

For the foregoing reasons, and the reasons set forth in Veolia's Objection, the Commission should deny TMC's application to intervene out of time.

II. Opposition to Appearance of Counsel

3. Despite the arguments raised by TMC in its Response, Polsinelli must withdraw as TMC's counsel for three reasons. First, Polsinelli did not disclose its status as TMC's counsel to Veolia in February 2012, and it is incorrect for TMC to state to the Commission that Veolia knew of this representation. Second, Polsinelli is bound by a written agreement that prohibits this representation. Finally, Polsinelli's continued representation of TMC is prejudicial to Veolia because it has access to and knowledge of Veolia's trade secrets which are directly relevant to these proceedings.

4. TMC erroneously asserts in its Response that Veolia was aware of Polsinelli's prior representation of TMC and fails to provide the Commission the full picture as to its disclosure of such representation.³ TMC's Response suggests that its representation by Polsinelli was "a fact well-known to Veolia" and attaches a string of emails between TMC, Veolia and Polsinelli beginning on February 16, 2012.⁴ However, TMC failed to mention the correspondence it had with Veolia making the representation that Frank Caro of Polsinelli was its "Utility Advisor."⁵

5. On February 13, 2012, Steve DeGarmo of TMC emailed Tim Dickerson of Veolia regarding a steam line issue and represented to Veolia that Frank Caro of Polsinelli was its

³ See Response, ¶¶ 17, 21.

⁴ Id. at ¶ 17.

⁵ See attached Affidavit of Tim Dickerson, ¶ 4.

“Utility Advisor.”⁶ TMC did not directly disclose in that communication, or any of the communications that followed, that Caro was an attorney and Polsinelli was its legal counsel.

6. Rather, based on the February 13, 2012 correspondence, Veolia’s representative, Mr. Dickerson, was under the impression that Polsinelli was merely a technical consulting firm.⁷ Had Mr. Dickerson (a non-lawyer) understood that Polsinelli was acting as counsel to TMC in February 2012, or that TMC was intending to assert some type of claim against Veolia, he would have taken additional measures, including seeking the involvement of its in-house counsel, prior to further correspondence with TMC and its counsel.⁸

7. TMC also attempts to characterize the February 2012 issue as a dispute between TMC and Veolia and again omits inclusion of the correspondence that directly suggests otherwise. TMC sent a letter to Veolia on February 9, 2012 requesting the involvement of Veolia in the repair and resolution of a problem with their main steam distribution line.⁹ This letter did not assert any type of demand on Veolia and certainly did not suggest that its counsel should get involved. There was no indication from TMC or Polsinelli that there was any matter of disagreement between TMC and Veolia; rather, the discussions focused on the planned outage to TMC’s steam service. The correspondence between TMC, Veolia and Polsinelli in February 2012 certainly did not relate to Polsinelli’s representation of TMC on “the issues of cost, quality, and sufficiency of Veolia’s steam service to TMC” as described in TMC’s Response.¹⁰

⁶ *Id.*

⁷ *Id.* at ¶ 6.

⁸ *Id.* at ¶ 7.

⁹ *Id.* at ¶ 2-3.

¹⁰ *See* Response, ¶ 19.

8. If TMC truly intended the February 2012 incident to be adversarial and it in fact had hired Polsinelli to represent its interests, Polsinelli should have asked to correspond directly with Veolia's counsel or at least have inquired about whether Veolia's counsel should get involved as Polsinelli would be ethically required to do.

9. Veolia was not aware of Polsinelli's representation of TMC prior to Trigen-St. Louis' engagement of Polsinelli in October 2012. When Trigen-St. Louis' engaged Polsinelli, it was unaware of a potential conflict with TMC. Polsinelli should have disclosed the relationship to Veolia at that time but it did not. Regardless, upon engagement by Trigen-St. Louis, Polsinelli signed an agreement indicating that it would not act adverse to Veolia ("Agreement").¹¹

10. TMC suggests that the Agreement it signed requiring it to avoid all conflicting representation was "prospective" in nature and therefore only applied to future representation.¹² It alleges that since it represented TMC prior to Trigen-St. Louis there was and is no violation of the agreement.¹³

11. TMC's assertion that the Agreement only applies prospectively is a stretch by any standard. Regardless of its erroneous characterization, the current representation of TMC in this matter is "prospective" and is distinct from any prior representation of TMC. In fact, TMC admits that it did not engage counsel related to this matter until mid-January, well after the Agreement was executed.¹⁴ As such, by its own definition of the terms of the Agreement, Polsinelli should not be acting as TMC's counsel in this matter. The language of the Agreement

¹¹ See Exhibit A of Objection, Affidavit of Charles A. Melcher, Attachment 1, Executed Copy of Outside Counsel Guidelines.

