

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

**TRUMAN MEDICAL CENTER'S RESPONSE TO OBJECTION OF VEOLIA ENERGY
KANSAS CITY, INC.**

COMES NOW, Truman Medical Center ("TMC") and hereby files its Response to the objection of Veolia Energy Kansas City, Inc. ("Veolia") to TMC's amended application to intervene in the above-captioned proceeding. In support of its Response, TMC respectfully states as follows to the Missouri Public Service Commission ("MPSC" or "Commission"):

1. On November 27, 2013, Veolia filed with the Commission proposed revised tariff sheets intended to implement a general rate increase.
2. In its December 3, 2013 *Order Suspending Tariff, Scheduling Pre-Hearing Conference, Directing Notice, and Setting Deadline for Intervenors*, the Commission directed interested parties to file motions for intervention by December 24, 2013.
3. TMC filed a Petition to Intervene on February 3, 2014, pursuant to Commission Rule 4 CSR 240-2.075(3), seeking permission to intervene out of time.
4. On February 26, 2014, the Commission issued an *Order Denying Application to Intervene* due to TMC's failure to proffer a reason for its inability to file an application to intervene by the December 24th deadline. However, the Commission granted TMC an opportunity to resubmit a motion to intervene with the requisite information by March 3, 2014.
5. On February 28, 2014, TMC filed its Amended Application to Intervene Out of Time (hereafter, the "Amended Application").

6. On March 10, 2014, Veolia filed its Objection to TMC's Amended Application, followed shortly thereafter by an Affidavit of Charles P. Melcher and Outside Counsel Guidelines which were filed on March 11, 2014.

7. Veolia's objection to TMC's Amended Application (hereafter ("Amended Application")) is comprised of two arguments: 1) that TMC fails to show good cause for its failure to intervene by the Commission's intervention deadline; and 2) Veolia's opposition to Polsinelli PC representing TMC in this matter. TMC will address both arguments in turn.

TMC Has Demonstrated Good Cause for Intervening Out of Time

8. Veolia contends that TMC fails to show good cause for its "extended delay" in filing its application to intervene.¹ Veolia acknowledges that as a large customer of Veolia, TMC has an obvious interest in this proceeding, yet suggests that TMC "decided to materially delay" its application to intervene, and that its delay was "intentional" and "conscious."² These contentions are false.

9. In both its initial Application to Intervene and the Amended Application, TMC thoroughly explained the circumstances giving rise to its late intervention in this matter. Though TMC was late in petitioning to intervene, it has acted in good faith as a concerned customer of Veolia. This requested intervention does not impact the procedural schedule in this case and does not prejudice Veolia. In fact, as Veolia's largest single-meter customer, TMC is at a loss to comprehend what interest Veolia has in arguing so vehemently to prevent TMC's participation in this case.

10. Despite Veolia's unsubstantiated claims to the contrary, there is no reasonable or rational reason for TMC to have consciously delayed filing for intervention in this matter and

¹ March 10, 2014 Objection to Amended Application to Intervene Out of Time and Opposition to Appearance of Counsel, at ¶ 5 (Hereafter, "Objection to Amended Application").

² Objection to Amended at ¶¶ 13-14.

potentially jeopardize its own substantial interests in this proceeding. For Veolia to contend that TMC intentionally delayed filing for intervention is simply absurd.

Polsinelli PC's Representation of TMC on Steam-Related Matters With Veolia Energy Kansas City, Inc. Predates its Representation of Trigen-St. Louis Energy Corporation and There Is No Conflict of Interest

11. Veolia asserts that, through its affiliate and parent corporation, it is a current client of Polsinelli. Polsinelli executed the *Acknowledgement of Veolia Energy North American Holdings, Inc. Outside Counsel Guidelines* on October 2, 2012 in order to undertake representation of Trigen-St. Louis Energy Corporation ("Trigen-St. Louis"), an affiliate of Veolia Energy Kansas City, Inc. Trigen-St. Louis is a single-city steam plant wholly regulated by the City of St. Louis, and not regulated by the Missouri Public Service Commission. Trigen-St. Louis does not have any contractual relationship with TMC.

