

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

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

In the Matter of Union Electric Company, d/b/a)	<u>File No. ER-2010-0036</u>
AmerenUE's Tariffs to Increase Its Annual)	Tariff No. YE-2010-0054
Revenues for Electric Service)	

**ORDER REGARDING MEUA'S MOTION TO COMPEL THE
MEMBERS OF MIEC TO RESPOND TO DATA REQUESTS**

Issue Date: March 3, 2010

Effective Date: March 3, 2010

On February 15, 2010, The Midwest Energy Users' Association (MEUA)¹ filed a motion to compel that asks the Commission to order the individual members of the Missouri Industrial Energy Consumers (MIEC) to answer certain data requests submitted to them by MEUA. The next day, the Commission ordered MIEC and its constituent members to respond to MEUA's motion to compel. On February 18, MIEC filed a Request for Hearing in which it asks the Commission to conduct a hearing before ruling on the motion to compel. MIEC filed a written response to the motion to compel on February 22.

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

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

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.

MEUA's motion to compel explains that it is concerned about MIEC's decision to support a reduced rate for Noranda. In its motion, MEUA rhetorically asks the following questions:

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?

In an attempt to find the answers to these questions, MEUA sent the following data requests to each of the 18 individual members of MIEC:

MEUA-1.1: Does [Company name] believe that electric rates should be based on cost?

MEUA-1.2: Under what circumstances would [Company name] agree that a below cost rate is appropriate for a particular class or customer?

MEUA-1.3: Please identify the individual at [Company name] that is most knowledgeable to testify on [Company name's] position on class cost of service / rate.

MEUA-1.4: Please identify all cases (jurisdiction and case number) in which [Company name] has advocated for a below cost rate for a particular class or customer.

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-1.6: What is [Company name's] position regarding the appropriate rate for the AmerenUE LTS class?

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

MEUA-1.8: Please identify all jurisdictions in which [Company name] receives electric service. Please identify the service provider in each jurisdiction from which [Company name] takes service.

MEUA-1.9: Please identify the rate schedule under which [Company name] takes electric service from AmerenUE.

MEUA-1.10: Has [Company name], as an individual entity or as a part of a group, ever filed testimony or taken a position regarding the appropriate electric rate for an aluminum smelter? If yes, please identify every jurisdiction and case number in which it has taken such a position?

MEUA-1.11: Please provide all documents, e-mail, or notes with (sic) [Company name's] control or possession which discuss the positions to be taken in the case by MIEC or Noranda.

MIEC responded to MEUA's motion to compel on February 22. MEUA replied to MIEC's response on February 23. In that reply, MEUA explains that it is seeking discovery from the members of MIEC about the inclusion of Noranda in MIEC to gather information to challenge the credibility and objectivity of the testimony offered by MIEC's expert witness. The parties offered oral argument regarding the discovery dispute on March 3.

MIEC contends MEUA's data requests are directed at an improper purpose, are not reasonably calculated to lead to the discovery of admissible evidence, and that some seek information protected by the attorney-client privilege. MIEC also contends that requiring the individual members of associations to respond to discovery requests is not in the public interest. The Commission will address MIEC's last contention first.

Formal and informal associations frequently appear as parties in the Commission's rate proceedings. The individual members of those associations usually jointly engage the services of expert witnesses to file testimony on behalf of the association as a whole and would not normally assert individual positions. Therefore, in most circumstances, it would not be appropriate to require those individual members of associations to respond to discovery about a case in which only the association is a party.

However, in this case, MIEC and its individual members,² applied to intervene both as an association and as individual entities. The Commission's order granting MIEC's request to intervene specifically allows intervention as individual entities and as an association. One member of MIEC, Noranda Aluminum, has exercised its status as an individual party to file its own testimony separate from that of MIEC as an association. Under these circumstances, the individual members of MIEC asked for and were given the privileges that go along with being a party to this case. They must also bear the responsibilities that go along with that status. That means they must respond to appropriate discovery requests submitted by other parties to the case.

Although the individual members of MIEC must respond to appropriate discovery requests, that does not mean they must respond to the specific data requests submitted by MEUA. Before the Commission can make that determination, it must examine MIEC's other objections to MEUA's data requests.

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.³ Data requests are used in a manner similar to the way interrogatories or requests for production of documents are used in civil court.

