

STATE OF INDIANA)	IN THE MARION COUNTY SUPERIOR COURT
) SS:	CIVIL DIVISION, ROOM NO. 7
COUNTY OF MARION)	CAUSE NO. 49D07-0804-CC-018081

JASON BOND, DAVID LEAR, and)
 LESLIE BRIDGES, individually and as)
 class representatives of all those similarly)
 situated,)

Plaintiffs,)

vs.)

VEOLIA WATER NORTH AMERICA)
 OPERATING SERVICE, LLC, VEOLIA)
 WATER INDIANAPOLIS, LLC, and)
 THE CITY OF INDIANAPOLIS,)
 DEPARTMENT OF WATERWORKS,)

Defendants.)

THE VEOLIA ENTITIES' OPPOSITION TO PLAINTIFFS' PETITION FOR CLASS CERTIFICATION

Veolia Water Indianapolis, LLC and Veolia Water North America Operating Service LLC (collectively "Veolia") submit this Opposition to Plaintiffs' Petition for Class Certification ("Petition").

I. Introduction.

Plaintiffs' only remaining claim against Veolia is for breach of contract. Plaintiffs contend that Veolia breached a contract with them by (1) estimating their water consumption in at least two consecutive months without a valid excuse and that these actions have caused Plaintiffs injury; and (2) applying something other than a seasonal average to estimate their water consumption. The damage allegedly caused by Veolia's breaches, if any, is the time-value of any purported over-charge -- usually only a few months -- and is, literally, pennies. Plaintiffs seek to certify both claims for class action treatment.

Plaintiffs' Petition should be denied, for multiple reasons. First, Plaintiffs are not adequate class representatives. They have affirmatively refuted the fundamental requisite to their claims: a contract with Veolia. Plaintiffs, according to their own admission, are thus not members of the class they seek to represent. Additionally, Plaintiffs are not sufficiently knowledgeable about key aspects of their claims and have not exhibited sufficient diligence in their pursuit to adequately represent the interests of absent class members.

Additionally, for claims to be appropriate for class treatment, the evidence supporting the Plaintiffs' claims must also prove the claims of absent class members. That is, Plaintiffs have the burden of establishing "the substantive elements of the underlying cause of action . . . are amenable to class-wide proof." *Blair v. SupportKids*, No. 02 C 0632, 2003 WL 1908031 at *4 (N.D. Ill. April 18, 2003). Plaintiffs, here, have not attempted to meet this burden. They have not attempted to explain to the Court how their and the class claims can be proven through common, and not individual, evidence. Thus, Plaintiffs have not attempted to satisfy their burden of proof.

And they can't do so. Plaintiffs' breach of contract claims require individual proof. Such proof is necessary to establish Veolia's breach with respect to the first claim -- whether any two consecutive estimates were or were not excused. Individualized proof is also necessary to prove causation on the second of Plaintiffs' claims -- whether they and the absent class members were injured because of the estimating logic Veolia applied.

Due to the necessity of individualized evidence to prove Plaintiffs' and the purported class members' claims, each claim will result in a mini-trial, eliminating the procedural efficiency class actions were designed to achieve and violating the basic requirements of Trial Rule 23.

Pursuant to the language of Rule 23: Plaintiffs are not adequate class representatives; Plaintiffs' claims are not typical of those of the purported class; there is no commonality among the claims of the purported class members; and individual issues will predominate in resolving the Plaintiffs' and the purported class members' claims. For each and all of these reasons, Plaintiffs' Petition should be denied.

II. Facts

A. The City's Waterworks.

The Consolidated City of Indianapolis, Department of Waterworks ("City") acquired the waterworks assets of IWC Resources Corporation ("Waterworks") in March 2002 pursuant to a settlement agreement approved by the Indiana Utility Regulatory Commission ("IURC").

As a result, the City owns a water system for the collection, purification, conveyance, treatment and storage of water and distribution of water to its customers in Central Indiana, including Plaintiffs. *See* March 28, 2002 Order of the IURC ("IURC Order"), a copy of which is attached as Exhibit A.

In March 2002, the City entered a Management Agreement with US Filter Operating Services, Inc., Veolia's predecessor, pursuant to which Veolia agreed to manage and operate the Waterworks for a period of twenty years. The City still owns and oversees the Waterworks. Veolia performs its obligations under the Management Agreement with the City as an independent contractor.

