

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 3<sup>rd</sup> day of March, 2010.

In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service	) ) )	<b><u>File No. ER-2010-0036</u></b> Tariff No. YE-2010-0054
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**ORDER REGARDING MEUA'S MOTION TO COMPEL NORANDA  
TO RESPOND TO DATA REQUESTS**

Issue Date: March 3, 2010

Effective Date: March 3, 2010

On February 22, 2010, The Midwest Energy Users' Association (MEUA)<sup>1</sup> filed a motion to compel Noranda Aluminum to answer certain data requests submitted by MEUA. Later that day, the Commission ordered Noranda to respond to MEUA's motion to compel. Noranda filed a written response to the motion to compel on February 25.

Missouri Industrial Energy Consumers (MIEC) is a group of large industrial companies that take electrical service from AmerenUE. Noranda Aluminum is a member of MIEC and is also the only entity that takes service from AmerenUE under the Large Transmission rate class. MIEC, as a group, and Noranda, as an individual party, filed testimony asking the Commission to establish a rate for the Large Transmission rate class, meaning Noranda, that would give Noranda a more favorable rate than would be enjoyed by the other members of MIEC who are not members of the Large Transmission rate class.

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<sup>1</sup> The members of MEUA for this case are Wal-Mart Stores and Best Buy Co., Inc.

MEUA's motion to compel explains that its data requests are intended to gather information about the justification for Noranda's request for a reduced electric rate.

In an attempt to find the answers to these questions, MEUA sent 63 data requests to Noranda. The specific data requests are attached to the motion to compel and are attached to this order as Appendix I. Noranda responded to MEUA's motion to compel on February 25. MEUA replied to Noranda's response on March 1. The parties offered oral argument regarding the discovery dispute on March 3.

Commission rule 4 CSR 240-090(1) provides: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." In addition to the discovery mechanisms used in circuit court, the Commission's rule also allows parties to send data requests to other parties as a means of discovery.<sup>2</sup> Data requests are used in a manner similar to the way interrogatories or requests for production of documents are used in civil court.

Rule 56.01(b) of the Missouri Rules of Civil Procedure allows parties to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action". That rule further indicates "[i]t 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." Finally, the rule puts the burden of establishing relevance on the party seeking discovery.

Noranda offers various objections to the data requests submitted by MEUA. The Commission will address those objections in turn.

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<sup>2</sup> 4 CSR 240-090(2).

**IRRELEVANT BECAUSE MOOT:**

Noranda objects that several data requests seek information that is no longer relevant because Noranda changed its position in its rebuttal testimony and no longer seeks a below-cost \$27 / MWH rate. Data requests 1-5, 1-6, 1-7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.33, 1.41, and 1.43 all seek information about the basis for Noranda's request for a below cost rate in general, or a rate of \$27 / MWH in particular. In its reply to Noranda's objection, MEUA claims that these data requests are not moot because Noranda is still seeking a rate that, although no longer below cost, would still be more favorable than the rate MIEC would have other rate-classes pay. From this, MEUA argues its data requests are still relevant despite Noranda's change of position.

The data requests that MEUA asks the Commission to compel Noranda to answer specifically refer to a \$27 / MWH rate or to a below cost rate. Noranda is no longer asking for a \$27 / MWH rate or a below-cost rate. However, some of MEUA's data requests are still relevant to Noranda's request for an economic development rate whether MEUA is specifically requesting a \$27 / MWH rate or some other rate that is lower than the rates charged to other rate classes. The Commission will grant MEUA's motion to compel as to data requests 1.7, 1.8, 1.9, 1.12, 1.13, 1.33, and 1.43 with the modification that they apply to the rate Noranda is now seeking. Since Noranda is no longer seeking a \$27 / MWH rate, those data requests directly tied to such a rate are no longer relevant or reasonably calculated to lead to the discovery of admissible evidence. The Commission will deny the motion to compel as it relates to data requests 1.5, 1.6, 1.10, 1.11, and 1.41.

**WORK PRODUCT:**

Noranda's second objection asserts that data request 1.1 improperly seeks the identity of Noranda's non-testifying consultants. Data request 1.1 asks Noranda to identify all consultants retained by Noranda or MIEC, including "all consultants whether they filed testimony or not in this case." Additionally, data requests 1.2, 1.3, and 1.4 go on to request additional information and documents about the consultants identified in data request 1.1. Noranda contends that all such data requests seek information that is protected from disclosure as attorney work-product.

