BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Veolia Energy Kansas City, Inc. For Authority to File Tariffs to Increase Rates	))	Case No. HR-2011-0241

RESPONSE OF KANSAS CITY POWER & LIGHT COMPANY TO VEOLIA"S MOTION TO RESTRICT ACCESS

Kansas City Power & Light Company ("KCP&L") hereby responds to the motion of Veolia Energy Kansas City, Inc. ("Veolia") (formerly "Trigen-Kansas City Energy Corporation ("Trigen")) to restrict access to highly confidential information. KCP&L also respectfully requests that the Missouri Public Service Commission ("Commission") direct Veolia to provide the data request responses requested in KCP&L's data request no. 1 as requested in its June 22 Motion to Compel. In support thereof, KCP&L states as follows:

The Commission rejected Veolia's arguments in the last Trigen rate case

1. The Commission has already considered and rejected Veolia's arguments in the context of Trigen-Kansas City Energy Corporation's (predecessor to Veolia) last rate case. In Case No HR-2008-0300, Trigen filed a motion requesting the Commission to issue an order preventing any employees, officers or directors of any party, or an affiliate of a party, from having access to Trigen's highly confidential information, and ordering that Trigen's highly confidential information may be disclosed only to the outside attorneys of record and outside experts that had been retained for the purposes of the case and who had executed an acceptable non-disclosure agreement pursuant to Commission Rule 4 CSR 240-2.135. Specifically, the motion sought to exclude Kansas City Power and Light Company's in-house attorney from viewing the HC filings in the case.

2. In its *Order Denying Trigen-Kansas City Energy Corporation's Motion To Restrict Access To Highly Confidential Information*, Case No. HR-2008-0300 (issued May 14, 2008)(attached), the Commission unequivocally rejected Trigen's arguments and allowed in-house counsel and outside experts to have access to HC materials as contemplated by 4 CSR 240-2.135:

> The Commission's rule is clear and unambiguous with regard to who can have access to highly confidential information and how that information may be used. Moreover, the rule has adequate safeguards for protecting access to and the use of that information. Trigen's motion shall be denied.

3. The Commission should again reject Veolia's motion in this case for the same reasons. The Commission's approach to protecting confidential materials has been successfully used for more than twenty-five years in the context of highly competitive telecommunicatons, electric and natural gas cases, as well as steam heating cases. There is no need to make a special exception for Veolia to allow it to shield its information from review by KCP&L's in-house and outside counsel, and KCP&L's outside expert in this rate case.

KCP&L's intervention in Veolia's rate case does not raise unique issues

4. Veolia acknowledges that "In a typical case before the Commission, where the utility has no or limited competitors in its service territory, it may be appropriate for all counsel to have access to the utility's highly confidential business information as permitted by 4 CSR 240-2.135(4)." (Veolia Motion, p. 4) However, Veolia argues that the fact that KCP&L and Veolia are competitors makes this case an unusual situation and therefore deserving of special treatment outside of the Commission's confidential information rule (4 CSR 240-2.135). Veolia is incorrect on this point. In fact, the Commission's rule regarding treatment of confidential information has been successfully used in many cases involving utilities that compete for customers. For example,

in KCP&L's last rate case (ER-2010-0355) Missouri Gas Energy, a gas local distribution company serving Kansas City, intervened. Both companies produced highly confidential cost of service information to each company's in-house counsel, outside counsel and outside experts. In KCP&L's previous rate case (ER-2009-0089) Veolia (which used to be called Trigen) intervened and KCP&L produced highly confidential information to Veolia's counsel and outside expert.

5. Veolia even tries to argue in paragraph 5 of its Motion that KCP&L has an unfair size advantage over Veolia. However, a check of Veolia' s web site shows that it is a division of Veolia Environnement which has$4.5 billion in revenue in North America and 30,000 employees. Clearly, Veolia has access to the resources it needs to compete with KCP&L.

Veolia's motion to restrict access does not comply with Commission rules

6. As part of its response to KCP&L's Motion to Compel, Veolia belatedly submitted a motion to restrict access to "highly confidential" information, as that term is used in 4 CSR 240-2.135. Section 5 of that rule places the burden on Veolia to 1) explain what information must be protected, 2) explain the harm to the disclosing entity that might result from the disclosure of information, and 3) explain how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

7. Veolia makes no effort to limit the information that is not to be produced nor does it do anything but make vague, unsupported allegations of potential harm. Mere allegations of potential harm are not evidence and not enough for the Commission to grant Veolia's motion.