B. Estimating Customers' Water Consumption.

The Waterworks is a municipally-owned utility. *See* IURC Order. *See also* Ind. Code § 8-1-2-1(a). As a municipally-owned utility, the City must charge its customers reasonable rates. Ind. Code § 8-1.5-3-8(b). These rates are subject to approval by the IURC. Ind. Code § 8-1.5-3-8(f).

As part of its approval of the City's purchase of the Waterworks, the IURC ordered the City to operate the Waterworks in accord with "the Commission's Rules of Service and Main Extensions for Water Utilities, contained in 170 IAC 6-1 and 6-1.5." (IURC Order at 9.)¹ Pursuant to 170 IAC 6-1-13(C) water utilities may estimate customers' consumption pursuant to a procedure approved by the IURC or for other good cause.

In September 2002, the City filed with the IURC a tariff, articulating the rules that would govern its relationship with its customers, including the frequency with which customers' meters would be read and the methodology that would be applied to estimate water consumption ("Tariff"). A copy of this Tariff, approved by the IURC, is attached as Exhibit B.

The City's Tariff informs customers that their meters will be read every other month and that their consumption will be estimated in the months it is not actually read. The Tariff also informs customers that their consumption may be estimated "where circumstances beyond the Department's reasonable control require estimates, including, but not limited to, inclement weather, labor disputes, inaccessibility of a customer's meter[.]" Ex. B, Rule 3(A).

The Tariff also describes the methodology by which customers' consumption will be estimated:

Estimated monthly consumption for interim billings will be based on a 12-month moving average or a seasonal average for the premises whenever such data are available. In those circumstances where 12 months of consumption history or a seasonal moving average is not available, the estimate shall be based on the average monthly consumption for the customer's classification, as determined for the previous calendar year, unless there is evidence currently available which would indicate that such an estimate would be inapplicable, in which case the Department will estimate the bill based on such known circumstances.

Exhibit B, Rule 3(A).

¹ This regulation does not apply to Veolia. In fact, 170 IAC 6-1 *et. seq.* does not apply to the City's municipally-owned water utility, but only public utilities. See 170 IAC 6-1-2; Ind. Code § 8-1-2-1(a). This regulation applies to the City only because of the IURC's Order, directing the City to operate the Waterworks in accord with this regulation. IURC Order at 9.

As part of its entering the Management Agreement, Veolia agreed to purchase the software IWC used to estimate consumer consumption. As a result of that purchase, Veolia has applied the same estimating methodology that IWC applied prior to the City's purchase of the Waterworks from IWC. (Veolia's Answers to Plaintiffs' First Set of Interrogatories, No. 3.)

With some exceptions, when a customer's consumption is estimated, the software Veolia purchased adopts, as the customer's estimated consumption, the higher of the customer's 12-month average consumption or the prior 2-month average consumption. (Veolia's Answers to Plaintiffs' First Set of Interrogatories, No. 2.)

In the Management Agreement, Veolia agreed to adhere to the City's rules and regulations applicable to the Waterworks. Thus, it promised the City it would read adhere to the Tariff, including those sections addressing the frequency of meter reads and estimations of customers' consumption.

Veolia endeavors to read each customer's meter every other month. (Affidavit of Paul Dicken ("Dicken Aff.") at ¶ 4, attached as Exhibit C.) At times, due to inclement weather, inaccessible meters (caused by a variety of factors such as cars parked over the meter pit or dogs in the yard where the meter is located), work force issues, or other, fact-specific issues, Veolia cannot actually read a customer's meter as scheduled. In these circumstances, Veolia estimates the customer's consumption. *Id.* at ¶ 5. It is Veolia's policy for its meter readers to record a "skip code" when they do not perform a scheduled meter read. *Id.* at ¶ 6. The recorded skip code will identify the reason the meter was not read as scheduled. *Id.* at ¶ 7. When a customer's meter is not read, the customer's consumption is estimated for that month. *Id.* at ¶ 8.