Section 56.01(b)(4)(a) of Missouri's Rules of Civil Procedure allows a party to discover through interrogatories the identity of persons whom a party intends to call as an expert witness at trial. The facts relied on and the opinions of testifying expert witness can then be discovered by deposition. However, "the discovery of facts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert."<sup>3</sup> Therefore, to the extent data requests 1.1, 1.2, 1.3, and 1.4 seek information about the identity of and the opinions of any retained experts who will not be offering testimony, they are improper inquiries into the work-product of Noranda's attorneys.

However, MEUA's data requests 1.1, 1.2, 1.3, and 1.4 also inquire about consultants who have or will offer testimony in this matter. For expert witnesses who will testify, Missouri's civil procedure rule 56.01(b)(4)(a) allows a party to discover through interrogatories the identity, qualifications, and the general nature of the subject matter on which the expert is expected to testify. Therefore, to the extent data requests 1.1, 1.2, 1.3,

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<sup>3</sup> *Tracy v. Dandurand*, 30 S.W.3d 831, 834 (Mo banc 2000).

and 1.4 are restricted to consultants who have or will testify, they are proper and the Commission will require Noranda to respond.

There is a complication with data requests 1.4 in that it asks for class cost of service analysis generated internally or by a consultant. An analysis generated internally would be undiscoverable work product unless it was shared with the testifying consultant. Therefore, Noranda must disclose such an analysis only if that analysis was shared with the testifying consultant.

**IRRELEVANT AS OUTSIDE THE SCOPE OF THIS LITIGATION:**

Noranda's third general objection is that numerous other data requests seek irrelevant information that is outside the scope of this litigation. In particular, Noranda objects to data request 1.14, which asks whether Mr. Earnhart receives electric service from AmerenUE at his residence. The data request does not identify Mr. Earnhart, but the Commission will assume that Mr. Earnhart is Rick Earnhart, a maintenance mechanic at Noranda's aluminum smelter, who filed direct testimony on behalf of Noranda. At the oral argument, counsel for MEUA explained that he is seeking this information to determine whether Mr. Earnhart will himself be paying increased rates because of this rate case. That is a relevant area for inquiry and the question is reasonably calculated to lead to admissible evidence. The Commission will grant MEUA's motion to compel a response to that data request.

Noranda also objects to the relevance of data requests 1.23, 1.24, 1.25, and 1.26. Those data requests seek information about shares and purchase options in Noranda held by a Mr. Smith and a Mr. Skoda. Presumably, Mr. Smith is Kip Smith, President, and CEO of Noranda Aluminum, Inc., who offered testimony on behalf of Noranda. Mr. Skoda did not

testify and the record does not indicate who he is, although Noranda's response seems to indicate he is an executive with the company. At the oral argument, counsel for MEUA indicated he is no longer seeking information about Mr. Skoda. Since Mr. Smith testified, MEUA's request to discover information about his financial stake in the company could lead MEUA to admissible evidence regarding his credibility. Therefore, the Commission will grant MEUA's motion to compel responses to data requests 1.23 and 1.25, which seek information about the financial holdings of Mr. Smith. However, since Mr. Skoda did not testify, his financial holdings are not relevant to his credibility. Therefore, the Commission will deny MEUA's motion to compel responses to data requests 1.24 and 1.26, which seek information about Mr. Skoda's financial holdings.

Data request 1.63 asks Noranda to "identify the amount of bonus compensation due to either Mr. Smith or Mr. Skoda associated with the outcome of this case." That request is relevant as to Mr. Smith since it affects his credibility as a witness, but it is not relevant as to Mr. Skoda since he has not submitted testimony. Therefore, the Commission will compel Noranda to answer that data request only as it applies to Mr. Smith's bonus.

Noranda also objects to data requests 1.22, 1.34, 1.39, 1.47, 1.49, and 1.50 on the basis of relevance. Data request 1.22 asks for an "update on the status of Noranda's initial public offering." Noranda has made its financial status an issue in this case by filing testimony pleading for favorable rate treatment to avoid having to close its Missouri aluminum smelter. The status of Noranda's initial public offering could be relevant to the financial health of the company. Therefore, the Commission will grant MEUA's motion to compel as regards data request 1.22.

Data request 1.34 seeks “citations to all SEC filings in which Noranda warns that an increase in electric rates threaten the ‘long-term viability of Noranda or the New Madrid smelter.” This is a straightforward data request that is relevant to Noranda’s claim that it needs a lower electric rate to be viable. The Commission will grant MEUA’s motion to compel a response to data request 1.34.

Data request 1.39 asks for “the number of shareholders of Noranda or any of its parent holding companies that are residents of Missouri.” The number of shareholders who are residents of Missouri may be relevant to the question of whether Noranda should receive a decreased economic development rate. The Commission will grant MEUA’s motion to compel a response to data request 1.39.

