

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

In the Matter of	)	<b><u>File No. HR-2011-0241</u></b>
Veolia Energy Kansas City, Inc.	)	Tracking Nos. YH-2011-0532
for Authority to File Tariffs to Increase Rates	)	and YH-2011-0533

**ORDER GRANTING MOTION TO COMPEL,  
DENYING MOTION FOR PROTECTIVE ORDER, AND  
DENYING MOTION FOR EVIDENTIARY HEARING**

Issue Date: July 18, 2011

Effective Date: July 18, 2011

The Missouri Public Service Commission is:

- granting the motion to compel of Kansas City Power & Light Company (“KCP&L”);
- denying the motion for protective order filed by Veolia Energy Kansas City, Inc. (“Veolia”).
- denying the motion for evidentiary hearing filed by Veolia.

Those rulings are pursuant to the Commission’s express delegation of authority to “rule on any discovery dispute, including any motion to compel compliance with discovery, notwithstanding the provisions of Commission regulation 4 CSR 240-2.090(8).”<sup>1</sup>

Veolia asks the Commission to protect its trade secrets from KCP&L’s internal counsel and expert witness. But competition was the basis of KCP&L’s motion for intervention<sup>2</sup> and Veolia made no objection or other response to that motion. Veolia cites authorities allowing—but not requiring—the order it seeks while other considerations weigh in favor of compliance with discovery. Veolia’s allegations, even if

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<sup>1</sup> *Order Suspending Tariff, Notice of Contested Case, and Order Delegating Authority*, issued May 4, 2011, effective May 11, 2011; page 3, first paragraph, last line; page 4, paragraph 4.

<sup>2</sup> Called an “application to intervene” in the Commission’s regulation 4 CSR 240-2.075.

true, do not outweigh the considerations cited by KCP&L and Southern Union Gas Company d/b/a Missouri Gas Energy (“Southern Union”) in favor of compliance.

Because that result is evident on the allegations in Veolia’s motions, an evidentiary hearing is unnecessary.

#### A. Procedural Background

Veolia Energy Kansas City, Inc. (“Veolia”) filed tariffs to implement a rate increase on its April 22, 2011. The Commission suspended the tariffs on May 4, 2011. Suspending the tariffs initiated a contested case.<sup>3</sup>

##### *(i) Filings*

Kansas City Power & Light Company (“KCP&L”) and Southern Union Gas Company d/b/a Missouri Gas Energy (“Southern Union”) filed their respective applications for intervention on May 11, 2011. The Commission received no response within the time set by 4 CSR 240-2.080(15). Therefore, the Commission granted the applications for intervention on May 24, 2011.

KCP&L served Veolia with KCP&L’s Data Request No. 1 on May 27, 2011. Veolia served objections dated June 3, 2011. KCP&L filed the *Kansas City Power & Light Company Motion to Compel Responses to Data Request* (“motion to compel”) on June 22, 2011. Veolia filed *Veolia Energy Kansas City’s Response to Motion to Compel Responses to Data Request and Motion for Protective Order pursuant to 4 CSR 240-2.135(2)(C) and (D)* on July 1, 2011.

The parties presented argument at the discovery conference on July 1, 2011. At that conference, KCP&L and Southern Union asked to file further arguments. KCP&L

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<sup>3</sup> Section 393.150.1, RSMo 2000; Section 536.010(4), RSMo Supp. 2010.

filed a reply to the motion for protective order. Southern Union filed a response to the motions for protective order and motion to compel. KCP&L and Southern Union made those filings on July 11, 2011. Veolia filed the *Request for Evidentiary Hearing on Motion for Protective Order and Motion to Compel Responses to Data Request* (“motion for evidentiary hearing”) on July 13, 2011. KCP&L filed its response to the motion for evidentiary hearing on July 15, 2011.

*(ii) Discovery and Compliance*

At issue in all pending motions is KCP&L’s Data Request 1. A data request is an informal discovery device created by Commission regulation:

Parties may use data requests as a means for discovery. [D]ata request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties. Answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers. Sanctions for failure to answer data requests may include any of those provided for abuse of the discovery process in section (1) [<sup>4</sup>]

Section (1) provides:

Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. [<sup>5</sup>]

Those means and conditions include the rule<sup>6</sup> requiring a response:

**Response.** The requests shall be answered by each party to whom they are directed. [<sup>7</sup>]

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<sup>4</sup> 4 CSR 240-2.090(2).

<sup>5</sup> 4 CSR 240-2.090(1). Section 536.073.2, RSMo 2000.

<sup>6</sup> All rules are in the 2011 Missouri Supreme Court Rules.

<sup>7</sup> 58.01(c).

Those are the provisions with which KCP&L asks the Commission to compel Veolia's compliance as to Data Request 1. Data Request 1 seeks all data requests in this action submitted to, and responses submitted by, Veolia.