If an actual read of a customer's meter reveals that the previous consumption estimate(s) over-estimated the customer's consumption, the customer will receive a bill indicating a negative

consumption. *Id.* at ¶ 9. Occasionally, the charge from prior estimates may exceed a customer's monthly charge; in such circumstances, the customer will receive a credit for that particular month. *Id.* at ¶ 10. Any such credit is reflected as a negative balance on the customer's bill. *Id.*

III. Plaintiffs' Claims and Their Description of the Two Classes They Seek to Certify.

Subsequent to Plaintiffs' filing their Petition, the Court granted both the City and Veolia judgment on Plaintiffs' claims under the Deceptive Consumer Sales Act and for unjust enrichment. The only claims remaining in this case are for breach of contract against both the City and Veolia.

Plaintiffs allege that both Veolia and the City are parties to the Tariff and that both entities breached the duties in the Tariff relating to the frequency of meter reads and the estimating methodology described in the Tariff. Plaintiffs' claimed damages are the time-value of money on alleged over-charges, for the period in which Veolia allegedly possessed Plaintiffs' overpayment -- usually a period of a few months. Plaintiffs' individual damages, and the damages of the individual, purported class members, are *de minimis*, in many cases just pennies.

A. The Purported "Methodology Class."

Plaintiffs request that the Court certify two classes. The first is composed of those water customers whose consumption, on any occasion since September 11, 2002, was determined by the estimating methodology Veolia has applied, described above (the "Methodology Class"). Presumably, the claimed damages for the Methodology Class, though not stated anywhere, is the time value of money (interest) on the difference, if any, between (1) the amount Plaintiffs paid for months estimated pursuant to the estimating logic Veolia applied and (2) the amount Plaintiffs would have paid for consumption estimated pursuant the allegedly correct, but unidentified, estimating methodology, over the period of time Veolia may have possessed this difference.

B. The Purported “Frequency Class.”

The second purported class is composed of those water customers whose consumption, between January 1, 2007 and December 31, 2009, was estimated for at least two consecutive months without a valid skip code, resulting in an actual read with a negative consumption bill, indicating that their estimated consumption for those consecutively-estimated months was greater than their actual consumption (the “Frequency Class”). The members of the Frequency Class seek to recover the time-value of money for any alleged overpayments caused by Veolia’s estimating their consumption less frequently than every other month.

IV. Plaintiffs’ Testimony Regarding Their Individual Claims.

A. David Lear

Mr. Lear admits that he does not have a contract with Veolia. (Lear Dep. at 12.) Mr. Lear believes that Veolia has an obligation to read his meter every other month, but he cannot identify the source for this belief. *Id.* at 14.

Mr. Lear admits that Veolia can legitimately exercise an estimating process with some frequency. *Id.* at 14. He also admits that circumstances may exist that could justify an exception from a scheduled meter read, such as snow on the ground, impassable roads, or a dog in the yard. *Id.* at 14-15. Mr. Lear has a dog that goes outside, without supervision, in the segment of this yard where his meter pit is located. *Id.* at 15-16.

Mr. Lear does not contend that the use of two-month averages -- the methodology potentially used to estimate his consumption -- is unreasonable. His sole complaint relates to the frequency with which Veolia has read his meter. (Lear Dep. at 13, 32, 35-36.) He testified:

Q: What do you believe Veolia should have done that [it] didn’t do?

A: Read the meters every other month?

Q: Anything else?

A: No.

Q: So there's nothing wrong with the [estimating] methodology as a methodology, it's all in the application as far as you're concerned?

A: I wouldn't say there is nothing wrong with it. I think it's at least reasonable.

Q: Okay. Fair enough. I don't mean to say it's perfect. But it's reasonable. But the application is where the error comes in from your perspective?

A: Correct.

Q: By application we specifically are talking about a frequency with which meters are read:

A: Correct.

Q: That's the central complaint you have in this case?

A: Correct.

(Lear Dep. at 13, 35-36.)

Mr. Lear testified that his claim is limited to a five-month period, from October 2007 -- the first month Lear contends his bill should have been read instead of estimated -- to April 2008, when his meter was actually read. *Id.* at 23.

Mr. Lear has no evidence to indicate the reason his consumption was estimated in any particular month and cannot refute that his consumption could have been estimated in the months relevant to his claim due to inclement weather or because his dog was in the yard. *Id.* at 19, 36-37.

The evidence Mr. Lear submitted with the Petition -- his Transactions Transcript -- does not identify any actual read after at least two consecutive estimates that resulted in a negative consumption bill. (Dicken Aff. at ¶¶ 11-12; Lear Aff. Ex. A.) Mr. Lear has no evidence

indicating he ever paid a late charge during the period for which he asserts a claim. (Lear Dep. at 36.)