8. The Commission's rule expressly allows attorneys of record or outside experts that have been retained for purposes of the case[1] access to highly confidential information.

1 4 CSR 240-2.135(4).

Veolia, since it only discusses Mr. Steiner, apparently seeks in its motion to choose which "attorneys of record" may receive highly confidential information.[2]

9. The rule provides:

> Highly confidential information may be disclosed only to the attorneys of record, or outside experts that have been retained for the purpose of the case.
>
> (A) Employees, officers, or directors of any of the parties in the proceeding, or any affiliate of a party, may not be outside experts for the purposes of this rule.[3]

10. Section A quoted above makes an express distinction between in-house and outside experts, *i.e.*, in-house experts do not have access to highly confidential information; outside experts hired for the case do have such access. There is no such distinction in all of Rule 4 CSR 240-2.135(4) for attorneys of record. The Commission could have treated experts and attorneys of record similarly in this regard when it promulgated the rule, but it did not. A plain reading of the rule clearly conveys that attorneys of record have access to highly confidential information, period. The rule does not distinguish between in-house and outside counsel. Nor do courts make such a distinction when determining the scope of access to confidential information. See U.S. Steel Corp. v. United States, 730 F. 2d 1465, 1468 (Fed. Cir. 1984). It should also be noted that Rule 4 CSR 240-2.135 holds in-house and outside counsel to the same standard concerning their duty to control access to and the distribution of highly confidential information.

Veolia Fails To Demonstrate That The Information It Seeks to Protect is Confidential or a Trade Secret

2 Despite the fact that in its motion to restrict access, Veolia does not explain why the HC information cannot be produced to KCP&L's outside counsel, Jim Fischer, Veolia has not produced any of the HC data request responses sought in KCP&L data request no. 1 to Mr. Fischer.

3 4 CSR 240-2.135(4)(A).

11. As Veolia correctly notes, Missouri Rule of Civil Procedure 56.01(c)(7), under which it seeks to prevent disclosure of its data requests and data request responses, is identical to Federal Rule of Civil Procedure 26(c)(7). A party seeking protection under Federal Rule 26(c)(7) must show that the information sought is confidential and a specific potential harm could result from disclosure of the information. In Re Remington Arms Co., 952 F.2d 1029, 1032 (8th Cir. 1991); Centurion Indus. v. Warren Steurer and Associates, 665 F.2d 323, 325 (10th Cir. 1981); Digital Equip. Corp. v. Micro Technology, 142 F.R.D. 488, 491 (D. Colo. 1992). While Veolia claims that the data request responses contain "highly confidential information" and that access to this information would result in "grave competitive harm" to it, these allegations are not self-proving. See State el rel. Wright v. Campbell, 938 S.W.2d 640, 645 (Mo. App. E.D. 1997).

12. Consequently, Veolia fails to demonstrate that the information KCP&L seeks in its Motion to Compel is confidential or a trade secret pursuant to the criteria established in State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson, 897 S.W.2d 167, 170 (Mo. App. S.D. 1995). In Blue Cross, the court used the following criteria, adopted generally by the federal courts, to determine whether information was confidential:

> (1) the extent to which the information is known outside the business; (2) the extent to which the information is known to those involved in the business; (3) the extent of the measures taken to guard the secrecy of the information; and (4) the value of the information to the business and its competitors.

Blue Cross, 897 S.W.2d at 170 (citations omitted).

13. In Blue Cross, the Relator sought to prevent discovery of certain pricing arrangements between the Relator and hospitals, studies of relative costs of health care, and a provision of a contract. Id. at 169. The court concluded that the Relator had demonstrated the information was confidential because the information was not available to the public, the

hospitals indicated to the Relator that they did not want the agreements disclosed, the pricing information was available to employees on a need-to-know basis, the access to the market analysis was limited to three or four key management officials, and a chief operating officer's stated that his copy of the study of relative health care was kept in a locked file. Id. at 170.

