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August 17, 2011

Mr. Leonard Toenjes
 Chairman, Rate Commission
 Metropolitan St. Louis Sewer District
 c/o John Fox Arnold, Esq.
 Lashly & Baer, P.C.
 714 Locust Street
 St. Louis, MO 63101

Re: Intervenor's Response to the Rate Commission's version of the
 Confidentiality and Non-Disclosure Agreement

Dear Mr. Chairman:

This response is submitted on behalf of the Missouri Industrial Energy Consumers ("MIEC"),¹ Barnes-Jewish Hospital ("BJH"), Mr. Robert A. Mueller ("Mueller"), the AARP, and the Consumers Council of Missouri ("CCM") (collectively, the "Intervenors"). Pursuant to Section 19(e) of the Procedural Schedule and in accordance with Mr. John Fox Arnold's recommendation, the Intervenors submit this response to your letter dated August 10, 2011 with the "Confidentiality and Non-Disclosure Agreement" attached (herein the "Confidentiality Agreement"). See Exhibit LB 55.

We appreciate MSD's and Black & Veatch's efforts in presenting the Intervenors with a draft of a confidentiality agreement on August 8, 2011 to attempt to provide the Intervenors with access to the electronic version, with all formulas intact, of the May 10, 2011 MSD wastewater rate proposal performed by Black & Veatch (herein "Electronic Model") in compliance with the Rate Commission's decision on August 2, 2011. See Exhibit L&B 48A. For the reasons that we discuss below, the Intervenors are unable to sign the Confidentiality Agreement as currently drafted.

I. Background

On August 2, 2011, the Rate Commission granted the Intervenors' Motion to Compel:

¹ Covidien, an intervenor, is being represented by the MIEC in this 2011 MSD rate proceeding.

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The Rate Commission (i) directs the District to make an electronic copy with formulas intact of the May 10, 2011, Black & Veatch Metropolitan Sewer District Rate Proposal (the Electronic Report) available to all participants in this proceeding no later than August 10, 2011 under nondisclosure agreements approved by the Presiding Officer under the provision of §19(e) of the Procedural Schedule; (ii) permits any participant to file not later than August 23, 2011 Supplemental Testimony based upon the Electronic Report; and (iii) directs any such participant filing Supplemental Testimony to answer questions propounded by the other participants during the Surrebuttal Technical Conference beginning on September 6, 2011.

See Exhibit L&B 48A. On August 8, 2011, six days after the Rate Commission granted the Intervenors' Motion to Compel, Mr. Arnold provided the Intervenors with a draft of a confidentiality agreement during the Rebuttal Technical Conference. Pursuant to your request, on August 8, 2011, the Intervenors jointly provided revisions to the draft confidentiality agreement to Mr. Arnold and Ms. Lisa Stump, counsel for the Rate Commission. A copy of the Intervenors' correspondence appears as Exhibit A. Significantly, the Intervenors only provided revisions that are reasonable within the industry. Moreover, the revisions were modeled after other nondisclosure agreements and confidentiality agreements that the Intervenors have executed recently in matters before the Missouri Public Service Commission ("PSC").

On August 10, 2011, you submitted a revised version of the Confidentiality Agreement in your capacity as Chairman of the Rate Commission. *See* Exhibit 55. Notably, two key provisions that the Intervenors revised were not accepted into the Confidentiality Agreement. As discussed below, the Intervenors are unable to sign the Confidentiality Agreement because of provisions 4(c) and 6. The Confidentiality Agreement exposes the Intervenors to significant potential liability for simply reviewing the Electronic Model in this rate proceeding. Moreover, the Intervenors are unable to sign a document that is inconsistent with other confidentiality agreements/nondisclosure agreements in the industry.

II. Examples of Other Confidentiality Agreements/Nondisclosure Agreements

In an effort to further demonstrate that provisions 4(c) and 6 of the Confidentiality Agreement are commercially unreasonable and are not standard in the industry, the Intervenors have attached copies of three different confidentiality agreements/nondisclosure agreements that were executed within the past two years for your review. Two of these nondisclosure agreements are public documents filed with the PSC,² and therefore, are reproduced in their entirety. *See* Exhibit B, Nondisclosure Agreement of Michael Gorman, dated September 7, 2010 for Case No. ER-2011-0028; *see also* Exhibit C, Nondisclosure Agreement of Billie S. LaConte, dated September 14,

² The standard Nondisclosure Agreement signed and executed before the PSC references 4 CSR 240-2.135, a regulation entitled "Confidential Information." *See* <http://www.sos.mo.gov/adrules/csr/current/4csr/4c240-2.pdf>.

