

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

In the Matter of Union Electric Company d/b/a )	
Ameren Missouri's Tariffs to Increase Its )	Case No. ER-2012-0166
Revenues for Electric Service )	

**THE MISSOURI INDUSTRIAL ENERGY CONSUMERS'  
RESPONSE TO MOTION FOR RECONSIDERATION**

Comes now Anheuser-Busch Companies, Inc., BioKyowa, Inc., The Boeing Company, Covidien, Doe Run, Explorer Pipeline, General Motors Corporation, GKN Aerospace, Hussmann Corporation, JW Aluminum, MEMC Electronic Materials, Monsanto, Procter & Gamble Company, Nestlé Purina PetCare, Noranda Aluminum and Saint Gobain (referred to herein as the Missouri Industrial Energy Consumers or "MIEC") and, pursuant to the Commission's Order of September 6, 2012, respond to Ameren Missouri's Motion for Reconsideration of the Commission's Order of August 31, 2012. For their response, the MIEC state as follows:

**Background**

1. On August 30, 2012, the Commission convened a discovery conference to resolve discovery disputes between the parties. As explained by Judge Woodruff, who presided at the hearing, this was the first time the Commission had conducted a discovery conference.<sup>1</sup> Judge Woodruff also explained that the Commission had delegated authority to him to resolve the disputes between the parties.<sup>2</sup>

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<sup>1</sup> Tr. p. 56, ll. 21-23.

<sup>2</sup> Tr. p. 56, ll. 23-25.

2. During the conference, the parties reached agreement on all but two issues: (1) the MIEC's objection to DR 015; and (2) the MIEC's objection to DR 020.<sup>3</sup> Both of these DR's requested information from MIEC member Noranda Aluminum ("Noranda").

3. As explained by the MIEC's counsel, DR 015 is objectionable in part because it seeks Noranda's forecasts and projections concerning Ameren Missouri's rates for the years 2012 through 2015. These confidential forecasts include the mental impression of counsel as well as retained experts.<sup>4</sup> This information reveals Noranda's litigation strategy for this and future rate cases, including counsel's advice and predictions concerning the outcome of the instant case.<sup>5</sup>

4. DR 020 is objectionable in that it seeks confidential information that will be damaging to Noranda in future contract negotiations with Ameren Missouri and is not relevant to the issues before the Commission in this case.<sup>6</sup>

5. The Commission sustained the MIEC's objections in part. With respect to DR 015 it directed Noranda "to provide copies of all annual and multi-year budgets and financial projections that Noranda has prepared for the New Madrid smelter that encompass any or all of the years 2012 through 2015."<sup>7</sup> The Commission limited the scope of Ameren Missouri's discovery by stating that the Commission "will not require Noranda to make any other disclosures regarding assumptions regarding Ameren Missouri's electric rates that were made and included in each such budget or financial projection."<sup>8</sup> With respect to DR 020, the Commission agreed that the information sought

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<sup>3</sup> Tr. p. 83, l. 21; Tr. p. 97, l. 25 to p. 98, l. 1.

<sup>4</sup> Tr. p. 73, ll. 5-9.

<sup>5</sup> Tr. p. 75, ll. 14-20; p. 76, ll. 3-7; p. 80, ll. 14-17.

<sup>6</sup> Tr. p. 92, l. 9 – p. 93, l. 19.

<sup>7</sup> Order Resolving Issues Presented at Discovery Conference ("Order"), August 31, 2012, at p. 3.

<sup>8</sup> *Id.*

by Ameren Missouri was not relevant to the issues in this case.<sup>9</sup> Accordingly, the Commission ruled that “Noranda is not compelled to comply with DR 020.”<sup>10</sup>

### **The Commission’s Order is Reasonable, Just and Supported by Law**

6. In reaching its conclusions concerning the permissible scope of discovery in this case, the Commission properly weighed the interests of Ameren Missouri in obtaining the information against Noranda’s interest in protecting the information from disclosure.<sup>11</sup> As the Missouri Court of Appeals explained in a case involving discovery in an administrative hearing, “[i]n ruling on an objection to a discovery request, the trial court must not only consider questions of privilege, work product, relevance, and the tendency of the request to lead to the discovery of admissible evidence, it must also balance the need of the interrogator to obtain the information against the respondent’s burden of furnishing it, including the extent to which the request will be an invasion of privacy . . . .”<sup>12</sup> Moreover, Missouri Rule of Civil Procedure 56.01(c) authorizes a court (and this Commission) to limit discovery in circumstances like those at hand. This rule expressly permits the issuance of “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .” The Commission’s Order was therefore supported by law.

7. The Commission’s order recognizes that requiring disclosure of all of the information sought by Ameren Missouri in DR 015 is improper in light of “Noranda’s interest in

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<sup>9</sup> *Id.* at p. 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at pp.3, 4.

<sup>12</sup> *Edwards v. Missouri State Board of Chiropractic Examiners*, 85 S.W.3d 10, 22 (Mo. App. 2002) *citing State ex rel. LaBarge v. Clifford*, 979 S.W.2d 206, 208 (Mo. App. 1998).

protecting from disclosure its strategies and positions” in this and future rate cases.<sup>13</sup> The Order also acknowledges that the information requested in DR 020 “could put Noranda at a disadvantage in future contract negotiations with Ameren Missouri.”<sup>14</sup> The Commission thus provided an explanation that demonstrates that the Order is reasonable and just, in that it is designed to protect the interests of both Noranda and Ameren Missouri.

**Ameren Missouri’s Arguments Do Not Provide a Basis for  
Reconsideration of the Commission’s Order**

8. Ameren Missouri argues that the information sought in DR 015 and DR 020 is not privileged, and must be disclosed because it is “necessary to allow the Company to prepare its case.”<sup>15</sup> The Company also contends that the failure to allow it access to this information violates its right to due process.<sup>16</sup> Finally, Ameren Missouri asserts that Noranda’s interests can be adequately protected by designating the information at “proprietary” or “highly confidential” and that the MIEC has not filed a motion for protective measures.<sup>17</sup> None of these arguments provide a basis for a reconsideration or reversal of the Commission’s Order.

9. Ameren Missouri’s arguments misrepresent the scope of the Commission’s discretion with respect to discovery. As noted above, the Commission is not limited to simply determining if the information requested is privileged. In this instance, the Commission engaged in an appropriate exercise of its discretion in weighing the relative interests of the parties with respect to the information sought. The harm that would be experienced by Noranda from disclosing its

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<sup>13</sup> Order at p. 3.

<sup>14</sup> *Id.* at p. 4.

<sup>15</sup> Ameren Missouri Motion for Reconsideration at ¶¶ 9 and 10.

<sup>16</sup> *Id.* at ¶ 10.

<sup>17</sup> *Id.* at ¶ 14.

assumptions about future electric rates and any studies it may have conducted concerning the costs of self-generating electricity is an appropriate basis for limiting discovery, in light of the limited relevance and significance of this information to the issues in this case. The Order also demonstrates that Ameren Missouri has failed to establish that this information is truly necessary for it to prepare its case.

10. Ameren Missouri cites no authority for its assertion that the Commission's Order "violates the Company's due process right to meaningfully and effectively confront witnesses who offer testimony and evidence against its interests."<sup>18</sup> Although the Sixth Amendment to the United States Constitution, and Article I, Section 18 of the Missouri Constitution guarantee the right of criminal defendants to confront the witnesses against them, we have found no cases that indicate that limiting the scope of written discovery constitutes an unconstitutional deprivation of a corporation's right to due process in a civil case or administrative hearing. Moreover, the Commission's Order does not prohibit Ameren Missouri from deposing or cross examining the MIEC's witnesses, it simply places a reasonable restriction on the scope of Ameren Missouri's inquiries.

11. Ameren Missouri also suggests that designating the information at issue as "proprietary" or "highly confidential" would adequately protect Noranda from harm.<sup>19</sup> This argument ignores the fact that the potential harm to Noranda is a strategic disadvantage *in this case*. As the Commission recognized, the information sought in DR 015 would require Noranda to disclose its strategies and positions in this, as well as other, rate cases.<sup>20</sup> Moreover, the information sought in DR 020 would place Noranda at a strategic disadvantage in future contract negotiations

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<sup>18</sup> *Id.* at ¶ 10.

<sup>19</sup> *Id.* at ¶ 13.

<sup>20</sup> Order at p. 3.

with Ameren Missouri; and those negotiations are likely to include the same attorneys who will have access to this information in this case. Notwithstanding their level of integrity, these attorneys cannot ensure that they will not take this information into account in the course of future contract negotiations—this kind of mental compartmentalization is simply not humanly possible.<sup>21</sup>

12. Finally, the disputed discovery issues were raised by both parties in a discovery conference, at the direction of the Commission. At the conference, the Commission permitted Ameren Missouri to request that the MIEC comply with its requests, without filing a written motion under Mo. Rule of Civil Procedure 61.01.<sup>22</sup> By the same token, the MIEC was allowed to request protection from disclosure of sensitive information without filing a formal motion for protective order. It is clear that the purpose of the conference was to dispose of these issues without the need for formal pleadings. Accordingly, contrary to Ameren Missouri's arguments, there is no basis for reversing the Commission Order based on the fact that MIEC did not file a written motion for a protective order prior to the discovery conference.

WHEREFORE, as demonstrated by the foregoing, the Commission's Order of August 31, 2012, is reasonable, just and supported by law. Accordingly, the MIEC requests that Ameren Missouri's Motion for Reconsideration be denied.

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<sup>21</sup> See *Life Technologies Corp. v. Ebioscience Inc.*, 2011 WL 1597441 (U.S. Dist. Ct., S.D. Cal., 2011) and cases cited therein at p. 3.

<sup>22</sup> Counsel for Ameren Missouri sent a letter to Judge Woodruff, dated August 28, 2012, in which he stated that in the discovery conference he intended "to present . . . Ameren Missouri's arguments as to why MIEC's objections should be overruled." This letter did not, however, set forth those arguments or request any relief, and thus does not meet the criteria for a motion. Instead it is clear that counsel for Ameren Missouri accepted that the discovery conference was the appropriate setting for raising and resolving these issues.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 10th day of September, 2012, to all parties on the Commission's service list in this case.

/s/ Diana Vuylsteke