*(iii) Objection, Confidentiality, Protection*

Veolia objects to producing trade secrets. KCP&L and Southern Union argue that Veolia's only available protection is the Commission's regulation on confidential material:

(2) When a party seeks discovery of information that the party from whom discovery is sought believes to be confidential, the party from whom discovery is sought may designate the information as proprietary or highly confidential.

(A) No order from the commission is necessary before a party in any case pending before the commission may designate material as proprietary or highly confidential and such information shall be protected as provided in this rule.

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(4) Highly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case.

(A) Employees, officers, or directors of any of the parties in a proceeding, or any affiliate of any party, may not be outside experts for purposes of this rule.

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(E) Subject to subsection (4)(B), the party disclosing information designated as highly confidential shall serve the information on the attorney for the requesting party.

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(16) All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than

preparation for and conduct of the proceeding for which the information was provided[.<sup>8</sup>]

But Veolia cites other provisions of that regulation:

This rule does not require the disclosure of any information that would be protected from disclosure by any privilege, rule of the commission, or the Missouri Rules of Civil Procedure [;<sup>9</sup>]

And:

If any party believes that information must be protected from disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public. [<sup>10</sup>]

That plain language shows that the regulations do not foreclose other orders under the rules.

The rules generally provide that the Commission:

. . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

Specifically, trade secrets may be the subject of a protective order:

(2) that the discovery may be had only on specified terms and conditions [; and]

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<sup>8</sup> 4 CSR 240-2.135.

<sup>9</sup> 4 CSR 240-2.135(2)(C).

<sup>10</sup> 4 CSR 240-2.135(5).

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way [<sup>11</sup>]

Therefore, the Commission has authority to issue a protective order for trade secrets.

KCP&L argues that Veolia has not proved the allegations in the motion for protective order. Veolia asks for an evidentiary hearing to do so. But the documents on file are sufficient for the Commission's ruling because, assuming that Veolia's allegations are true, they do not support a protective order.

### B. Discussion

Veolia alleges that compliance with Data Request 1 will deliver trade secrets to KCP&L's internal counsel and expert witness, who have competitive decision-making power or influence, resulting in a risk of competitive disadvantage to Veolia. Veolia seeks a protective order barring KCP&L's internal counsel and expert witness from access to Veolia's trade secrets.

Veolia cites a federal district court judgment issuing such an order,<sup>12</sup> and a federal appellate court opinion that such an order is not an abuse of discretion,<sup>13</sup> but cites no authority mandating the Commission to issue such an order. Instead, an order of protection "may"<sup>14</sup> issue:

[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown [<sup>15</sup>]

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<sup>11</sup> Rule 56.01(c)(7).

<sup>12</sup> *Life Technologies Corp. v. Ebioscience Inc.*, WL 1597441 (S.D. Cal., Apr. 26, 2011).

<sup>13</sup> *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (C.A.9, 1992).

<sup>14</sup> Rule 56.01(c).

<sup>15</sup> Rule 56.01(c).

Good cause means a good faith request for reasonable relief.<sup>16</sup> "May" means an option, not a mandate.<sup>17</sup> The rules thus commit the motions to the Commission's discretion.

Discretion's boundaries are careful consideration, the logic of the circumstances, and justice.<sup>18</sup>

*(i) Protection or Compliance*

On the circumstances before the Commission, logic and justice favor compliance over protection, as does the policy governing discovery generally:

The **purposes of discovery are to** eliminate concealment and surprise, to aid litigants in determining facts prior to trial, ... to provide litigants with access to proper information with which to develop their respective contentions and to **present** their respective sides on **issues framed by the pleadings** ... [and] to preserve evidence, prevent unjust surprise, and formulate issues for trial. [<sup>19</sup>]

The pleading of KCP&L is its motion to intervene, which the regulations required to include a statement of interest:

An application to intervene shall state the proposed intervenor's interest in the case and reasons for seeking intervention, and shall state whether the proposed intervenor supports or opposes the relief sought or that the proposed intervenor is unsure of the position it will take.[<sup>20</sup>]

KCP&L's interest plainly appears in its motion to intervene at paragraph6:

. . . KCP&L provides electricity in the same service area for which Veolia is providing steam services. It is therefore

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<sup>16</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207, 210 (Mo. App., W.D. 1996).

<sup>17</sup> *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).

<sup>18</sup> *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

<sup>19</sup> *Fairbanks v. Weitzman*, 13 S.W.3d 313, 327 (Mo. App., E.D. 2000) (emphasis added).

<sup>20</sup> 4 CSR 240-2.075(2).

important to KCP&L that Veolia's rates appropriately reflect its cost of service.

Thus, Veolia knew that competition was KCP&L's reason for intervening. Nevertheless, Veolia made no objection to KCP&L's intervention on the grounds of competition.

Also, as KCP&L notes, the issue of competition is late in arising. Veolia did not proffer evidence with the motion for protective order, and did not file the motion for evidentiary hearing, until:

- 12 days after Veolia filed the motion for protective order,
- 21 days after KCP&L filed the motion to compel, and
- 47 days after the service of Data Request 1.