Additionally, for those consecutive months in which Ms. Lear's consumption was estimated, Mr. Lear has presented no evidence of any skip codes or other evidence indicating the reason(s) for the consecutive estimates.

B. Jason Bond

Mr. Bond admits that he does not have a contract with Veolia. (Bond Dep. at 14.) Mr. Bond believes he has an "indirect" contract with Veolia due to Veolia's Management Agreement with the City. *Id.* Mr. Bond believes that Veolia has an obligation to read his meter every other month, but, he cannot identify the source for this belief. *Id.* at 16.

Mr. Bond admits that Veolia can legitimately exercise an estimating process with some frequency. *Id.* at 17. And, Mr. Bond agrees that circumstances exist that would legitimately justify an exception from a scheduled meter read, such as impassable roads, or a dog in the yard. *Id.*

Mr. Bond has no evidence to indicate the reason his consumption was estimated in any particular month in which he contends his meter should have been read. *Id.* at 22-25. Mr. Bond does not know whether he has ever paid a late charge. *Id.* at 30.

Mr. Bond does not know the estimating methodology the IURC purportedly approved, he does not know where the allegedly correct estimating logic is described, he does not know the estimating methodology Veolia applied to estimate his consumption, and thus he does not know how, if at all, Veolia's estimating logic may have differed from the estimating logic he contends Veolia should have used. *Id.* at 33-35, 50-52. As a result, Mr. Bond cannot describe the damage he purportedly suffered (i.e. the time value of money on the difference between the estimating methodology Veolia applied and the allegedly correct estimating methodology) from Veolia's

consumption estimations. *Id.* at 47, 50-52. Mr. Bond does not know if he ever paid a late fee and does not know how Veolia or the City may have determined owed late charges. *Id.* at 53.

The evidence Mr. Bond submitted in support of the Petition identifies one instance in which Mr. Bond received a negative consumption bill after at least two consecutive months of estimated consumption. But, for those consecutive months in which Mr. Bond's consumption was estimated, Mr. Bond has presented no evidence of any skip codes or other evidence indicating the reason(s) for the consecutive estimates.

C. Leslie Bridges

Ms. Bridges also admits she does not have an oral or written contract with Veolia. (Bridges Dep. at 15, 44-45.) Ms. Bridges contends that Veolia is required to read her meter every month, though she cannot identify any evidence to support her contention. *Id.* at 18, 20. She admits that circumstances could make it impossible for Veolia to read her meter, such as snow on the ground. *Id.* at 21.

Ms. Bridges claims that she has been harmed because Veolia estimated her consumption when it should have determined her actual consumption from a meter read, but she cannot identify any particular occasions on which her consumption was wrongly estimated. *Id.* at 23. Her claim for this harm begins in 2008. *Id.* at 53.

Ms. Bridges' consumption was estimated, during the purported class period, consecutively for the months January 2007 - May 2007. *See* Bridges Affidavit, Ex. A. For these months Ms. Bridges does not contend that her consumption would have been lower had it been determined by actual meter reads. (Bridges Dep. at 31-32.) She does not know whether her meter was accessible during those months. *Id.* at 33. Ms. Bridges did not have a negative consumption bill at the end of this string of estimates. *See* Bridges Affidavit, Ex. A.

Ms. Bridges' consumption was also estimated, during the purported class period, consecutively for the months January 2008 - March 2008. *See* Bridges Affidavit, Ex. A. For these months Ms. Bridges does not contend that her consumption would have been lower had it been determined by actual meter reads. (Bridges Dep. at 33.) She does not know whether her meter was accessible during those months. *Id.* Ms. Bridges does not claim any harm from Veolia's estimating her consumption in these months. *Id.* at 33-34. Ms. Bridges' evidence does not indicate whether she received a negative consumption bill at the end of that sequence of consecutive estimates.

