION OF MIEC

COMES NOW the Midwest Energy Users' Association ("MEUA"), and for its Reply to the Opposition filed by MIEC, respectfully states as follows:

I. BACKGROUND

1. On February 15, 2010, MEUA filed its Motion to Compel Responses to Data Requests that had been issued to the MIEC constituent members. On February 22, 2010, the MIEC constituent members filed their Opposition to the Motion to Compel ("Opposition"). In general, the MIEC members raise 3 areas of concern which they maintain relieves them from the obligation to answer the Data Requests. *First*, MIEC claims that the Data Requests are solely designed to "harass the members of MIEC."¹ *Second*, MIEC claims that the Data Requests seek information that is protected by the attorney-client privilege. *Third*, MIEC asserts that the discovery is "oppressive and burdensome" in that it seeks information from the member entities instead of the joint MIEC association. As this pleading demonstrates, MIEC's assertions are legally and factually erroneous. As such, MIEC's constituent members should be ordered to respond in full to each of the Data Requests.

¹ Opposition at page 1.

II. DISCOVERY IS NOT HARRASSING. BUT INSTEAD SERVES AN APPROPRIATE PURPOSE

2. At pages 3-8 of its Opposition, MIEC claims that the Data Requests are “not reasonable calculated to lead to the discovery of admissible evidence.” Instead, MIEC asserts that the discovery is solely designed to “harass” the MIEC members by seeking information pertaining to “Noranda’s arrangement with other MIEC members.”² Ultimately, MIEC posits that information related to this arrangement “has no bearing whatsoever on any of the issues in this case.”³

The nature of Noranda’s arrangement with the other MIEC members is relevant in that it has a direct effect on: (1) the Commission’s ability to assess the credibility of the MIEC’s rate design witness and his recommendations; and (2) as a result, the Commission’s ability to establish just and reasonable rates based upon objective expert testimony.

3. As MIEC recognizes, one aspect of the Commission’s responsibility in this matter is to determine “how the revenue requirement should be allocated among AmerenUE’s customer classes.”⁴ The allocation of revenue requirements has historically been done through the use of class cost of service studies undertaken by expert witnesses. In this case, MIEC has submitted a class cost of service study through the expert testimony of Maurice Brubaker. In that testimony, Mr. Brubaker, with the apparent agreement of the other MIEC members, has attempted to minimize the overall cost of service for the LTS (Noranda) class. In minimizing Noranda’s cost of service, however, other customer classes will unfairly suffer in the form of higher rates. For some

² Opposition at pages 3-4.

³ *Id.*

⁴ *Id.* at page 1.

unexplained reason, the MIEC members, all receiving service under the LP tariff, have made concessions to Noranda even though those concessions will result in higher rates for the LP class as well as all other tariff classes.

4. It is well established that the role of fact finder is exclusively reserved for the Commission.⁵ One aspect of the Commission's fact finding duty is to assess the credibility of witnesses appearing before it.⁶ In PSC matters, the Commission is routinely charged with assessing the credibility of expert witnesses. In order for the expert to be credible, however, he must reach his conclusions based upon an objective application of the facts. "The court explained that the basic policy of ensuring 'frank and objective testimony' remains regardless of how the witness comes to court. 'As a matter of law,' the court wrote, 'the expert serves the court.'"⁷ Given, then, that the expert "serves the Commission" and that his fundamental duty is to provide "frank and objective testimony," it is critical that parties be allowed to peer into facts that may call into question the expert's objectivity.

5. In the last two cases, MIEC's consultant recommended that all customer classes be moved simultaneously and in an equal manner towards their class cost of service. Suddenly, following the inclusion of Noranda in MIEC in this case, that same consultant recommends that the LTS (Noranda) class be moved to a rate that is at or below its cost of service. This concession to Noranda is made at the detriment of other customer classes, including Large General Service / Small Primary class, which are left significantly above their class cost of service.

⁵ *State ex rel. Gulf Transport Co. v. Public Service Commission*, 658 S.W.2d 448, 469 (Mo.App. 1983).

⁶ "Evidence which is not credible is, of necessity, not substantial but issues of credibility are for the fact finder, not for the court." *State ex rel. St. Joseph v. Public Service Commission*, 713 S.W.2d 593, 595 (Mo.App. 1986).

⁷ *Murphy v. A.A.Mathews*, 841 S.W.2d 671, 678 (Mo. 1992) (emphasis added).

Given the sudden change in his recommendation, upon the inclusion of Noranda in MIEC, it is appropriate to inquire into the objectivity of MIEC's consultant and his analysis. That consultant himself appears to indicate that the recommendations in his testimony are not the result of objective expert analysis, but, rather, the product of some policy decision made by individual MIEC members. "Because of the unique circumstances faced by aluminum smelters, MIEC supports moving the Large Transmission class to its cost of service at this time."⁸

Given the coincidental inclusion of Noranda in MIEC at the same time that Mr. Brubaker's recommendation changed, it is appropriate to inquire into the nature of the MIEC arrangement so that parties can explore the consultant's objectivity. It appears possible that MIEC's consultant has allowed his objective expert opinion, and the recommendations contained in his expert testimony, to be influenced by matters unique to the relationship between MIEC and Noranda. In this way, one must be allowed to question whether his testimony is "frank and objective." As such, it is not only appropriate, it is necessary, that parties be permitted to inquire into that relationship and further test to see how that relationship has affected MIEC consultant's recommendations and testimony. For this reason, the MEUA Data Requests are appropriate.

