

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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

**NORANDA ALUMINUM, INC.'S SUGGESTIONS IN  
OPPOSITION TO MIDWEST ENERGY USERS' ASSOCIATION'S  
MOTION TO COMPEL**

Noranda Aluminum, Inc. ("Noranda"), submits its suggestions in 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. Many of the over 63 Data Requests in MEUA's First Set of Data Requests directed to Noranda are rendered moot by the supplemental direct testimony of Kip Smith filed on February 11, 2010 and Noranda's Responses to MEUA's Second Set of Data Requests, because Noranda no longer seeks a below cost of service rate. The remaining requests in MEUA's First Set of Data Requests to Noranda, and that are the subject of its February 21, 2010 Motion to Compel, are not likely to lead to the discovery of admissible evidence because they improperly seek information outside the scope of this proceeding principally related to: 1) Noranda's inclusion into MIEC; 2) communications between Noranda and non-testifying consultants; and 3) the personal finances of Noranda executives. Additionally, the Requests improperly seek information regarding the compensation paid to various expert witnesses and

specialized information such as quantitative projections, forecasts and equations calling for expert testimony that is beyond the experience, education and training of anyone at Noranda.

## **INTRODUCTION**

3. MEUA's motion is predicated on the incorrect position that Noranda is seeking a below cost of service rate. While Noranda initially requested a below cost of service rate, it amended its position and now requests a "class cost of service" rate in the supplemental direct testimony of Kip Smith filed on February 11, 2010, and further clarified its request in its responses to MEUA's Second Set of Data Requests, served on February 22, 2010. As such, many of the arguments proffered in MEUA's Motion to Compel are inapplicable to Noranda's position in this case.

4. a. The Motion and Accompanying Requests violate 4 CSR 240-2.080 (7)(A) because they are directed at an improper purpose. That is, they appear to serve no function other than to frustrate Noranda's ability to participate in this proceeding and to impede Noranda's relationship with the other members of MIEC.

b. 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 information that has been rendered moot by Kip Smith's supplemental direct testimony of February 11, 2010. Moreover, they seek information far outside the scope of this litigation and inquire vaguely into issues that have been discussed in painstaking detail by Noranda's retained experts.<sup>1</sup> Also, many of the requests are overly broad

---

<sup>1</sup> 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.

and unduly burdensome because they seek extensive data about matters only peripherally relevant to this proceeding. Additionally, in violation of Missouri Rules of Civil Procedure 56.01(b)(5), the requests seek information related to scientific, technical or other specialized knowledge from fact witnesses who are not qualified by knowledge, experience, training or education to address such requests.

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

e. Finally, MEUA's request for sanctions in Paragraph 12 of its Motion is inappropriate as Noranda has timely filed its objections and responses as required by Missouri Rule of Civil Procedure 61.01.

5. For the foregoing reasons, Noranda respectfully requests that the Commission deny MEUA's Motion to Compel, and order MEUA to pay all costs and attorneys fees associated with Noranda's opposition to MEUA's Motion and improper Data Requests.

## **DISCUSSION**

6. 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.

7. 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.

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

9. On January 6, 2010, Noranda's CEO, Kip Smith filed testimony requesting a rate of \$27.00 / MWH. *See* Direct Testimony of Kip Smith, January 6, 2010.

10. On January 28, 2010, MEUA filed sixty-six Data Requests on Noranda, most of which sought information far afield of the issues in this case (four separate Data Requests were numbered 1.32).

11. On February 11, 2010, Mr. Smith filed supplemental direct testimony revising Noranda's previous position, stating: "[W]e adjust our request to ask for a rate consistent with Maurice Brubaker's cost of service study filed on behalf of the Missouri Industrial Energy Consumers." *See* Supplemental Direct Testimony of Kip Smith, February 11, 2010.

12. On February 12, 2010, MEUA served a Second Set of Data Requests on Noranda. On February 22, 2010, Noranda responded to MEUA's Second Set of Data Requests. The Requests and corresponding responses are as follows:

MEUA-2.1: . . . . Please clarify which class cost of service study Mr. Smith is referencing in his supplemental direct testimony.