Ms. Bridges does not know how Veolia estimated her consumption in those months for which her consumption was not determined by a meter read. *Id.* at 41. Ms. Bridges does not know whether she uses more water in the summer or the winter. *Id.* at 44. Ms. Bridges does not know how Veolia or the City determined the amount of late fees. *Id.* at 42. She thinks that late fees were inflated due to Veolia's estimations of her consumption, but she cannot identify any evidence to support her belief. *Id.*

Ms. Bridges' evidence submitted in support of the Petition does not identify any actual read after more than two consecutive estimates that resulted in a negative consumption bill. Additionally, for those consecutive months in which Ms. Bridges' consumption was estimated, Ms. Bridges has presented no evidence of any skip codes or other evidence indicating the reason(s) for the consecutive estimates.

V. The Court Must Rigorously Examine the Record to Determine if Plaintiffs Have Met Their Burden of Showing that the Substantive Elements of the Absent Class Members' Claims Will be Proven by the Evidence Supporting the Plaintiffs' Claims.

Plaintiffs have the burden to establish all essential elements for class certification. *Thompson v. County of Medina*, 29 F.3d 238, 241 (6th Cir. 1994); *Nguyen Da Yen v. Kissinger*,

70 F.R.D. 656, 661 (N.D. Cal. 1976), *appeal dismissed*, 602 F.2d 925 (9th Cir. 1979); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 447-48 (N.D. Cal. 1994).²

A class may be certified only if the Court is satisfied, *after a rigorous analysis*, that the required elements have been met. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982) (a class action may be certified only if the trial court is satisfied, “after a rigorous analysis,” that the prerequisites of Rule 23(a) have been satisfied); *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 849 (Ind. 1997) (“class actions require heightened judicial scrutiny”).

The existence of a purported class action does not relieve the purported class members from the obligation to prove each element of each cause of action as to each absent class member. *Andrews v. American Telephone & Telegram Co.*, 95 F.3d 1014, 1025 (11th Cir.), *rehearing denied*, 104 F.3d 373 (11th Cir. 1996) (“class treatment in no way alters substantive proof required to succeed on claim for relief”) (citing *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327 (5th Cir. 1978)); *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (reversed class certification: “Class-wide relief was awarded here without any necessary connection to the merits of each individual claim. Rule 23 does not permit that result”) (footnote omitted).

A class action is merely a procedure device and is thus not meant to “alter the parties’ burdens of proof . . . or the substantive prerequisites to recovery[.]” *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693-94 (Tex. 2002). Procedural devices may “not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.” *Id.*

² “Because Indiana Trial Rule 23 is based on Rule 23 of the Federal Rules of Civil Procedure, it is appropriate [for the Court] to consider federal court interpretations when applying the Indiana rule.” *Chicago Title Ins. Co. v. Gresh*, 888 N.E.2d 779, 782 (Ind. Ct. App. 2008).

To determine if the Plaintiffs can meet their burden, the court “should not talismanically accept the plaintiff[s]’ factual allegations as true when determining whether to certify a class.” *Hamilton v. O’Connor Chevrolet, Inc.*, No. 02 C 1897, 2006 WL 1697171 at *3 (N.D. Ill. June 12, 2006). “The proposition that a . . . judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.” *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

Instead, the Court should “probe[] behind a plaintiff’s allegations or assertions because it is necessary to determine whether, if the class were certified, the issues presented could fairly and confidently be resolved with respect to all the absent class members based on the proof offered on behalf of only the named plaintiffs.” *Hamilton*, 2006 WL 1697171 at *3.

At all times the burden is on Plaintiffs to establish that “the substantive elements of the underlying cause of action . . . are amenable to class-wide proof.” *Blair v. SupportKids*, No. 02 C 0632, 2003 WL 1908031 at *4 (N.D. Ill. April 18, 2003).

VI. Plaintiffs Are Not Adequate Representatives for the Purported Frequency Class Because They Have Not Attempted to Show They Are Even Members of that Class.

The barest minimum for establishing a class is the existence of adequate class representatives. To be an adequate class representative the “class representative must be part of the class.” *General Telephone Co. of the Southwest*, 457 U.S. at 156; *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (same). Plaintiffs cannot satisfy this minimum requirement with respect to either the Methodology Class or the Frequency Class.

Plaintiffs’ only remaining claim against Veolia is for breach of contract. But, each named plaintiff has testified, affirmatively, that they do not have a contract with Veolia. None of the Plaintiffs were even equivocal on this point. (Lear Dep. at 12; Bond Dep. at 14; Bridges Dep. at 15, 44-45.) Mr. Bond, for example, specifically stated that his claim is based on Veolia’s

contract with the City. (Bond Dep. at 14.) Mr. Bond thus contends that he is a third-party beneficiary of the Management Agreement. This Court has already entered judgment in Veolia's favor on this theory and it is not contained in Plaintiffs' existing complaint.