⁸ Brubaker Revised Direct, filed February 3, 2010, at page 37. This recommendation, made by MIEC, stands in stark contrast to other recommendations which were made based upon Mr. Brubaker's objective expert witness. For instance: "I have changed AmerenUE's cost of service methodology."; "I have instead classified and allocated them as a demand-related cost."; "I have changed the allocation to reflect the more appropriate energy-based allocation."; "I have modified AmerenUE's allocation of general and intangible plan to reflect a more appropriate allocation." (all citations at page 3).

III. DATA REQUESTS DO NOT SEEK PRIVILEGED INFORMATION

6. At pages 8-9, MIEC claims that MEUA's data requests seek to discover information that is protected under the attorney-client privilege. Specifically, MIEC claims that the following data requests seek privileged information:

MEUA 1.5: 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.

MEUA 1.11: Please provide all documents, email, or notes within [Company name's] control or possession which discuss the positions to be taken in this case by MIEC or Noranda.

7. It is not MEUA's intention to discover privileged information through any of its data requests. While repeatedly referencing Missouri Rule of Civil Procedure 56.01, MIEC fails to consult any of the remaining rules. For instance, Rule 57.01(c) provides specific procedures to follow in the event such a privilege is asserted.

If a privilege or the work product doctrine is asserted as a reason for withholding information, then without revealing the protected information, the objecting party shall state information that will permit others to assess the applicability of the privilege or work product doctrine.

While MIEC has claimed attorney client privilege, it has failed to provide the information necessary to allow opposing counsel of the Commission to "assess the applicability of the privilege." Assertion of such a privilege is not merely an act of self-certification. If such were true, the privilege would eventually consume the remainder of the discovery rules. MIEC counsel has the affirmative duty to allow other parties to assess such privilege and react accordingly.

8. That said, there is undoubtedly information available, that is not privileged, which would be responsive to each of these discovery requests. For instance,

are there communications between any of the MIEC entities and their retained consultants that do not concern disclosures to the attorney or the mental impressions of the attorney? If so, such communications are discoverable. Still again, are there communications between the MIEC entities and Noranda concerning their arrangement for inclusion in MIEC? Those communications may show how the positions to be espoused by MIEC's consultants have been modified to accommodate Noranda's presence. In summary, it is not enough for MIEC to make a broad-brush claim of attorney client privilege. Instead, the parties must reveal information necessary for parties to assess such privilege. Furthermore, MIEC must undertake the necessary review to determine if there are communications that do not fall within the claimed privilege.

IV. DISCOVERY IS IN THE PUBLIC INTEREST

9. Finally, at pages 9-10, MIEC makes the unsubstantiated claim that MEUA's discovery is "not in the public interest." MIEC claims that "requiring 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."⁹ Again, MIEC's claims are unsubstantiated.

10. Counsel finds it somewhat amazing that MIEC claims that relevant discovery submitted to a party in the case is contrary to the public interest. Such a statement is directly undermined by the fact that the General Assembly has reflected discovery in Chapters 386 and 536 of the Missouri States; the Missouri Supreme Court has reflected discovery in Rules 56-60 of the Missouri Rules of Civil Procedure; and the

⁹ Opposition at page 9.

Missouri Public Service Commission has codified discovery rules in Chapter 2 of its Rules of Process and Procedure.

11. Moreover, MIEC has failed to provide any legal support for its belief that discovery is limited to the association, rather than to individual members. That said, the inquiry as to whether discovery can be issued to members underlying an association is not relevant to the current inquiry. As demonstrated in its Motion to Compel, each of the entities served with discovery are parties to this proceeding. As such, it is appropriate to conduct discovery on the positions of those parties.

12. As MIEC notes, MEUA is also an association representing the interest of several individual entities. As such, from a self preservation point of view, counsel would be seriously concerned with any actions, including discovery, which would chill the ability of entities to participate through an association. In this case, counsel finds it highly unlikely that we should expect to see a sudden exodus of parties from MIEC or any other association in response to this discovery in this matter.

V. RESPONSE TO MOTION FOR HEARING

13. Prior to preparing its Objection to the Motion to Compel, MIEC filed a Request for Hearing. In its Motion to Compel, MEUA claims that MIEC's "objections are solely designed for the purpose of delay and to hinder another party's ability to prepare for trial." MEUA suggests that MIEC's request for a hearing is further evidence of MIEC's intent to delay and hinder a party's ability to prepare for hearing. MEUA believes that there is nothing of such complexity in these pleadings which require the Commission to engage in fact finding (a hearing) or schedule an oral argument. Rather, counsel implores the Commission to expeditiously issue its order compelling responses to

all the MEUA Data Requests so that counsel can prepare for the commencement of the hearing in this matter on March 15, 2010.

WHEREFORE, MEUA respectfully requests that the Commission issue its order compelling responses to each of the MEUA data requests.

Respectfully submitted,

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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 23, 2010