**Response: The class cost of service study referenced by Mr. Smith is Maurice Brubaker's revised study filed on February 3.**

MEUA-2.2 (a): Please clarify whether Mr. Smith is seeking a rate consistent with Mr. Brubaker's first proposal (class cost of service study) or his second proposal (targeted revenue figure).

**Response: Mr. Smith is seeking the cost of service rate.**

MEUA-2.2 (b): In the event Noranda is seeking a rate resulting from Mr.

Brubaker's first proposal, would Noranda be subject to the equal percent, across the board, increase envisioned by Mr. Brubaker's first proposal?

**Response: Yes, as set forth in revised schedule MEB-COS-7.**

13. As is clearly stated in both Kip Smith's supplemental testimony and Noranda's responses to MEUA's Second Set of Data Requests, Noranda now seeks a cost of service rate, not a below cost of service rate as alleged in MEUA's Motion to Compel.

**I. MEUA's Data Requests are not Reasonably Calculated to Lead to the Discovery of Admissible Evidence or are Improper Under Missouri Law.**

14. "The party seeking discovery shall bear the burden of establishing relevance." Missouri Rules of Civil Procedure 56.01(b)(1). "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 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).

**A. MEUA's Requests Seeking Information Related to Below Cost of Service Rate are Moot.**

16. Of MEUA's 63 Data Requests directed at Noranda, twelve of them seek information related to Noranda's initial request for a below cost of service rate of \$27.00 /

MWH. *See* MEUA 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. None of these Requests are likely to lead to the discovery of admissible evidence in this case, because Noranda no longer seeks a below cost of service rate of \$27.00. Rather, Noranda expressly seeks a cost of service rate as described in Kip Smith’s Direct Supplemental Testimony and Noranda’s Responses to MEUA’s Second Set of Data Requests. As such, MEUA’s Motion to Compel Responses to these Data Requests should be denied.

**B. MEUA’s Requests Seeking Identities and Work-Product of Non-Testifying Consultants are Improper Under the Missouri Rules of Civil Procedure and the Work Product Doctrine.**

17. One of MEUA’s Data Requests Directed at Noranda improperly seeks the identities of Noranda’s non-testifying consultants. Missouri Rule of Civil Procedure 56.01(b)(4) contemplates that only the identities of those experts “whom the other party expects to call as an expert witness at trial” is discoverable. As such, MEUA’s attempt to discover the identity of non-testifying consultants in Data Request 1.1 is improper.

18. At least four of MEUA’s Data Requests seek information protected from discovery by Missouri’s work product doctrine as they seek information prepared by or for a party in anticipation of litigation. *See* MEUA 1.2, 1.3, 1.4 and 1.48. Missouri’s work product doctrine protects from discovery “documents and tangible things . . . prepared in anticipation of litigation . . . by or for another party or by or for that other party’s representative.” *See* Missouri Rule of Civil Procedure 56.01(b)(3). The rule further states that the court will “protect against disclosure . . . the legal theories of an attorney or other representative of a party concerning the litigation.” *In re Murphy*, 560 F.2d 326, 332 (8th Cir. 1977) (“The items protected by the work product doctrine are not confined to attorney-client confidential communications. [The doctrine]

extends protection to all ‘documents and tangible things’ that are prepared in anticipation of litigation or for trial.”). MEUA’s Data Requests 1.2, 1.3, 1.4 and 1.48 expressly seek documents prepared by or for Noranda in anticipation of litigation. As such, all four requests improperly seek Noranda’s protected work product. Thus, MEUA’s Motion to Compel responses to these Requests should be denied.

**C. MEUA’s Requests Seek Information Unrelated to the Issues in this Case.**

19. MEUA served multiple Data Requests that seek information far outside the scope of this litigation. For example, MEUA 1.14 asks, “At his residence, does Mr. Earnheart receive electric service from AmerenUE?” Such a request is unrelated to the current litigation.