2010 for Case No. ER-2011-0028. The third confidentiality agreement was executed in July of 2009 by one of the Intervenor in a matter before the PSC; however, since this agreement is not filed as matter of public record, all of the references to the names of the parties have been redacted. *See* Exhibit D. In short, as demonstrated by Exhibits B, C, and D, the Intervenor have recently executed numerous nondisclosure agreements/confidentiality agreements in this industry, and provisions 4(c) and 6 of the Confidentiality Agreement are not consistent with the terms of these agreements.

III. Concerns with Provisions 4(c) and 6 of the Confidentiality Agreement

The Intervenor are very concerned about the potential liability that the Intervenor and their consultants could incur by signing the Confidentiality Agreement as currently drafted. In particular, provisions 4(c) and 6 are commercially unreasonable, do not appear in other confidentiality agreements/nondisclosure agreements for other rate proceedings, and expose the Intervenor to substantial and unnecessary liability.

A. Provision 4(c)

Provision 4(c) currently states: “Recipient further agrees that it will not use Black & Veatch’s provision of access to the Electronic Model pursuant to this Agreement as support for any position or argument for similar access in any other rate proceeding, dispute, or matter.”

Importantly, the Intervenor struck this provision of section 4 in the August 8, 2011 revision for three principal reasons. *See* Exhibit A. First, if a Intervenor or consultant who signs the Confidentiality Agreement is asked by any tribunal (i.e., the PSC, Missouri state courts, Federal courts, etc.) if the individual has reviewed or analyzed the Electronic Model in this proceeding, the individual has an obligation, under oath, to answer the questions of the tribunal. The Intervenor or the consultant is potentially hindered by provision 4(c) from being able to testify in other future proceedings. Second, provision 4(a) specifically outlines how the Intervenor or consultant will not use the confidential information for any commercial purpose other than providing expert consultation or testimony in this proceeding. Provision 4(c) is unnecessary in light of 4(a). Third, provision 4(c) is not executed in other confidentiality agreements/nondisclosure agreements in this industry. *See* Exhibits B, C, and D. The Intervenor and their consultants should not be penalized in the future for executing a confidentiality agreement in this proceeding.

Furthermore, it is unclear as to why provision 4(c) is important to MSD and/or Black & Veatch, considering that this rate proceeding is a matter of public record and MSD’s website³ clearly shows that that the Rate Commission granted the Intervenor’s Motion to Compel. If desired, any member of the public or any court can review the record to determine that the Electronic Model

³ *See* <http://www.stlmsd.com/aboutmsd/organization/rateproposal> (providing links to all of the motions, letters, affidavits, and ultimately the Rate Commission’s decision regarding granting access to the Electronic Model).

was provided to the parties in this matter and make an argument for similar access in other rate proceedings.

B. Provision 6

Provision 6 of the Confidentiality Agreement currently states:

This Agreement is for the benefit of Black & Veatch, and without prejudice to the rights and remedies otherwise available to it, Black & Veatch shall be entitled to equitable relief if the Recipient breaches or threatens to breach any of the provisions of this Agreement. In the event that Black and Veatch incurs attorney fees and/or expenses in enforcing this Agreement or otherwise prevails in any action arising from or relating to Recipient's breach of any of the provisions of this Agreement, Recipient shall be require[d] to pay Black & Veatch's attorney fees and expenses. Without limiting the foregoing, or any other rights and remedies, otherwise available to Black & Veatch, Recipient further agrees to pay over to Black & Veatch any revenue generated by Recipient through use of the Confidential Information. If Recipient is compelled or sought to be compelled by legal process to disclose the information (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demands, or otherwise), Recipient shall immediately provide Black & Veatch timely written notice of such legal process so that Black & Veatch may seek a protective order or other appropriate remedy. In any event, Recipient will not, unless legally compelled to do so, disclose the Confidential Information until after such timely written notice has been given, and in all cases shall only disclose that portion of the information to which the compelling party is legally entitled and will use its best efforts to obtain reliable assurance (by appropriate court orders, if applicable) that confidential treatment will be accorded the information.

(emphasis added). On August 8, 2011, in accordance with other confidentiality agreements in the industry, the Intervenors proposed modifying the first sentence and eliminating the second and third sentences. *See* Exhibit A. Unfortunately, these revisions were not accepted.

The Intervenors recognize that Black & Veatch is entitled to equitable relief if the Intervenors or their consultants breach the provisions of the Confidentiality Agreement. The Intervenors proposed the following language for the first sentence of provision 6: "This Agreement is for the benefit of Black & Veatch, and without prejudice to the rights and remedies otherwise available to it, Black & Veatch shall be entitled to equitable relief if the Recipient breaches any of the provisions of this Agreement." *See* Exhibit A. As demonstrated in other confidentiality agreements that have been signed by the Intervenors, the Intervenors acknowledge that Black & Veatch will be entitled to equitable relief if the Confidentiality Agreement is breached. *See* Exhibit D, no. 9.