12. Veolia further states that, pursuant to its contract of engagement with Polsinelli, Polsinelli expressly agreed that it would not represent clients adverse to Veolia or its affiliates.³ Veolia states that it does not consent to Polsinelli's adverse representation of TMC and has not waived this perceived conflict in writing.⁴

13. Veolia's consent is not required, as Veolia has not established that an actual conflict exists. Importantly, the relationship between Trigen-St. Louis and Polsinelli is not relevant to the material issues of the case with its affiliate Veolia, so disqualification of counsel is inappropriate. In deciding whether to disqualify an attorney or firm, the court must balance a client's right to counsel of choice with the need to maintain high professional standards among attorneys. To establish grounds for disqualification, the party seeking disqualification must first

³ March 10, 2014 Objection to Amended Application to Intervene Out of Time and Opposition to Appearance of Counsel, at ¶¶ 19-20.

⁴ *Id.* at ¶ 25.

show that there is an actual conflicting relationship; only then does the burden of showing that confidential information has not been shared shift to the party rebutting disqualification.⁵

14. Although Polsinelli has represented Veolia's affiliate, Trigen-St. Louis, the nature and scope of the matters are unrelated enough that they would not qualify as having ever represented Veolia. The ABA's Model Rules of Professional Conduct provide that a "lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."⁶ While an attorney may not accept representation adverse to a client if "circumstances are such that the affiliate should also be considered a client of the lawyer," this is limited to situations where the lawyer's interest in one client would be materially limited by its ongoing representation of the other client.⁷ Such is not the case here. Matters involving Polsinelli's representation of Trigen-St. Louis will never be heard before the Missouri Public Service Commission, as Trigen-St. Louis is regulated exclusively by the City of St. Louis. Similarly, TMC is not and can never be a customer of Trigen-St. Louis. Finally, Veolia's pending rate case before the Commission pertains solely to Veolia's steam service and rates, and will have no bearing on Trigen-St. Louis.

15. Corporate affiliates are not automatically considered a single entity for attorney conflict purposes, based solely on the fact that one is a subsidiary owned by the other.⁸ Veolia has not established a conflict or "appearance of impropriety" by merely pointing to Polsinelli's history of work for an affiliated organization.

⁵ *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591 (Mo.App.E.D. 2010); *Baybrook Homes v. Banyan Construction & Demolition, Inc.*, 991 F.Supp 1440, 1446-7 (1991).

⁶ *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2010), quoting ABA Model Rule of Professional Conduct 1.7, Comment 34.

⁷ ABA Model Rule of Professional Conduct 1.7, Comment 34.

⁸ *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2010).

16. Further, Courts are reluctant to disqualify counsel on the basis of an “appearance of impropriety” alone because of the potential for strategic use and abuse by opposing parties and the hardship it causes to the party losing its choice of counsel.⁹ Courts balance the hardship imposed on the party losing counsel against the subject matter and relevance of information the party moving for disqualification alleges will be disclosed by allowing counsel to continue.¹⁰ And when ruling on disqualification, a less stringent standard should be applied to vicarious or attenuated representation of past clients, and will only be required when “the subject matter of a suit is sufficiently related to the scope of the matter on which a firm represents an association as to create a realistic risk that either the plaintiff will not be represented with vigor or that an unfair advantage will be taken of the defendant.”¹¹ Here, Polsinelli is well-acquainted with TMC’s history with Veolia and energy needs such that it would be a hardship for TMC to secure new counsel. At the same time, Polsinelli possesses no relevant or privileged information gained from its engagement with Trigen-St. Louis.

17. In addition, Polsinelli’s representation of TMC preceded Polsinelli’s representation of Trigen-St. Louis, a fact well-known to Veolia, despite its protestations to the contrary. Attached to Veolia’s Objection as *Exhibit A* is the affidavit of Charles P. Melcher. This affidavit states, in part, that “[t]o my knowledge after due investigation, no employees of Veolia Energy North American Holdings, Inc., or any of its subsidiaries or affiliates were aware prior to February 3, 2014 that Polsinelli represented TMC as counsel regarding matters adverse to Veolia Energy North American Holdings, Inc. or any of its subsidiaries or affiliates.”¹²

⁹ *Hartford Acc. And Indem. Co. v. RJR Nabisco, Inc.* 721 F.Supp. 534, 538 (1989); *Quality Developers, Inc. v. Thorman*, 29 Kan.App.2d 702 (Kan.App.2001).

¹⁰ *National Bank of Andover, N.A. v. Aero Standard Tooling, Inc.*, 30 Kan.App.2d 784 (Kan.App.2002.).

¹¹ *Hartford Acc. And Indem. Co. v. RJR Nabisco, Inc.* 721 F.Supp. 534, 539 (1989).