20. Similarly Data Requests 1.23-1.26 improperly seek information related to the personal finances of Noranda executives, including questions about stock options, strike prices and bonuses. Such Requests are not relevant to the issues. Moreover, such requests are likely to lead to wasteful and immaterial mini-trials within this procedure where the Commission is asked to review salaries, bonuses, stock options, etc., of all parties to this litigation. Such information is not material in this case, and even if it were, its relevance would be so remote that the burden of requiring all parties to respond to multiple requests about their finances would outweigh it. Likewise, the information sought in MEUA Data Request 1.22, 1.34, and 1.39 related to Noranda’s initial filing, SEC filings and shareholder information, is so tangential to this proceeding as to render it immaterial.

21. Also, MEUA Data Requests 1.44 and 1.46 seek information related to the inclusion of Noranda into MIEC, a matter completely immaterial to this proceeding. To the extent MEUA wishes to challenge Noranda’s experts, it should depose and/or cross-examine them regarding their analysis in this case. The MEUA is not entitled under the rules to explore

matters wholly outside the scope of this litigation. The nature of the relationship between the members of MIEC may be of interest to MEUA's counsel but has no bearing on the issues in this case and MEUA's motion demanding responses to questions about it should be denied.

22. And finally, MEUA Data Requests 1.47 (seeking all jurisdictions wherein Noranda receives electric service), 1.49 (seeking the number of Noranda employees in each Missouri county), and 1.50 (seeking the amount of property taxes paid in each Missouri county by Noranda) all seek information that is outside the scope of this case and irrelevant to the issues at hand. As such, MEUA's motion to compel responses to such Requests should be denied.

**D. MEUA's Requests Seek Expert Testimony from Non-Expert Witnesses.**

23. Several of MEUA's Data Requests improperly seek expert testimony from non-expert witnesses. *see* 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. Missouri Rules of Civil Procedure 56.01(b)(5) provide that only experts who are qualified by knowledge, experience, training or education may testify to information related to scientific, technical or other specialized knowledge, and non-experts may not testify to such information. *See also Heisler v. Jetco Service*, 849 S.W.2d 91, 95 (Mo. Ct. App. E.D. 1993); *Piper v. Missouri Pacific R. Co.*, 847 S.W.2d 907, 909-10 (Mo. Ct. App. E.D. 1993). The way to obtain these expert opinions is by deposing the experts themselves, not by asking for the opinions of the non-expert parties that retained the experts. Data Requests 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, 1.27, 1.28, 1.29, 1.30, 1.31, 1.32, 1.35, 1.42, 1.45, 1.51, and 1.52 call for information that can only be answered by expert witnesses at trial or in a deposition, and cannot be answered by a non-expert party in this case. The MEUA is in effect attempting to circumvent rule 56.01(B) (4) by attempting to discover the opinions of experts through interrogatories/DRs rather than by depositions. Because



Noranda is not an expert on the information sought in these data requests as contemplated by Missouri law, it is not qualified to testify to these Requests. As such, the MEUA's Motion to Compel with respect to these Data Requests should be denied.

24. Similarly, MEUA Data Requests 1.53-1.63 seek information related to amounts paid to Noranda's expert witnesses. Missouri Rule of Civil Procedure 56.01(b)(4) controls the type of information a party may seek regarding another party's experts in an interrogatory. While the rule permits a party to inquire about an "expert's hourly deposition fee," the rule does not permit a party to inquire in an interrogatory to the party about amounts paid to its retained experts. To the extent a party seeks discovery of this information, it can only be sought by deposing the expert witness, or examining them at trial.

## **II. MEUA's Data Requests are Directed at an Improper Purpose.**

25. "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. 4 CSR 240-2.080 (7)(A).

26. Many of MEUA's Data Requests appear to be directed at the improper purpose of harassing Noranda, frustrating its participation in this proceeding and disrupting its relationship with the other members of MIEC.<sup>2</sup> For example, the exorbitant number of Data Requests (66), the request for information related to a witness' residential service provider, the numerous requests for personal financial information, the numerous requests for information relating to payment to expert witnesses, the requests for information related to non-testifying consultants,

---

<sup>2</sup> 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.

the multiple requests for information related to MIEC's relationship with Noranda and the multiple requests for extensive scientific analysis and forecasts from other than expert witnesses appear to be designed to burden and frustrate Noranda's participation in this proceeding. Thus, MEUA's Motion to Compel responses to these requests should be denied.