Other portions of provision 6 are very concerning. Specifically, the Confidentiality Agreement requires the Recipient to pay Black & Veatch's attorneys fees and expenses "[i]n the event that Black and Veatch incurs attorney fees and/or expenses in enforcing this Agreement or otherwise prevails in any action arising from or relating to Recipient's breach of any of the provisions of this Agreement." If the Intervenors and their consultants were to sign this document, the Intervenors and consultants would be responsible for paying for Black & Veatch's attorneys fees and expenses if Black & Veatch chooses to enforce the Confidentiality Agreement. Black & Veatch's claim – legitimate or not – would be paid for in full by the Intervenors and their consultants. Moreover, according to provision 6, the Intervenors and their consultants would be responsible for paying Black & Veatch any "revenue generated by Recipient through use of the Confidential Information," however that revenue may be calculated.

These provisions expose the Intervenors and their consultants to unnecessary and unprecedented legal liability. The Intervenors recognize that Black & Veatch is entitled to equitable relief if the Intervenors violate the terms of the Confidentiality Agreement. Significantly, none of the other agreements that the Intervenors have signed demand that the Intervenors pay all attorneys' fees, expenses, and lost revenues to a party claiming confidentiality if the party claiming confidentiality simply brings a claim. *See* Exhibits B, C, and D.

Provision 6, as currently written, is not commercially reasonable. It provides Black & Veatch with an opportunity to sue the Intervenors and their consultants for any claim (whether legitimate or not), and recover all fees, expenses, and lost revenues in the process. It is not consistent with other confidentiality agreements that have been recently executed before the PSC. *See* Exhibits B, C, and D.

IV. Looking Forward

As discussed above, the Intervenors and their consultants are unable to execute the Confidentiality Agreement. The Rate Commission expressed its desire for MSD to provide the Electronic Model to the Intervenors on August 2, 2011. The Intervenors did not receive a draft of the confidentiality agreement until six days after the Motion to Compel was granted. And the draft confidentiality agreement that was provided was not consistent with other confidentiality agreements that have been executed in this industry. All MSD had to do was submit a standard nondisclosure agreement that has been recently filed with the Public Service Commission. *See, e.g.*, Exhibits B and C. Instead, the Intervenors received a confidentiality agreement that was commercially unreasonable.

The Intervenors jointly submitted revisions to the confidentiality agreement on August 8, 2011, the same day that the Intervenors received the confidentiality agreement. Unfortunately, the Intervenors' revisions to provisions 4(c) and 6 were not adopted in the Confidentiality Agreement distributed on August 10, 2011. To date, no intervenor herein has yet to validate the accuracy of the Electronic Model. The Intervenors had hoped to have been able to evaluate the Electronic Model by this time; however, MSD not only delayed in providing a copy of a confidentiality

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agreement, but also failed to provide an agreement that is commercially reasonable and consistent with other agreements in the industry.

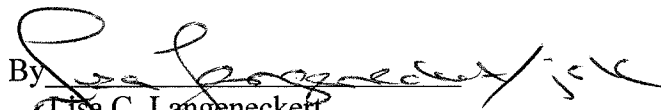
In short, the Confidentiality Agreement is so onerous that all of the Intervenor and their consultants are unable to sign the document. It took MSD too long to provide the Intervenor with a draft of a confidentiality agreement. And the agreement provided was not even commercially reasonable in the industry. Even if revisions to provisions 4(c) and 6 of the Confidentiality Agreement are adopted today, the Intervenor and their consultants would not have the necessary time to review, analyze, and evaluate the Electronic Model given the time constraints of this rate proceeding.

At a minimum, the Intervenor hope that this response will provide MSD with examples of confidentiality agreements/nondisclosure agreements to use in future rate proceedings. The Intervenor are frustrated not only by the terms of the Confidentiality Agreement, but by the unnecessary delays that MSD took in failing to provide access to the Electronic Model during this rate proceeding.

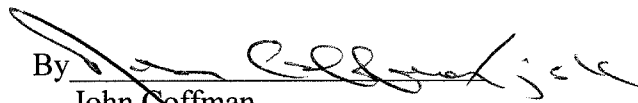
Sincerely,

By 

Diana M. Vuylsteke
John R. Kindschuh
Bryan Cave LLP
Attorneys for Missouri Industrial Energy
Consumers

By 

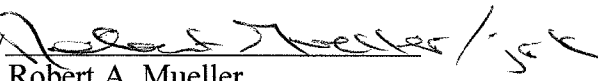
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By 
Robert A. Mueller

cc: John Fox Arnold, Esq.
Lisa Stump, Esq.

Attachments