Simply stated, Plaintiffs cannot be members of purported classes, based on breach of contract theories, when each has, in sworn testimony, affirmatively negated the fundamental requirement of the underlying a claim -- a contract with Veolia. The Court need go no further to deny Plaintiffs' Petition.

Additionally, none of the named Plaintiffs have presented any evidence that they fit within the Frequency Class. According to Plaintiffs' Petition, the Frequency Class is composed of those water customers, who between January 1, 2007 and December 31, 2009, "had their water usage estimated in at least two consecutive months without a valid skip code terminating in an actual read with a negative consumption bill." (Petition at 8.)

Mr. Lear's claim, according to his own testimony, extends only over a five-month period, October 2007 to April 2008. (Lear Dep. at 23.) Ms. Bridges testified that her claim based on the frequency of Veolia's meter reads began in 2008. (Bridges Dep. at 53.) Therefore, not only do Mr. Lear's and Ms. Bridges claims not fit the class definition, but neither person can adequately represent any absent class members whose claims may extend over a longer period of time.

Furthermore, only Mr. Bond has shown at his consumption was estimated in two consecutive months and that these consecutive estimates terminated in an actual read with a negative consumption bill. This happened once, resulting in Mr. Bond receiving a \$3.02 credit that was applied to his bill the very next month.

Neither Mr. Lear nor Ms. Bridges have presented any evidence that they received a negative consumption bill during the relevant period. Thus, neither Mr. Lear nor Ms. Bridges has met his or her fundamental burden of proving they are members of the Frequency Class.

None of the Plaintiffs -- including Mr. Bond -- have presented any evidence showing they satisfy another element of the purported Frequency Class: that any occasions of at least two consecutive estimates were "without a valid skip code." Thus, Plaintiffs have not attempted to show that they are members of the class they have described.

This issue is not an immaterial, technical failing. Each Plaintiff has admitted that circumstances could exist that would justify Veolia in estimating their consumption instead of actually reading his or her meter. Indeed, the Tariff specifically states that customers' consumption may be estimated when an actual read is not reasonable. Consequently, Plaintiffs' breach of contract claims, relating to the frequency of their meter reads, depend upon any string of two or more consecutive estimates being unexcused.

A "skip code" records the reason a particular customer's meter was estimated when it was scheduled to be read. Any two consecutive estimates that include a "valid skip code" -- a recorded, reasonable justification for the estimate -- would not, according to Plaintiffs' own testimony and description of the proposed class, constitute a breach of the Plaintiffs' purported contracts with Veolia and would not be a part of Plaintiffs' claims.

None of the named Plaintiffs, however, have presented any evidence of any kind indicating whether any skip codes -- valid or allegedly invalid -- are associated with those occasions on which their respective consumption was estimated for at least two consecutive months. Further, each Plaintiff has testified that he or she does not know why his or her

consumption was estimated on any particular occasion and that he or she cannot refute that legitimate reasons may have caused any string of two or more consecutive estimates.

As a result, Plaintiffs have provided no evidence showing the alleged contracts with Veolia have in fact been breached and thus Plaintiffs have provided no evidence that they are members of the purported Frequency Class. Plaintiffs have simply failed to meet their burden of proof. They cannot be adequate representatives of the Frequency Class.

VII. Plaintiffs are Not Adequate Representative of Either Purported Class Due to Their Lack Understanding the Issues and Their Lack of Diligence in Presenting Supporting Evidence.

Class representatives must possess a sufficient level of knowledge and understanding to be capable of controlling the litigation. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-483 (5th Cir. 2001).

“Class representatives must satisfy the court that they, and not counsel, are directing the litigation. To do this, class representatives must show themselves sufficiently informed about the litigation to manage the litigation effort.” *Unger v. Amedisys, Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). “That the proposed class representatives gained knowledge of the facts and issues from counsel is insufficient.” *Karnes v. Fleming*, No. H-07-0620, 2008 WL 4528223, *3 (S.D. Tex. July 31, 2008).