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

27. 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) (holding that waiver of the privilege by one of the entities does not constitute a waiver of the other corporate entities). "When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original charmed circle." *DeBold v. Case (In re Tri-River Trading, LLC)*, 329 B.R. 252, 269 (B.A.P. 8th Cir. 2005); see also *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (*quoting* 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 91 at 335-36 (4th ed.1992)); *City of Coralville v. Iowa Dist. Court*, 634 N.W.2d 675, 677 (Iowa 2001). [A]ttorney-client communications in the presence of, or disclosed to, clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when made to further the interest of the client or when reasonably necessary for transmission or accomplishment of the purpose of the consultation, remain privileged. *State ex rel. Syntex Agri-Business, Inc. v. Adolf*, 700 S.W.2d 886, 888-889 (Mo. Ct. App. 1985). "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. Moreover, waiving the joint-client privilege requires the consent of all joint clients.” *Teleglobe Communs. Corp. v. BCE, Inc. (In re Teleglobe Communs. Corp.)*, 493 F.3d 345, 363 (3d Cir. Del. 2007).<sup>3</sup> “If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged . . . and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege. . . .” Restatement 3d of the Law Governing Lawyers, § 75.

28. At least two of MEUA’s Data Requests (1.44 and 1.48) seek information protected by the attorney-client privilege. MEUA Data Request 1.44 seeks “all documents, email or notes within Noranda’s control or possession which discuss the arrangement reached between MIEC, its individual members and Noranda regarding Noranda’s inclusion in MIEC.” In addition to the immateriality and impropriety of this Request as stated above, it also seeks confidential communications to or from counsel for the purpose of obtaining or giving legal advice that are protected by the attorney-client privilege. Similarly, MEUA Data Request 1.48 seeks “all documents, emails or notes within Noranda’s control or possession which discuss the positions to be taken in this case by MIEC or Noranda.” This Request, in addition to improperly seeking documents and tangible things protected by the work-product doctrine as described above, also seeks confidential communications between Noranda and its counsel relating to legal

---

<sup>3</sup> *Teleglobe* offers an extensive discussion of the difference between the “joint-client” also known as “co-client” privilege and the “joint-defense” and/or “community of interest” privilege. In short, the joint-client privilege applies when two or more parties jointly retain single counsel for a particular purpose. The “joint-defense / community of interest” doctrine applies where multiple parties retain multiple counsel, and those counsel work together toward the common legal interest of their clients. For an extensive analysis of the development of the “joint-defense” and “community of interest” doctrines, see *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe 89-129 (Under Seal)*, 902 F.2d 244, 249 (4th Cir. Va. 1990).

advice and strategy. As such, the information sought in this Request is immune from discovery by the attorney-client privilege.

### **CONCLUSION**

For all the reasons set forth above, MEUA's First Set of Data Requests are improper and unlikely to lead to the discovery of admissible evidence in this case. As such, Noranda respectfully requests that the Commission deny MEUA's Motion to Compel, and order MEUA to pay all costs and attorneys fees associated with Noranda's opposition to MEUA's Motion and improper Data Requests.

Respectfully submitted,

BRYAN CAVE LLP

By: /s/ Diana Vuylsteke  
Diana Vuylsteke, #42419  
Edward F. Downey, #28866  
Mark B. Leadlove, #33205  
Brent Roam, #60666  
211 N. Broadway, Suite 3600  
St. Louis, MO 63102-2750  
Telephone: (314) 259-2532  
Fax: (314) 552-8543  
dmvuylsteke@bryancave.com  
efdowney@bryancave.com  
mbleadlove@bryancave.com  
brent.roam@bryancave.com

ATTORNEYS FOR INTERVENOR MIEC

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent by electronic mail this 25th day of February to each person on the Commission's official service list in this case.

/s/ Diana Vuylsteke