14. Veolia's statements in its Response do not establish the extent to which the information is known to those outside the business or to those involved in the business. Veolia gives no indication that its customers have indicated that they do not want this information disclosed to KCP&L, nor does it give any indication of the extent of measures taken to guard the secrecy of the information. Veolia alleges that disclosure of the information would give KCP&L a competitive advantage against Veolia, but this allegation is insufficient by itself to establish the value to KCP&L. Thus, Veolia has failed to demonstrate the information is confidential or a trade secret.

Veolia Fails To Demonstrate Good Cause For Its Requested Protective Order.

15. A party seeking protection under Federal Rule 26(c) must also show good cause by demonstrating a particular need for protection. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). Accordingly, a party seeking a protective order pursuant to Rule 56.01 must establish good cause. State ex rel. Ford Motor Co. v. Manners, 239 S.W.3d 583, 587 (Mo. 2007); Stortz v. Seier, 835 S.W.2d 540, 540 n.3 (Mo. App. E.D. 1992); Brown v. McIbs, 722 S.W.2d 337, 342-43 (Mo. App. E.D. 1986). "The party or person opposing discovery has the burden of showing 'good cause' to limit discovery." State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. 2002).

17. The Commission has discretion in determining whether good cause exists, but it must have evidence presented before it can exercise discretion. Broad allegations of harm that are

not substantiated by specific examples or articulated reasoning fail the Rule 26(c) test. Cipollone, 785 F.2d at 1121. "Without evidence, it is impossible to ascertain whether or not 'good cause' does, in fact, exist." Brown, 722 at 343. Veolia fails to provide this evidence.

18. The mere statement that "customers who purchase regulated and unregulated steam service from Veolia and unregulated chilling service from Veolia-Missouri to heat and cool their buildings could instead install electric powered boilers and chillers and purchase electricity from KCP&L" is insufficient to show good cause. Indeed, allegations that KCP&L and Veolia compete for business from the same customers and that KCP&L, armed with the information in the data request responses it seeks, could hypothetically pursue Veolia's customers is mere conjecture. Veolia's broad allegation of "grave competitive harm" does not on its face demonstrate the required good cause for a protective order.

Veolia Fails To Demonstrate That KCP&L's In-House Counsel or Expert Are Engaged in Competitive Decisionmaking That Would Warrant A Protective Order.

19. Veolia attempts to bestow upon KCP&L's corporate counsel, Roger Steiner, and outside consultant, Chris Giles, powers of "competitive decisionmaking" that purportedly give cause to withhold disclosure of the information KCP&L seeks to KCP&L. See Veolia Response at 4-5, 7-8. These KCP&L representatives simply do not have the "competitive decisionmaking" duties that would warrant any protective order.

20. When determining whether in-house counsel should be permitted to access confidential information of a competitor, the Commission must strike a balance between a party's interest in safeguarding its confidential information and the opposing party's right to broad discovery under Missouri Rule of Civil Procedure 56.01(b). Softwareworks Group, Inc. v.

Ihosting, Inc., 2006 U.S. Dist. LEXIS 89846 *3 (N.D.Ca. 2006); Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992).

21. A request for access might be denied where in-house counsel is involved in "competitive decisionmaking," a term that the Federal Circuit has defined as "shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 n. 3 (Fed. Cir. 1984). Because KCP&L counsel is this matter is not involved in "competitive decisionmaking," the Commission should deny Veolia's motion for protective order. See Fluke Corp., v. Fine Instruments Corp., 1994 U.S. Dist. LEXIS 16286 *12-15 (W.D.Wa. 1994); Amgen, Inc. v. Elanex Pharm., Inc., 160 F.R.D. 134, *137-39 (W.D.Wa. 1994).

22. Citing Brown Bag, Veolia alleges at p. 7 of its Response that Mr. Steiner is involved in "competitive decisionmaking" and, because he is incapable of "compartmentalizing" the information to which KCP&L seeks access, he should be barred from having access to that information. Veolia's understanding of Mr. Steiner's duties at KCP&L is simply mistaken. Counsel in Brown Bag was Brown Bag's sole legal advisor, one of just 13-14 employees, and advised Brown Bag on "a gamut of legal issues, including contracts, marketing, and employment." Brown Bag, 960 F. 2d. at 1471. For these reasons, the Brown Bag court found that counsel's employment would necessarily entail advising his employer in areas relating to the trade secrets sought in discovery, thus warranting a protective order. Id.