Data request 1.47 asks Noranda to identify all jurisdictions in which it receives electric service and to identify the service provider in each jurisdiction from which it takes that service. The identity of other electric service providers from which Noranda receives electric service could lead to relevant information about Noranda’s claim to need a reduced rate to be competitive. The Commission will grant MEUA’s motion to compel a response to data request 1.47.

Data request 1.49 asks Noranda to identify the number of Noranda employees in each of Missouri’s counties. Data request 1.50 asks Noranda to identify the amount of property tax it pays in each of Missouri’s counties. Noranda’s testimony asserts that its continued operation of its New Madrid smelter is important to the economy and tax base of numerous counties in Southeast Missouri, as well as to the economic health of the entire state. This data request is reasonably calculated to lead to relevant information about that

claim. The Commission will grant MEUA's motion to compel a response to data requests 1.49 and 1.50.

### **IMPROPER DISCOVERY OF EXPERT WITNESSES:**

Noranda objects to a number of MEUA's data requests as calling for expert testimony from non-expert witnesses. Specifically, Noranda raises this objection to data requests 1.15, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.27, 1.28, 1.29, 1.30, 1.31, 1.32, 1.35, 1.40, 1.42, 1.45, 1.51, and 1.52. Noranda also objects that these data request seek expert opinions that can only be answered by expert witnesses at trial or in a deposition, but not through a data request.

Data requests 1.15, 1.16, 1.17, 1.18, and 1.19 ask specific questions about the testimony offered by Henry Fayne. In his testimony, Mr. Fayne describes himself as a consultant in the electric energy sector. Clearly, he is being offered as an expert witness and can be asked to provide expert testimony. The questions asked regarding Mr. Fayne's testimony are simple factual questions about a chart attached to his testimony. These are appropriate questions to be asked in data requests and the Commission will grant MEUA's motion to compel responses to those data requests.

Data request 1.20 and 1.21 asks specific questions about the testimony of Kip Smith, Noranda's President, and CEO. Mr. Smith offered opinion testimony about Noranda's need for a lower electric rate. The data requests appropriately ask him to clarify a statement he made about the closing of aluminum smelters in other states. They are appropriate questions that can lead to the discovery of relevant information. The Commission will grant MEUA's motion to compel responses to those data requests.

Data requests 1.27, 1.28, 1.29, 1.30, 1.31, ask Noranda open-ended questions about certain statements made by Noranda in a Form S-1 filed on January 14, 2010. Data requests 1.32, and 1.35 ask similar open-ended questions about competing smelters and the effect of the price of aluminum on the cost of electricity. The questions asked are relevant to Noranda's claim to need an electric rate reduction to be competitive with other aluminum smelters. However, they are not appropriate questions to be asked and answered through a data request in that they would require Noranda to create expert analysis that does not otherwise exist. The Commission will grant MEUA's motion to compel responses to data requests 1.27, 1.28, 1.29, 1.30, 1.31, and 1.35, but only to the extent that Noranda already possesses a study or other compilation that contains the requested information. The Commission will deny the motion to compel a response to data request 1.32, as that request would specifically require Noranda to perform a specific analysis.

Data requests 1.36, 1.37, and 1.38 also ask questions about the Form S-1 filed by Noranda. Data requests 1.36 and 1.38 ask Noranda to define the phrases medium and long term as used in the Form S-1. These are appropriate questions to be asked in a data request. Data request 1.37 asks Noranda to provide any forecasts done by Noranda or other entities as to projected aluminum prices. With the added restriction that these forecasts are in the possession of Noranda, this is an appropriate data request. At the oral argument, counsel for Noranda indicated that the company has already responded to these data requests. Nevertheless, so that the record is clear, the Commission will grant MEUA's motion to compel responses to these data requests.

Data request 1.42 asks for the identity of the individual at Noranda that is most knowledgeable to testify on Noranda's position on class cost of service / rate design. That is an appropriate question to ask in a data request and the Commission will grant MEUA's motion to compel a response to that data request.

Data request 1.40 asks whether Noranda believes electric rates should be based on cost. Data request 1.45 asks Noranda's position regarding the appropriate amount of revenues to be collected from the LTS rate schedule. Noranda has already identified its position through its testimony and neither request is appropriate. The Commission will deny MEUA's motion to compel a response to those data requests.

Data requests 1.51 asks Noranda to provide "all CRU documents relied upon by Mr. Fayne in creating Exhibit HWF-1." That is a straightforward request for documents and is an appropriate data request. The Commission will grant MEUA's motion to compel a response to that data request.