² The individual members of MIEC for this case are Anheuser-Busch Companies, Inc.; BioKyowa, Inc.; The Boeing Company; Doe Run; Enbridge; General Motors Corporation; GKN Aerospace; Hussman Corporation; JW Aluminum; MEMC Electronic Materials; Monsanto; Pfizer; Precoat Metals; Proctor & Gamble Company; Nestlé Purina PetCare; Noranda Aluminum; Saint Gobain; Solutia, and U.S. Silica Company.

³ 4 CSR 240-090(2).

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.

MIEC asserts that all eleven of MEUA’s data requests are objectionable because they are not reasonably calculated to lead to the discovery of admissible evidence. The Commission agrees with only part of MIEC’s objection. MEUA’s motion to compel explains that it is sending these data requests to each of the members of MIEC to determine why those members are willing to go along with MIEC’s decision to support Noranda’s request for a below cost rate. That apparently is a question of great interest to MEUA, but it is of no relevance to any decision the Commission will need to address regarding AmerenUE’s request for a rate increase or regarding the design of AmerenUE’s rates. MIEC and its members have clearly stated their position through the expert testimony they have presented. MEUA is free to attack the credibility of that testimony at the hearing and can conduct appropriate discovery to assess the credibility of the MIEC witnesses. Certainly MEUA is free to attack the wisdom of allowing Noranda a reduced rate through the testimony of its witnesses and the arguments of its counsel. It is not, however, entitled to pry into the internal workings of the association, as that information likely is not relevant in this proceeding and may be privileged. Therefore, the Commission will deny MEUA’s motion to compel responses to DRs 1.5, and 1.11. However, the Commission will direct the members of MIEC to supply a privilege log regarding the information sought in those data

requests. Data request 1.7 simply inquires about the name of an individual and thus does not implicate any privileged information, thus the Commission will compel the members of MIEC to answer the data request. The named individual is not, however, under any compulsion to reveal any privileged information.

Not all the data requests submitted by MEUA deal directly with the internal workings of the association. The Commission will examine those data requests separately. Several of the challenged data requests are directly related to the question of whether a below-cost rate should be established for a particular rate class. In their direct testimony, MIEC and Noranda requested a special below-cost of service electric rate for Noranda. However, in the rebuttal testimony of Kip Smith, President and CEO of Noranda, Noranda withdrew its request for a below-cost rate. As a result, those data requests that seek positions regarding below-cost rates are no longer relevant. On that basis, the Commission will deny the motion to compel regarding DRs 1.1, and 1.2.

Data request 1.6 asks the company to state its position on the appropriate electric service rate for Noranda. Data request 1.3 asks the company to identify an individual at the company who is most knowledgeable to testify on the company's position on class cost of service/ rate. Data request 1.4 asks the companies to identify all cases in which that company has advocated for a below cost rate. The requests are reasonably calculated to lead to relevant information. The Commission will grant the motion to compel an answer to data requests 1.3, 1.4 and 1.6.

The remaining data requests, 1.8, 1.9, and 1.10, request relatively simple factual information about the companies. The information sought appears to be relevant to the question of an appropriate rate structure for AmerenUE, or at least they appear to be

reasonably calculated to lead to the discovery of admissible evidence. MIEC does not claim that these data requests would implicate the attorney-client privilege. MEUA has met its burden to show that these three data request are “relevant to the subject matter involved in the pending action”. Therefore, the Commission will grant MEUA’s motion to compel answers to those three data requests.

THE COMMISSION ORDERS THAT:

1. The Midwest Energy Users’ Association’s Motion to Compel is denied as to data request numbers 1.1, 1.2, 1.5, and 1.11, although the member companies of the Missouri Industrial Energy Consumers must supply Midwest Energy Users’ Association with a privilege log regarding data requests 1.5 and 1.11.
2. The Midwest Energy Users’ Association’s Motion to Compel is granted as to data request numbers 1.3, 1.4, 1.6, 1.7, 1.8, 1.9, and 1.10.
3. The member companies of the Missouri Industrial Energy Consumers to whom the data requests are addressed shall answer those data requests no later than 5:00 p.m. on March 5, 2010.
4. This order shall become effective immediately upon issuance.

BY THE COMMISSION

(S E A L)



Steven C. Reed
Secretary

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

Woodruff, Chief Regulatory Law Judge