23. Mr. Steiner, conversely, is one of nine legal counsel at KCP&L, which employs approximately 3000employees, and does not advise KCP&L on issues of competitive pricing and

design. The scope of Mr. Steiner's duties at KCP&L is to manage the regulatory proceedings of KCP&L at the Commission. He is not involved in pricing or product design decisions that are made in light of similar information about a competitor. See U.S. Steel, 730 F.2d at 1468 n. 3. Thus, the rationale to deny access used by the Brown Bag court is not present here. Mr. Steiner clearly is not in a position of "competitive decisionmaking" that would warrant barring his access to the information KCP&L seeks.

24. Veolia's attempt to bar Mr. Giles from access to the information sought is even more far-fetched. Mr. Giles left KCP&L over two years ago, and the scope of his recent engagement by KCP&L is limited to the evaluation of the regulatory implications of construction projects. Mr. Giles' role as a consultant does not entail advising KCP&L on pricing or product design decisions that are made in light of similar information about a competitor. Mr. Giles certainly is not in a position of "competitive decisionmaking" that would warrant barring his access to the information KCP&L seeks.

25. Whether an unacceptable opportunity for inadvertent disclosure of confidential information exists must be indicated by the facts on a counsel-by-counsel basis and cannot be determined solely by counsel's position in-house. See U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984). Indeed, the U.S. Steel Court cautioned against arbitrary distinctions based on the category of employment. Id. Veolia has not put forward any evidence indicating that Mr. Steiner or Mr. Giles has *any* involvement in competitive decisionmaking. Instead, Veolia merely alleges that "Mr. Steiner is involved in KCP&L's day-to-day business operations which could impact Veolia's customers and their choice of Veolia's services versus KCP&L's," and that "Mr. Giles is a former executive of KCP&L and has close ties to the company." See Veolia Response at 4. Because Veolia has not specifically addressed the factual circumstances

surrounding Mr. Steiner's and Mr. Giles' "activities, association, and relationship" with KCP&L, it fails to demonstrate that any opportunity for inadvertent disclosure of purported trade secrets exists that would warrant a protective order. See also Wi-Lan, Inc. v. Acer, Inc., 2009 U.S. Dist. LEXIS 53918 *18-20 (E.D. Tx. 2009).

The Discovery KCP&L Seeks Is Relevant.

26. Missouri Rule of Civil Procedure 56.01(b)(1) provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action." No party has claimed that the information KCP&L seeks is privileged, and, as established above, Veolia has failed to demonstrate that this information is confidential or a trade secret. Certainly, Veolia's responses to the data requests issued by the Commission Staff in this matter are relevant to this cause. Rule 56.01(b)(1) clearly provides the basis for allowing KCP&L access to this information. Essentially, KCP&L is entitled to review the information that Staff has requested in developing its recommended revenue requirement and rate design recommendations. As Veolia admits, in a typical case, such information is routinely available to "all counsel of record to have full access to the utility's highly confidential business information as permitted by 4 CSR 240-2.135(4)." (Veolia Motion, p. 4)

Conclusion

27. Under the procedural schedule adopted by the Commission in this case, KCP&L and other parties are scheduled to file their direct testimony on revenue requirement issues by August 15, 2011, merely six weeks from now. Due to Veolia's refusal to provide information to anyone at KCP&L, the Company has not had an opportunity to review the specifics of Veolia's rate case and determine its strategy and course of action. The Commission should immediately grant KCP&L's motion to compel and order Veolia to provide all data request responses to

counsel of record and Mr. Giles. The Company reserves the right to ask the Commission for additional time to file its rebuttal testimony due to Veolia's refusal to provide the requested information to anyone at KCP&L.

28. The Commission should again reject Veolia's motion as it did in the last Trigen rate case. There is no need to make a special exception for Veolia when the Commission's rule 4 CSR 240-2.135 is clear, unambiguous, and has worked well for many years in a variety of types of cases before the Commission.

WHEREFORE, KCP&L respectfully requests that the Commission deny Veolia's request to restrict access to highly confidential information and direct Trigen to provide the data request responses to undersigned counsel and its outside expert.

Respectfully submitted,

/s/ Roger W. Steiner

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ATTORNEYS FOR KANSAS CITY
POWER & LIGHT COMPANY

Dated: July 11, 2011

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, this 11th day of July, 2011 to all counsel of record in this case.

/s/ Roger W. Steiner

Roger W. Steiner