¹² *See*, Affidavit of Charles P. Melcher at ¶ 8.

18. Mr. Melcher's sworn and verified statement is inaccurate. A brief history of Polsinelli's representation of TMC and Trigen-St. Louis is warranted so that this alleged conflict may be placed in the appropriate context.

19. Polsinelli's representation of TMC on the issues of the cost, quality, and sufficiency of Veolia's steam service to TMC began in December 2011, predating the October 2012 Polsinelli representation of Trigen-St. Louis.

20. Prior to beginning the representation of Trigen-St. Louis in October of 2012, Polsinelli, TMC, and Veolia engaged in electronic mail correspondence in February 2012.¹³ Clearly noted at the bottom of each electronic mail message is the undersigned's name, denoted as a shareholder at Polsinelli. On February 22, 2012, representatives from all three entities participated in a meeting to discuss issues pertaining to Veolia's Kansas City steam plant. Present and participating at this meeting was Tim Dickerson, Veolia's Kansas City steam plant manager. This is the same Tim Dickerson that signed the Customer Notice letter filed in this docket on December 10, 2013.

21. Contrary to the assertions contained in Mr. Melcher's affidavit, in light of Mr. Dickerson's participation in electronic mail correspondence with Polsinelli and TMC, as well as his participation in the February 22, 2012 meeting, there can be no doubt that Veolia was aware of Polsinelli's representation of TMC in early 2012.

22. Further, Polsinelli's representation of Trigen-St. Louis did not commence until October 2012, nearly a year after Veolia became aware of Polsinelli's representation of TMC on steam-related matters in the Kansas City area. As noted, Polsinelli executed the *Acknowledgement of Veolia Energy North American Holdings, Inc. Outside Counsel Guidelines* on October 2, 2012 in order to undertake representation of Trigen-St. Louis. The "conflicts"

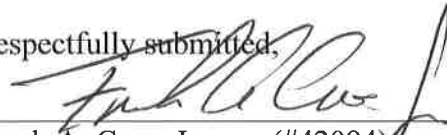
¹³ See, Electronic mail correspondence between Frank A. Caro, Jr., Steve DeGarmo, and Tim Dickerson, which is attached to this document as **Exhibit A**.

paragraph contained in that *Acknowledgement* states that “[b]y undertaking representation of Veolia or any of its affiliates, Counsel expressly agrees to avoid all representation adverse to Veolia or any of its affiliates without the prior, express approval of Veolia.”

23. The phrase “avoid all representation” in this document is clearly prospective in nature. It cannot be construed to prohibit or restrain Polsinelli’s representation of TMC on steam-related matters that pre-dated Polsinelli’s representation of Trigen-St. Louis, particularly in light of the fact that Veolia was aware of Polsinelli’s representation of TMC at the time the Acknowledgment was executed.

WHEREFORE, TMC respectfully renews its petition for intervention in the above-captioned matter, and states that neither the procedural schedule nor any party to this proceeding will be prejudiced by TMC’s participation.

Respectfully submitted,



Frank A. Caro, Jr. (#42094)

Anne E. Callenbach (#56028)

Polsinelli PC

900 W 48th Place, Suite 900

Kansas City, MO 64112

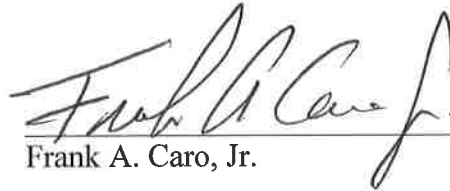
(816) 572-4754

ATTORNEYS FOR TRUMAN MEDICAL
CENTER

VERIFICATION

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

I, Frank A. Caro, Jr., being first duly sworn, do hereby certify, depose and state that I am the attorney for Truman Medical Center, that I have read the above and foregoing Response to Objection of Veolia Energy Kansas City, Inc. and that the allegations therein contained are true and correct to the best of my knowledge, information and belief.

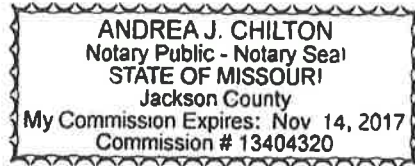


Frank A. Caro, Jr.

Subscribed and sworn to before me, a Notary Public this 19th day of March, 2014.



Notary Public



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via email on this 19th day of March, 2014, to all parties.