¹² See Response, ¶ 23.

¹³ *Id.*

¹⁴ See Truman Medical Center's Amended Petition to Intervene Out of Time, ¶ 7.

is clear. Polsinelli was to “avoid all representation” that was adverse to Veolia. Polsinelli must be held to the terms of the agreement it signed.

12. Finally, contrary to TMC’s assertions in its Response, Polsinelli has a direct and actual conflict in representing TMC in this matter that necessitates its withdraw. TMC suggests that Veolia must establish an actual conflicting relationship in order for the Commission to order withdraw of Polsinelli.¹⁵ The conflicting relationship is undeniable here and continued representation by Polsinelli will only result in prejudice to Veolia.

13. TMC readily admits that Polsinelli represents Trigen-St. Louis.¹⁶ Veolia and Trigen-St. Louis are (1) owned by the same parent company; (2) have the same business function, strategies and protected trade secrets; (3) have the same officers; (4) have the same directors; (5) have the same in-house legal department; (6) enter the same types of contracts; (7) have the same financial structure; (8) and operate in the same state using the same type of equipment.¹⁷

14. TMC represents that Polsinelli possesses no relevant or privileged information gained from its engagement with Trigen-St. Louis. Quite to the contrary, Polsinelli has access to Veolia’s entire business development and growth strategy through its association with Trigen-St. Louis.¹⁸ It also has access to Veolia’s trade secrets which are identical to those of Trigen-St. Louis.¹⁹ There can be no question that Polsinelli’s knowledge of Veolia’s business creates a

¹⁵ See Response, ¶ 13.

¹⁶ *Id.* at ¶ 19-20.

¹⁷ See Dickerson Affidavit, ¶ 13.

¹⁸ *Id.*

¹⁹ *Id.*

clear conflict of interest. Polsinelli's representation of TMC prejudices Veolia by giving TMC through Polsinelli the advantage of knowing the strategies of both sides of the rate setting business through Polsinelli's representation of Trigen-St. Louis and TMC. This is particularly prejudicial to Veolia, which in a manner unique among utilities regulated by the Commission, competes for its customer base with investor-owned electric and natural gas monopolies on the basis of price.

15. TMC's application of the ABA's Model Rules of Professional Conduct is completely irrelevant. Contrary to TMC's assertions, the applicable rules are the Missouri Rules of Professional Conduct ("Missouri Rule"). Pursuant to Missouri Rule 1.7, Comment 34, Polsinelli is barred from representing TMC because there is a signed contract that governs Polsinelli's representation of Trigen-St. Louis and Veolia, and that signed contract satisfies one of the exceptions outlined in Comment 34 barring representation adverse to Veolia.²⁰

16. Comment 34 outlines three exceptions to the standard established in Rule 1.7. It provides that a "lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that [1] the affiliate should also be considered a client of the lawyer, [2] there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or [3] the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client."²¹

²⁰ See Mo. Sup. Ct. Rule 4-1.7 Comment [34].

²¹ *Id.* (emphasis added)

17. TMC correctly stated the general rule that a “lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter.”²² However, TMC incorrectly omitted the three exceptions to that general rule. If the circumstances are such that the client satisfies any of the three exceptions, then the lawyer is barred from representing adverse to the client’s affiliates. In the present case, Veolia satisfies the second exception because Polsinelli [the lawyer] and Veolia [the organizational client] have an understanding that Polsinelli will avoid representation adverse to Veolia’s affiliates.²³ Polsinelli is barred from representing TMC adverse to Veolia because Polsinelli agreed not to engage in representation adverse to Veolia.

18. The Commission should look squarely to the Missouri Rules, including Rule 1.7 and its corresponding Comment 34, as well as to the terms of the Agreement signed by Polsinelli that satisfies the second exception to the general rule and correctly determine if a conflict exists. Polsinelli expressly agreed that it “would not represent clients adverse to Veolia or its affiliates” and the Missouri Rules of Professional Conduct require that it be held to that agreement.²⁴

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.

²² *Id.*

²³ *See* Exhibit A of Objection, Affidavit of Charles A. Melcher, Attachment 1, Executed Copy of Outside Counsel Guidelines.

²⁴ *Id.* *See also* Mo. Sup. Ct. Rule 4-1.7 Comment [34].

Respectfully submitted,

By: /s/ Diana Vuylsteke

Diana M. Vuylsteke, # 42419

Bryan Cave LLP

211 N. Broadway, Suite 3600

St. Louis, Missouri 63102

Telephone: (314) 259-2543

Facsimile: (314) 259-2020

E-mail: dmvuylsteke@bryancave.com

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 24th day of March, 2014, to all parties on the Commission's service list in this case.

/s/ Diana Vuylsteke