Data request 1.52 asks Noranda to "provide a discussion of Mr. Fayne's past experience relative to rates charged to an aluminum smelter." That is a strangely worded question in that it seems to be asking Noranda to write an essay on the value of Mr. Fayne's past experience. As such, it is not an appropriate data request question. The Commission will deny MEUA's motion to compel a response to that data request.

Data requests 1.53, 1.54, 1.55, 1.56, 1.57, 1.58, 1.59, 1.60, 1.61, and 1.62 ask Noranda to identify the amount of compensation Noranda has or will pay to the expert witnesses who have filed testimony on its behalf. Noranda does not challenge the relevance or ultimate discoverability of the information MEUA seeks. Rather, it objects that

Missouri Rule of Civil Procedure 56.01(b)(4)(a) limits interrogatory questions regarding expert testimony to “the expert’s hourly deposition fee.”

As MEUA argues, Noranda is being asked to respond to data requests, not interrogatories. Data requests are allowed by the Commission’s rules and although they are similar to interrogatories, they are not limited by the civil rules’ limitations on interrogatories. These are appropriate data requests under the Commission’s rules and the Commission will grant MEUA’s motion to compel a response to them.

### **ATTORNEY-CLIENT PRIVILEGE**

Data request 1.44 asks Noranda to “provide all documents, emails or notes within Noranda’s control or possession which discuss the arrangements reached between MIEC, its individual members and Noranda regarding Noranda’s inclusion in MIEC.” Noranda objects that this data request seeks information that is protected by the attorney-client privilege and also that the data request seeks irrelevant information. The internal arrangements within the MIEC are not relevant to this proceeding, regardless of whether they are also protected by attorney-client privilege. Because data request 1.44 is not reasonably calculated to lead to relevant information, the Commission will deny MEUA’s motion to compel Noranda to respond to that data request.

Data request 1.46 asks Noranda to identify the individual at Noranda most knowledgeable about those arrangements. This request asks only for the identity of an individual. As such, it does not delve into any privileged information. The Commission will grant the motion to compel Noranda to respond to data request 1.46.

Data request 1.48 asks Noranda to “provide all documents, emails or notes within Noranda’s control or possession which discuss the positions taken in this case by MIEC or

Noranda.” Noranda objects that this data request seeks information that is protected by the attorney-client privilege and that it seeks information protected as attorney work-product. Documents, emails and notes that discuss the positions a party intends to take in litigation are clearly protected as attorney work-product. The Commission will deny MEUA’s motion to compel Noranda to respond to that data request.

**REQUEST FOR WAIVER:**

MEUA asks the Commission for a waiver of Commission rule 4 CSR 240-2.100 which restricts the issuance of a subpoena fewer than twenty days before the start of a hearing. Given the length of time it has taken to resolve this discovery dispute, the Commission will waive application of the rule to allow the issuance of subpoenas at anytime before the start of the hearing.

**THE COMMISSION ORDERS THAT:**

1. The Midwest Energy Users’ Association’s Motion to Compel is denied as to data request numbers 1.5, 1.6, 1.10, 1.11, 1.24, 1.26, 1.32, 1.40, 1.41, 1.44, 1.45, 1.48, and 1.52.
2. The Midwest Energy Users’ Association’s Motion to Compel is denied as to data request numbers 1.1, 1.2, 1.3, and 1.4 to the extent those data requests seek information about non-testifying consultants or expert witnesses.
3. The Midwest Energy Users’ Association’s Motion to Compel is granted as to data request numbers 1.1, 1.2, 1.3, and 1.4 to the extent those data requests seek information about testifying consultants or expert witnesses.

4. The Midwest Energy Users' Association's Motion to Compel is granted as to data request number 1.63 to the extent that data requests seek information about Mr. Smith's bonus compensation.

5. The Midwest Energy Users' Association's Motion to Compel is granted as to data request numbers 1.7, 1.8, 1.9, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.22, 1.23, 1.25, 1.27, 1.28, 1.29, 1.30, 1.31, 1.33, 1.34, 1.35, 1.36, 1.37, 1.38, 1.39, 1.42, 1.43, 1.46, 1.47, 1.49, 1.50, 1.51, 1.53, 1.54, 1.55, 1.56, 1.57, 1.58, 1.59, 1.60, 1.61, and 1.62.

6. Noranda Aluminum shall answer those data requests no later than 5:00 p.m. on March 5, 2010.

7. The Commission waives application of Commission Rule 4 CSR 240-2.100 and will allow the issuance of subpoenas at any time before the beginning of the hearing of this case.

8. This order shall become effective immediately upon issuance.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Clayton, Chm., Davis, Jarrett, Gunn,  
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge