

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

In the Matter of Veolia Energy )  
Kansas City, Inc. for Authority )  
to File Tariffs to Increase Rates )

Case No. HR-2014-0066

**OBJECTION TO AMENDED APPLICATION TO INTERVENE OUT OF TIME  
AND OPPOSITION TO APPEARANCE OF COUNSEL**

COMES NOW, Veolia Energy Kansas City, Inc. (“Veolia”) and for its Objection to Amended Application to Intervene Out of Time and Opposition to Appearance of Counsel states as follows:

**I. Objection to Amended Application to Intervene Out of Time**

1. On December 3, 2013, the Commission issued its Order Suspending Tariff, Scheduling Pre-Hearing Conference, Directing Notice, and Setting Deadline for Intervenors. This order established a deadline of December 24, 2013 for applications to intervene.

2. On February 3, 2014, Truman Medical Center (“TMC”) filed its application to intervene out of time.

3. On February 26, 2014, the Commission issued an order denying TMC’s application, finding that TMC failed to proffer a reason for its inability to file the application by the intervention deadline, and thus failed to show good cause as required Commission Rule 4 CSR 240-2.075 (10). The Commission’s order provided that TMC would be allowed to resubmit an application to intervene out of time consistent with the order.

4. On February 28, 2014, TMC filed its Amended Application to Intervene Out of Time (“Amended Application”).

5. TMC's Amended Application fails to show good cause for its failure to intervene by the Commission's intervention deadline. Additionally, TMC fails to show good cause for its extended delay long after the deadline before finally filing its application.

6. TMC had abundant notice of this case. TMC was first notified of the anticipated rate case filing during its meeting with Veolia on August 29, 2013<sup>1</sup> -- three months before this case was filed, and one week prior to Veolia's Notice of Rate Case Filing filed with the Commission on September 6, 2013.<sup>2</sup> During the August 29 meeting, Veolia informed TMC of details regarding the planned rate case to be filed with the Commission including the expected timing and expected amount of the planned rate increase.<sup>3</sup> TMC was again informed of this case by letter from Veolia dated December 2, 2013.<sup>4</sup> Additionally, the Commission issued its public suspension order on December 3, 2013 setting the intervention deadline and directing the Commission's Public Information Office to issue a press release regarding the case.<sup>5</sup> This press release was issued on December 4, 2013, providing public notice of both the rate case filing and the December 24, 2013 deadline for applications to intervene.

7. Despite this ample notice, TMC did not file its initial application to intervene out of time until 41 days after the Commission's intervention deadline. TMC's Amended Application was filed 66 days after the deadline. During the period TMC waited to intervene, the parties were

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<sup>1</sup> See Exhibit A, Affidavit of Charles P. Melcher, ¶ 2.

<sup>2</sup> See Notice of Rate Case Filing (filed September 6, 2013).

<sup>3</sup> See Exhibit A, Affidavit of Charles P. Melcher, ¶ 2. TMC has claimed that the details of the planned rate filing were not discussed in this meeting. See Truman Medical Center's Response to Veolia's Motion to Delay Consideration of Petition to Intervene, page 2, ¶ 6. This claim is factually incorrect.

<sup>4</sup> See Customer Notice (filed December 10, 2013).

<sup>5</sup> See Order Suspending Tariff, Scheduling Pre-Hearing Conference, Directing Notice, and Setting Deadline for Intervenors (December 3, 2013).

actively engaged in discovery and the exploration of issues to be presented in this case. Veolia has responded to over one hundred data requests and has participated in numerous conferences and meetings regarding the issues in this case. Granting TMC's intervention would disrupt the progress the parties have made in this case in discovery and understanding of the issues and would therefore prejudice Veolia.

8. TMC's Amended Application states in response to the Commission's request for an explanation for TMC's failure to intervene by the deadline that TMC "did not receive the type of notice that it had anticipated for a case such as this. TMC was not provided and had no knowledge of the Commission's December 3, 2013 Order setting the intervention deadline in this case."<sup>6</sup> TMC's Amended Application disregards the Commission's well-established rate case procedure provided in its published rules. In all rate cases, the Commission issues an order suspending tariff, directing notice, and setting a deadline for intervention. The Commission directs its Data Center to serve a copy of this order upon the county commission of the counties in the utility's service area. Additionally, the Commission directs its Public Information Office to make notice of the order available to the media serving Veolia's service area and to the members of the General Assembly representing those areas. TMC had the benefit of the same notice pursuant to the same Commission process provided to all affected customers in all rate cases. If the Commission were to find good cause in TMC's explanation that it was "not provided and had no knowledge of the Commission's December 3, 2013 order setting the intervention deadline," any party seeking to intervene in any rate case would be free to disregard the Commission's intervention deadlines.

9. TMC's Amended Application further states that TMC received a letter from Veolia dated December 2, 2013 in which Veolia indicated that it was in the process of filing a rate case with the Commission "when it had in fact already filed its proposed tariff revisions with the Commission

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<sup>6</sup> See Amended Application, page 2, ¶ 6.

the prior week.”<sup>7</sup> TMC’s Amended Application fails to indicate the relevance of this statement in Veolia’s letter to TMC’s failure to comply with the Commission’s intervention deadline. Veolia was in the process of filing this rate case when it sent TMC the letter --Veolia filed its Transmittal Letter and Tariff Revisions on November 27, 2013, and filed its Substitute Tariff revisions on December 4, 2013. TMC’s Amended Application fails to draw any connection between the statement in Veolia’s letter that it was “in the process of filing a rate case” and good cause for its failure to comply with the Commission’s intervention deadline. Veolia’s letter and its meetings were not required by Commission rules, rather Veolia provided TMC with additional information above and beyond the Commission’s full and fair legal process of rate case notification. The fact that TMC did receive Veolia’s letter is additional evidence that TMC did not have good cause for its delayed decision to intervene.

10. TMC’s Amended Application goes on to complain that Veolia’s letter did not notify TMC that a docket was underway, did not notify TMC of its rights to intervene in this proceeding, and did not notify TMC that it would need to file for intervention by a certain date.<sup>8</sup> TMC appears to argue that it is Veolia’s responsibility to advise TMC regarding compliance with the Commission process. Contrary to TMC’s arguments, it is not Veolia’s duty to provide legal advice or to dispense publicly available information regarding the Commission’s orders. TMC’s complaint about the letter is baseless because it would have been improper for Veolia to provide TMC with legal advice regarding its intervention rights. TMC’s complaint about the letter is also incongruous, because it would have been impossible for Veolia’s letter to advise TMC that it was required to intervene by a certain date -- the Commission did not issue its suspension order setting the intervention deadline until December 3, 2013, after the date of Veolia’s letter.

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<sup>7</sup> See Amended Application, page 2, ¶ 6.

<sup>8</sup> See Amended Application, page 2, ¶ 6.

11. Finally, TMC complains that Veolia’s December 2 letter closes by stating that “[w]e will keep you up to date periodically as the process unfolds over the next year” but that despite this assurance TMC received no further updates from Veolia regarding this proceeding.<sup>9</sup> TMC draws no connection between this complaint and its failure to intervene by the December 24, 2013 deadline. It would be unreasonable for TMC to blame its non-compliance on Veolia’s statement that it “would keep TMC up to date periodically as the process unfolds over the course of the next year.” If this absolved TMC’s responsibility to exercise basic due diligence and attention to the Commission’s orders and procedures, particularly with respect to the intervention deadline set by the Commission three weeks from the date of the letter, then all of Veolia’s customers would have good cause to intervene out of time on this basis.

12. TMC’s Amended Application asserts that due to “lack of notice and the fact that TMC has not intervened on its own in proceedings before the Commission since 2006, TMC was not aware that this rate case was underway until it was contacted by an outside consultant during the **second week of January**, after the initial deadline for intervention had already lapsed (*emphasis supplied*).”<sup>10</sup> As demonstrated above, TMC cannot reasonably argue that it lacked notice of this case. The City of Kansas City, a large Veolia customer<sup>11</sup>, and Missouri Gas Energy, a competitor of Veolia, had no trouble meeting the December 24 intervention deadline based on the notice provided by the Commission pursuant to its procedural rules. Furthermore, TMC fails to draw any connection between “the fact that it has not intervened on its own since 2006” and good cause for

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<sup>9</sup> See Amended Application, page 2, ¶ 6.

<sup>10</sup> See Amended Application, page 2, ¶ 7.

<sup>11</sup> Both TMC and the City of Kansas City, Missouri receive steam service under the Large Commercial Service Tariff.

noncompliance.<sup>12</sup> TMC is a large customer of Veolia and pursuant to its pleading in this case “Polsinelli has represented TMC on numerous matters since 2012, including on issues pertaining to Veolia’s provision of steam service to TMC.”<sup>13</sup> TMC continues to be represented by experienced counsel familiar with Commission practice. To the extent TMC claims it delayed intervention because it is unfamiliar with the Commission process, this claim is untenable.

13. Furthermore, TMC cannot provide good cause for its extended delay in filing beyond the date of its claimed notice of this case. TMC’s Amended Application claims “TMC was not aware this case was underway until it was contacted by an outside consultant about the proceeding during the **second week of January**, after the initial deadline for intervention had already lapsed (*emphasis supplied*).”<sup>14</sup> TMC did not file its application to intervene out of time until February 3, 2014. Even if TMC’s claimed date of notice were to be accepted by the Commission, it is clear that TMC decided to materially delay its application to intervene.

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<sup>12</sup> See Amended Application, page 2, ¶ 7. TMC’s assertion that it “has not intervened on its own in proceedings before the Commission since 2006” understates its experience with Commission proceedings. TMC notes that “TMC last intervened in Case No. HA-2006-0294 relating to the application of Trigen Kansas City Energy Corporation, the predecessor to Veolia, to expand its existing certificated area to include TMC.” This case was specifically established for the purpose of constructing Truman’s steam line and the case was open until June 6, 2011. Truman was a party throughout the five year duration of the case.

In addition to the one case mentioned in TMC’s Amended Application, TMC was also represented by experienced counsel and participated as a named party to Commission Case Nos. EO-2010-0259, ER-2010-0355 and ER-2010-0356 as part of a group of other hospital parties.

<sup>13</sup> See Truman Medical Center’s Response to Veolia’s Motion to Delay Consideration of Petition to Intervene, p. 2, ¶ 6 (filed February 24, 2014).

Veolia was unaware of Polsinelli’s representation prior to TMC’s Application to Intervene Out of Time on February 3, 2014. See Exhibit A, Affidavit of Charles P. Melcher, ¶ 8. Further, Veolia does not consent to such representation. See *below*, Section II, Objection to Appearance of Counsel.

<sup>14</sup> See Amended Application, page 2, ¶ 7.

14. TMC fails to show good cause for its intentional delay. TMC's Amended Application states that after it was made aware of the case, it proceeded to evaluate Veolia's proposals, retain and consult with counsel, and prepare and file TMC's Petition to Intervene on February 3, 2014.<sup>15</sup> TMC states that it "moved as quickly as possible to evaluate Veolia's proposal and determine whether intervention would be necessary to protect its interests."<sup>16</sup> TMC fails to state good cause for its conscious delay. As a customer of Veolia, TMC's interest in this case should be clear to any reasonable person in TMC's position, especially with experienced counsel familiar with Commission practice already having been retained regarding Veolia matters.<sup>17</sup> Additionally, TMC claims to have been represented by its current counsel in this case on Veolia steam matters for over two years.<sup>18</sup> As a large customer of Veolia, TMC had an obvious interest in this case. Under these circumstances, it is not reasonable that TMC would delay its application. TMC claims that the reason for its additional delay was to determine its interest, hire a lawyer and file a petition to intervene.<sup>19</sup> All applicants for intervention in all Commission cases must evaluate the proposals in the case, retain counsel and prepare and file a petition to intervene. If the need for these actions constitutes good cause for failure to meet the Commission's intervention deadline, all parties in any rate case would have a basis to intervene out of time. This would render the Commission's deadline meaningless.

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<sup>15</sup> See Amended Application, page 2, ¶ 7.

<sup>16</sup> See Amended Application, pages 2-3, ¶ 7.

<sup>17</sup> Veolia was not aware of and did not consent to this representation. See *below*, Section II, Opposition to Appearance of Counsel.

<sup>18</sup> See Truman Medical Center's Response to Veolia's Motion to Delay Consideration of Petition to Intervene, page 2, ¶ 6 (filed February 24, 2014). Veolia does not consent to such representation. See *below*, Section II, Opposition to Appearance of Counsel.

<sup>19</sup> See Amended Application, pages 3-4, ¶ 7.

15. Except in those cases where an application to intervene out of time is unopposed, the Commission has consistently found lack of good cause for late intervention where the applicant or its counsel is aware, or should be aware, of the Commission's procedures, actions and rules. Indeed, the Commission has denied late intervention to applicants who failed to show good cause for missing the deadline, even if good cause would have otherwise existed to grant intervention, especially if the applicant or its counsel is involved in Commission cases and should be aware of Commission procedure.<sup>20</sup> The Commission has particularly emphasized in its recent orders the importance of compliance with its intervention deadlines for the reason that "consistent, rather than arbitrary rulings, will serve the expectations of those practicing before the Commission."<sup>21</sup>