47346889.3

Frank Caro

From: DeGarmo, Steve W <Steve.Degarmo@tmcmcd.org>
Sent: Friday, February 17, 2012 11:17 AM
To: Dickerson, Tim; Frank Caro
Subject: RE: Phone Message

2055 Holmes, NE corner of 22nd and Holmes.

Steve DeGarmo
Sr. Dir. Corporate Design, Construction & Property Management
Truman Medical Centers
2055 Holmes Street, Kansas City, MO 64108
(816) 404-2625 | steve.degarmo@tmcmcd.org
Trumcd.org

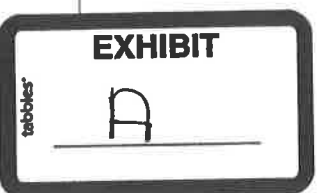


From: Dickerson, Tim [<mailto:tdickerson@veoliaenergy-na.com>]
Sent: Friday, February 17, 2012 10:56 AM
To: DeGarmo, Steve W; Frank Caro
Subject: RE: Phone Message

I will see you next Wednesday.

Steve, is this the plant or another location at the hospital?

Tim Dickerson, PE
Plant Manager
Veolia Energy N.A.
115 Grand Blvd.
Kansas City, Mo. 64106
Office: 816-889-4909
Cell: 816-315-2091
Fax: 816-842-4272
Email at: tdickerson@veoliaenergy-na.com





Confidentiality Note: This e-mail message and any attachments to it are intended only for the named recipients and may contain legally privileged and/or confidential information. If you are not one of the intended recipients, please do not duplicate or forward this e-mail message and immediately delete it from your computer.

From: DeGarmo, Steve W [<mailto:Steve.DeGarmo@trmcmcd.org>]
Sent: Thursday, February 16, 2012 10:55 AM
To: Frank Caro; Dickerson, Tim
Subject: RE: Phone Message

How about Wednesday at 2pm in my office at 2055 Holmes?

Steve DeGarmo
Sr. Dir. Corporate Design, Construction & Property Management
Truman Medical Centers
2055 Holmes Street, Kansas City, MO 64108
(816) 404-2625 | steve.degarmo@trmcmcd.org
Trumcd.org



From: Frank Caro [<mailto:FCaro@Polsinelli.com>]
Sent: Thursday, February 16, 2012 9:26 AM
To: DeGarmo, Steve W; Dickerson, Tim
Subject: RE: Phone Message

Yes, I am free either of those afternoons after 1:30. Thanks.

Frank Caro
Polsinelli Shughart PC
6201 College Blvd., Suite 500
Overland Park, KS 66211
(913) 234-7409
(913) 481-5215 cell

From: DeGarmo, Steve W [mailto:Steve.DeGarmo@tmcmed.org]
Sent: Thursday, February 16, 2012 7:16 AM
To: Dickerson, Tim
Cc: Frank Caro
Subject: Phone Message

Tim,

Thanks for calling the other day, we had a couple of emergencies yesterday that had me tied up so I was unable to call you back. My afternoons are free both next Wednesday and Thursday would you be available either of those days? Frank how about you?

Thanks

Steve DeGarmo
Sr. Dir. Corporate Design, Construction & Property Management
Truman Medical Centers
2055 Holmes Street, Kansas City, MO 64108
(816) 404-2625 | steve.degarmo@tmcmed.org
Trumcd.org



The information contained in this communication may be confidential and is intended only for the use of the intended recipient(s). If the reader of this message is not the intended recipient(s), you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please return it to the sender immediately and delete any copy of it from your computer system.

This electronic mail message contains CONFIDENTIAL information which is (a) ATTORNEY - CLIENT PRIVILEGED COMMUNICATION, WORK PRODUCT, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not an Addressee, or the person responsible for delivering this to an Addressee, you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please reply to the sender and take the steps necessary to delete the message completely from your computer system.

IRS CIRCULAR 230 DISCLOSURE: Unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail, including attachments, is not intended or written by Polsinelli Shughart PC (in California, Polsinelli Shughart LLP) to be used, and any such tax advice cannot be used, for the purpose of avoiding penalties that may be imposed by the Internal Revenue Service.

The information contained in this communication may be confidential and is intended only for the use of the intended recipient(s). If the reader of this message is not the intended recipient(s), you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please return it to the sender immediately and delete any copy of it from your computer system.

The information contained in this communication may be confidential and is intended only for the use of the intended recipient(s). If the reader of this message is not the intended recipient(s), you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please return it to the sender immediately and delete any copy of it from your computer system.