Conclusory statements in a purported class representative’s affidavit regarding her willingness and availability to act as class representative and her understanding of the gravity of the responsibility cannot overcome specific statements indicating a lack of knowledge of the issues. *Id.*

“The upshot [of requiring the named plaintiff have knowledge of the case] is that the class’s attorney may not become a *de facto* plaintiff.” *Kelley v. Mid-America Racing Stables*,

Inc., 139 F.R.D. 405, 409 (W.D. Okla. 1990). A class representative is inadequate where his or her knowledge about the case comes almost entirely from counsel. *Id.*

Mr. Lear, Mr. Bond and Ms. Bridges lack sufficient information about the case and have not sufficiently invested in this case to be adequate class representatives. What knowledge they have come from their counsel, but counsel cannot be a *de facto* class representative.

A. Mr. Lear is not an adequate class member because his lack of knowledge makes him entirely reliant upon his counsel to direct the litigation.

First, Mr. Lear admits that he does not have a contract with Veolia. Mr. Lear believes that Veolia has an obligation to read his meter every other month, but he cannot identify the source for this belief. (Lear Dep. at 14.)

Mr. Lear does not purport to be a member of the Methodology Class. The time period for Mr. Lear's claim does not coincide with the time period for the Frequency Class. *Id.* at 23.

Mr. Lear has no evidence to indicate the reason his consumption was estimated in any particular month and cannot refute that his consumption could have been estimated in the months relevant to his claim due to inclement or because his dog was in the yard. *Id.* at 19, 36-37.

Mr. Lear has not attempted to identify any actual read after at least two consecutive estimates that resulted in a negative consumption bill. Mr. Lear has no evidence indicating he ever paid a late charge. For those consecutive months in which Mr. Lear's consumption was estimated, Mr. Lear has not attempted to present any evidence of any skip codes or other evidence indicating the reason(s), or lack thereof, for the consecutive estimates.

Mr. Lear has done nothing to attempt to prove his claim, to prove the claims of absence purported class members, or to inform himself of facts critical to his causes of action. Given his lack of knowledge and diligence in gaining knowledge, Mr. Lear cannot direct the litigation

effort, but must rely on his counsel. This fact makes him an inadequate class representative for either the Frequency Class or the Methodology Class.

B. Mr. Bond's Lack of Knowledge About Key Aspects of His Claim Also Makes Him Entirely Reliant on Counsel and Therefore Makes Him an Inadequate Class Representative.

Mr. Bond believes that Veolia has an obligation to read his meter every other month, but he cannot identify the source for this belief. (Bond Dep. at 16.)

Mr. Bond has no evidence to indicate the reason his consumption was estimated in any particular month in which he contends his meter should have been read. *Id.* at 22-25. Mr. Bond does not know whether he has ever paid a late charge. *Id.* at 30.

Mr. Bond cannot describe the estimating methodology he contends Veolia should have applied; he does not know where the allegedly correct estimating logic is described; he does not know the estimating methodology Veolia applied to estimate his consumption; and thus he does not know how, if at all, Veolia's estimating logic may differ from the estimating logic he claims Veolia should have applied.

Mr. Bond cannot describe the damage he has purportedly suffered from Veolia's consumption estimations. *Id.* at 47, 50-52. Mr. Bond does not know if he ever paid a late fee and does not know how Veolia or the City may have determined owed late charges. *Id.* at 53.

For those consecutive months in which Mr. Bond's consumption was estimated, Mr. Bond has not attempted to present any evidence of any skip codes or other evidence indicating the reason(s), or lack thereof, for the consecutive estimates.

Mr. Bond has almost no knowledge about the crucial elements of his case. The limited amount of knowledge Mr. Bond demonstrates, comes from his counsel and improperly makes class counsel a *de facto* plaintiff. *Id.* at 20, 32-34, 37, 44, 51, 52, 59. Mr. Bond therefore cannot

properly represent the interests of absent class members and is not an adequate class representative.

C. Ms. Bridges Also Lacks Sufficient Knowledge to be an Adequate Class Representative.

Ms. Bridges contends that Veolia is required to read her meter every month, though she cannot identify any evidence to support her contention. (Bridges Dep. at 18, 20.)