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<sup>20</sup> See *Joint Application of Southern Union Company d/b/a Missouri Gas Energy and Laclede Gas Company*, Case No. GM-2013-0254, Order Regarding Motion for Reconsideration Issued May 29, 2013 (late intervention denied where application was three months past the deadline and discovery and exploration of issues had advanced even though procedural schedule is not yet adopted; applicant "is a sophisticated party that is well aware of filings and proceedings at the Commission."). See also *Missouri Gas Energy*, Case No. GR-2006-0422, Order Denying Application to Intervene Issued August 28, 2006 ("Were the Commission to accept 'we just found out' as good cause for filing a request to intervene almost two months out of time, 'good cause' as used in the Commission's rule, would have no substance. This is particularly so when it is a proposed intervenor's business to know what is going on in its environment.") cited in *Kansas City Power & Light Company*, Case No. ER-2012-0135, Order Denying Application to Intervene (February 27, 2013) (Commission did not find good cause in applicant's assertion that it only recently became aware of proceedings' impact and additional time was needed for customer group to authorize intervention; "consistent, rather than arbitrary rulings, will serve the expectations of those practicing before the Commission."); see also *Kansas City Power & Light Company*, Case No. EU-2014-0077, Order Granting Application to Intervene Issued November 26, 2013 (applicant acknowledged overlooking order setting intervention deadline; the Commission found applicant's declaration "specious" because applicant was a sophisticated litigant cognizant of the Commission's regulations).

<sup>21</sup> See *Kansas City Power & Light Company*, Case No. ER-2012-0135, Order Denying Application to Intervene Issued February 27, 2013.



16. TMC had the knowledge and ability to intervene on a timely basis but elected not to do so. TMC's counsel has represented TMC for at least two years with respect to Veolia steam matters, and its counsel practices regularly before the Commission and had full access to Veolia's pre-rate case notices and all case filings. TMC was aware far in advance of this rate case that the case would be filed, and received full and fair notice of this proceeding as is customary pursuant to the Commission's rules. TMC's Amended Application admits that even after the date that TMC claims it had notification of this case, it intentionally delayed its decision to intervene. Even if the Commission were to accept TMC's improbable claim that it experienced "lack of notice" of this case, TMC has failed to show good cause for its extended delay.

17. For the foregoing reasons, the Commission should deny TMC's application to intervene out of time.

## II. Opposition to Appearance of Counsel

18. TMC is represented by the law firm Polsinelli PC ("Polsinelli") in this case.

19. Through its affiliate and parent corporation, Veolia is a current client of Polsinelli.

20. Pursuant to Veolia's contract of engagement with Polsinelli including "Outside Counsel Guidelines," Polsinelli expressly agreed that it *would not represent clients adverse to Veolia or its affiliates (emphasis supplied)*.<sup>22</sup>

21. Commission Rule 4 CSR 240-4.020 (14) (E) provides that an attorney, or law firm the attorney is associated with, appearing before the Commission shall comply with all the Missouri Rules of Professional Conduct.

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<sup>22</sup>See Exhibit A, Affidavit of Chuck Melcher, Attachment 1, Executed Copy of Outside Counsel Guidelines.

22. Rule 4-1.7 of the Missouri Rule of Professional Conduct provides that a lawyer or law firm shall not represent a client in a matter adverse to a current client unless the current client has waived the conflict in writing.<sup>23</sup> Pursuant to Comment [34] of Rule 4-1.7, a lawyer or law firm is barred from representing a client adverse to the current organizational client's subsidiary or affiliate "if there is an understanding between the lawyer [and law firm] and the [current] organizational client that the lawyer will avoid representation adverse to the [current organizational] client's affiliates."<sup>24</sup>

23. Polsinelli has agreed in writing that it will avoid all representation adverse to Veolia or any of its affiliates without the prior, express approval of Veolia.

24. In the present case, the representation of TMC by Polsinelli is directly adverse to Veolia.

25. Veolia does not consent to Polsinelli's adverse representation of TMC. Veolia has not waived this conflict in writing.

26. Veolia and Polsinelli have been engaged in discussions regarding this matter since TMC filed its application to intervene out of time in this case on February 3, 2014, and Polsinelli has declined to withdraw as counsel in this matter.

27. Because Polsinelli's representation of TMC is a concurrent conflict of interest which violates Rule 4-1.7, the Commission should issue an order requiring Polsinelli to withdraw as counsel for TMC.

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<sup>23</sup> See Mo. Sup. Ct. Rule 4-1.7.

<sup>24</sup> See Mo. Sup. Ct. Rule 4-1.7, Comment [34].

WHEREFORE, based on the foregoing, Veolia respectfully requests that the Commission (1) issue an order denying TMC's Amended Application to Intervene Out of Time; and (2) issue an order requiring Polsinelli to withdraw from representing TMC in this case.

Respectfully submitted,

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Attorney for Veolia Energy Kansas City, Inc.

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 10<sup>th</sup> day of March, 2014, to all parties on the Commission's service list in this case.

/s/ Diana Vuysteke