

**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	)	<b><u>File No. ER-2010-0036</u></b>
AmerenUE's Tariffs to Increase Its Annual	)	Tariff No. YE-2010-0054
Revenues for Electric Service	)	

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

Issue Date: March 3, 2010

Effective Date: March 3, 2010

On February 25, 2010, The Midwest Energy Users' Association (MEUA)<sup>1</sup> filed a motion to compel the Missouri Industrial Energy Consumers (MIEC) to answer certain data requests submitted by MEUA. On February 26, the Commission ordered MIEC to respond to MEUA's motion to compel by Noon on March 2.

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 24 data requests to MIEC. MIEC objected and refused to answer six of those data requests. MEUA seeks to compel answers to those 6 data requests. MIEC responded to MEUA's motion to compel on March 2. 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.

The following are the data requests to which MIEC has objected and has refused to answer:

MEUA – 1.2:

a) Please provide a full accounting of the compensation Brubaker and Associates has received, to date, for its participation in this proceeding.

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

b) Please provide a breakdown of this compensation by particular activity. For instance, breakdown by revenue requirement versus class cost of service activities.

c) Please provide an estimate for all remaining costs associated with Brubaker and Associates' participation in this proceeding.

d) Please provide a full accounting of the compensation Brubaker and Associates has received, to date, from Noranda associated with its participation in this proceeding.

e) Please provide a breakdown of this compensation received from Noranda, to date, by particular activity. For instance, breakdown by revenue requirement versus class cost of service.

f) Please provide any contract or other documents detailing the arrangement for billing of legal or professional services to the individual members of MIEC. Please provide a discussion of how this billing arrangement has changed with the addition of Noranda to MIEC.

MEUA – 1.4: Please provide citations to every case in which Mr. Brubaker has recommended that a specific class be provided a cost-based rate based upon 'unique circumstances.' Please provide a description of those 'unique circumstances.' Please provide a copy of all relevant testimony from those cases.

MEUA – 1.5: Please provide citations to every case in which Mr. Brubaker has seen a public utility commission grant special class cost of service consideration to a particular class based upon 'unique circumstances.'

MEUA – 1.6: At page 32, Mr. Brubaker refers to the role that electric rates play in economic development, specifically job creation and job retention. Please provide all studies which support the linkage between electric rates and job creation / retention.

MEUA – 1.13: Please provide citations to every case in which Mr. Brubaker has recommended or agreed to a below-cost rate for a particular customer or class. Please provide copies of Mr. Brubaker's testimony in which he has either recommended or agreed to a below-cost rate for a particular customer or class.

MEUA – 1.22: Please describe in detail Noranda's reaction upon being notified that Mr. Brubaker's class cost of service study included a misallocation of income taxes.

MIEC's response to MEUA's motion to compel raises four arguments for why it should not be required to respond to some or all of the contested data requests.

## **DISCOVERY MAY BE BY DEPOSITION ONLY:**

First, MIEC contends each of the contested data requests violates Commission Rule 4 CSR 240-2.090 and Missouri Rule of Civil Procedure 56.01(b)(4) by seeking information that may be discovered only by deposition.

Civil Procedure Rule 56.01(b)(4)(a) provides that parties may through interrogatories discover the identity of experts expected to testify at trial, the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee. Rule 56.01(b)(4)(b) then provides that "a party may discover by deposition the facts and opinions to which the expert is expected to testify." MIEC contends the contested data requests go far beyond the limited matters that may be discovered by interrogatory and that if MEUA wants more detail it must depose MIEC's expert.

MIEC correctly states the requirements of Civil Procedure Rule 56.01(b)(4) for the use of interrogatories, but practice before the Commission also allows for the use of data requests. A data request at the Commission is similar to an interrogatory and a request for production of documents, but is not as narrowly defined in practice as either. A proper data request may ask a party to provide supporting documents and studies. It may also ask a party to briefly state its position on a particular question. It may not require a party to compile information or create studies or documents that are not already in the party's possession. A data request is not intended as a substitute for a deposition and it may not be used to ask an expert to prepare an essay on a topic chosen by the requesting party.

Five of the six challenged data requests are appropriate data requests. The only one that is inappropriate is data request 1.22, which asks Mr. Brubaker to describe in detail Noranda's reaction when it learned that Mr. Brubaker had misallocated income taxes in his

initial class cost of service study. On that basis, the Commission will deny MEUA's motion to compel MIEC to respond to that data request.

**DIRECTED TO NON-PARTY WITNESS:**

MIEC contends all the data requests submitted by MEUA are improper under Commission Rule 4 CSR 240-2.090 because they were submitted to MIEC's witness, Maurice Brubaker, rather than to MIEC as a party. The data requests submitted by MEUA are entitled First Set of Data Requests for MEUA to Maurice Brubaker (MIEC). Although their title includes MIEC only in parenthesis, the data requests were delivered to the attorney's for MIEC and those attorney's have responded to the data requests. Any irregularity is insubstantial and is not a basis for denying MEUA's motion to compel.

**NOT LIKELY TO LEAD TO ADMISSIBLE EVIDENCE:**

MIEC contends it should not be compelled to answer three of the challenged data requests because they are not reasonably calculated to lead to the discovery of admissible evidence. In particular, MIEC objects to data request 1.22, which as previously indicated asks MIEC to describe Noranda's reaction when it learned that Mr. Brubaker's initial class cost of service study misallocated income taxes. Noranda's reaction to learning that information is not relevant to any issue in this case and that irrelevance is an independent reason to deny MEUA's motion to compel MIEC to answer that data request.

MIEC also objects to the relevance of data request 1.2, which requests detailed information about MIEC and Noranda's payments to Brubaker and Associates for its testimony in this case. Parts a), c) and d) of data request 1.2 appropriately ask how much Brubaker and Associates has been and likely will be paid for its expert services by MIEC and Noranda. However, parts b) and e), go beyond that simple request and ask MIEC to

breakdown the compensation paid by particular activity. That additional breakdown is not objectionable so long as it is not interpreted as to require MIEC to produce any information it does not already possess. If Brubaker's invoices are broken down on those lines that information must be produced, but MIEC is not required to produce any new documents creating such a breakdown. Section f), which requests a copy of the billing contract and a discussion of how those arrangements changed after Noranda joined MIEC, is not reasonably calculated to lead to the discovery of any admissible evidence. On that basis, the Commission will deny MEUA's motion to compel MIEC to respond to data request 1.2 f).

### **UNDULY BURDENSOME**

MIEC's final objection to MEUA's data requests is that they are unduly burdensome in that they would require MIEC to conduct what it describes as "an exorbitant amount of further analysis and calculation, as well as additional research, drafting and compiling of information." The Commission has reviewed the remaining data requests and finds that despite MIEC's anguished cries, there is no reason to believe that any of the otherwise appropriate data requests would place any significant burden on MIEC or Brubaker and Associates. The Commission will grant MEUA's motion to compel MIEC to respond to data requests 1.2 a), b), c), d) and e); 1.4; 1.5; 1.6; and 1.13.

### **THE COMMISSION ORDERS THAT:**

1. The Midwest Energy Users' Association's Motion to Compel is denied as to data request numbers 1.2 f) and 1.22.

2. The Midwest Energy Users' Association's Motion to Compel is granted as to data request numbers 1.2 a), b), c), d) and e); 1.4; 1.5; 1.6; and 1.13.

3. MIEC 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**



Steven C. Reed  
Secretary

( S E A L )

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

Woodruff, Chief Regulatory Law Judge