KCP&L alleges that such delay unjustly threatens prejudice to preparation of its case, which the procedural schedule shows is likely.

Similarly, the Commission considers Veolia's burden of compliance against the protection of KCP&L and the public.<sup>21</sup> As KCP&L notes, and Data Request 1's text shows, the matters sought already exist. There could scarcely be a more convenient production than of matters already assembled so that balance weighs in favor of compliance.

Moreover, the protection that Veolia seeks does not logically follow from the order that Veolia seeks. Veolia argues that the Commission should prevent a competitive imbalance by restricting trade secrets to KCP&L's outside counsel. But outside counsel could violate the protective order just as inside counsel could violate the confidentiality regulation. Both the regulation and Veolia's proposal rely on compliance with the Commission's regulation or order, which ultimately stand on counsel's ethical

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<sup>21</sup> 4 CSR 240-2.135(5).



obligations and oath of admission. Another invisible line, just outside the one already existing, does not logically add more protection.

Therefore, the Commission will exercise its discretion in favor of compliance over protection.

*(ii) Alternative Relief*

In the alternative, Veolia seeks an order requiring KCP&L to prove need, relevance, and safeguards.

. . . to demonstrate the specific need and relevance of each and every data response and to implement substantial safeguards to prevent disclosure of such response to any KCP&L employees, outside consultants or outside counsel involved in KCP&L's competitive decision making.

Veolia raised a relevance objection to Data Request 1. Relevance is a condition of discovery as follows.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. [<sup>22</sup>]

Because KCP&L is seeking discovery, establishing relevance is KCP&L's burden,<sup>23</sup> but that burden is met in the text of Data Request 1, the breadth of which raises an inference—at least—that the matter sought is relevant to claims or defenses in this action. Therefore, the Commission will exercise its discretion to deny the motion for protective order as to the alternative relief.

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<sup>22</sup> Rule 56.01(b)(1). All rules are in the 2011 Missouri Supreme Court Rules.

<sup>23</sup> Rule 56.01.

*(iii) Evidentiary Hearing*

Because compliance outweighs protection on the scales of justice and logic, even under the facts as alleged by Veolia, there is no purpose in an evidentiary hearing. A hearing on those motions can address only the allegations in the motions to compel and motion for protective order:

A written motion shall state with particularity the grounds for the motion. We determine that the [tribunal] erred in . . . going beyond the scope of the issues raised in [a] motion for protective order and Appellants' motion to compel, which were the subject of [an] evidentiary hearing. To conclude otherwise would risk violating [party] rights to due process by the lack of notice and an opportunity to be heard on the issues decided [.]<sup>24</sup>

When no effective relief is possible, the motion seeking that relief is moot.<sup>25</sup> Therefore, the Commission will deny the motion for evidentiary hearing.

C. Ruling

Therefore, the Commission will exercise its discretion to deny the motion for evidentiary hearing and the motion for protective order, and to grant the motion to compel. The rules provide that:

If a motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery [.]<sup>26</sup>

The Commission will order Veolia to provide the matter sought in Data Request 1.<sup>27</sup>

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<sup>24</sup> *Maloney v. Thurman*, 206 S.W.3d 369, 373 (Mo.App. E.D.,2006) (citation omitted).

<sup>25</sup> *State v. Kiesau*, 794 S.W.2d 309, 312 (Mo. App., S.D. 1990).

<sup>26</sup> Rule 56.01(c).

<sup>27</sup> KCP&L and Southern Union note that this result is consistent with the *Order Denying Trigen-Kansas City Energy Corporation's Motion To Restrict Access To Highly Confidential Information* (May 14, 2008) that the Commission issued in *In the Matter of the Tariff Filing of Trigen-Kansas City Energy Corporation to Implement*

**THE COMMISSION ORDERS THAT:**

1. The *Kansas City Power & Light Company Motion to Compel Responses to Data Request* is granted.

2. The *Veolia Energy Kansas City's Response to Motion to Compel Responses to Data Request and Motion for Protective Order pursuant to 4 CSR 240-2.135(2)(C) and (D)* is denied.

3. The *Request for Evidentiary Hearing on Motion for Protective Order and Motion to Compel Responses to Data Request* is denied.

4. Veolia Energy Kansas City, Inc. shall complete compliance with Kansas City Power & Light Company's Data Request 1 subject to 4 CSR 240-2.135 no later than July 22, 2011.

5. This order shall become effective immediately upon issuance.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Daniel Jordan, Senior Regulatory Law Judge,  
by delegation of authority pursuant to  
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 18<sup>th</sup> day of July, 2011.

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*a General Rate Increase for Regulated Steam Heating Service Provided to Customers in the Company's Missouri Service Area*, File No. HR-2008-0300. In that action, the Commission did not address Rule 56.01(c) (7). But the Commission found its confidential treatment regulation adequate on the same allegations and arguments.