Ms. Bridges claims that she has been harmed because Veolia estimated her consumption when it should have determined her actual consumption from a meter read, but she cannot identify any particular occasions on which her consumption was wrongly estimated. *Id.* at 23. Her claim for this harm begins in 2008, which is different from the purported class she has been identified to represent. *Id.* at 53.

For those months in which her consumption was estimated, Ms. Bridges does not contend that her consumption would have been lower had it been determined by actual meter reads -- contrary to the very foundation of the claims of the purported each both the Frequency and Methodology Classes. *Id.* at 31-32.

Ms. Bridges did not present evidence of any negative consumption bills at the end of an allegedly improper string of estimates.

Ms. Bridges does not know whether her meter was accessible during the months in which her consumption was allegedly improperly estimated. *Id.* at 33.

Ms. Bridges does not claim any harm from Veolia's estimating her consumption. *Id.* at 33-34. Ms. Bridges does not know how Veolia estimated her consumption in those months for which her consumption was not determined by a meter read. *Id.* at 41. Ms. Bridges does not know whether she uses more water in the summer or the winter. *Id.* at 44.

Ms. Bridges does not know how Veolia or the City determined the amount of late fees. *Id.* at 42. She thinks that late fees were inflated due to Veolia's estimations of her consumption, but she cannot identify any evidence to support her belief. *Id.*

For those consecutive months in which Ms. Bridges' consumption was estimated, Ms. Bridges has not attempted to present any evidence of any skip codes or other evidence indicating the reason(s) for the consecutive estimates.

The above testimony makes clear that Ms. Bridges has demonstrated virtually no knowledge of the material issues and has not attempted to produce evidence supporting her or absent class members' claims. As a result, she cannot adequately represent the interests of absent purported class members.

Because they are not adequate class representatives, Plaintiffs' Petition for Class Certification of the Frequency and Methodology Classes should be denied.

VIII. Plaintiffs' Claims Cannot be Typical of the Claims of the Purported Frequency Class or the Purported Methodology Class Because Resolution of Both Sets of Claims They Depend Upon Individualized Evidence from Each Plaintiff and Each Class Member.

Trial Rule 23(A)(3) requires that Plaintiffs show their claims are typical of the claims or defenses of the class. To satisfy this requirement, Plaintiffs must establish that "the adjudication of [their claims] would require the decision of any common question concerning the [purported class members' claims]." *General Telephone Co.*, 457 U.S. at 161. The typicality test "limit[s] the class claims to those fairly encompassed by the named plaintiffs' claims." *Sprague*, 133 F.3d at 399.

"[A] proposed class member's claim is not typical if proof [of his or her individual claim] would not necessarily prove all the proposed class members' claims." *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 511 (S.D. Ill. 2004).

“Common requests for relief . . . or common legal theories do not establish typicality when the facts required to prove the claims are markedly different among class members” because in such circumstances the named plaintiff cannot establish the bulk of the elements of each class member’s claim when she proves her own. *See Retired Chicago Police Ass’n v. City of Chicago*, 141 F.R.D. 477, 485-86 (N.D. Ill. 1992), *aff’d in relevant part*, 7 F.3d 584 (7th Cir. 1993).

Based upon the above principles, courts have routinely and consistently determined that named plaintiffs’ claims are not typical of the purported class where the named plaintiffs’ and the class members’ claims will require individual evidence on material issues.

In *Reichert v. Bio-Medicus, Inc.*, 70 F.R.D. 71 (D. Minn. 1974), both the named plaintiffs and one group of the purported class each alleged fraud, based upon non-uniform oral representations in the after-market purchase of securities. The court found that because the claims by this group of plaintiffs necessarily differed from another, as a result of the non-uniform misrepresentations alleged, that the named plaintiffs’ claims necessarily could not be typical of the other class member, even though they alleged the same legal theories and the same course of conduct by the defendant. The court found: “Recovery by each of the purchasers in the after-market would depend upon the particular circumstances attendant his purchase. Neither of the representative parties can be said to present typical claims whose resolution would materially affect the merits of claims of other purchasers in the after-market.” *Id.* at 76.

In *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584 597 (7th Cir. 1993), both the named plaintiff and a certain segment of the purported class asserted claims based upon oral misrepresentations. There was no evidence that these alleged misrepresentations were uniform in either form or character. Some class members’ claims were based upon written statements,

others were not; some class members merely had a general impression of the alleged misrepresentation, others had detailed information; and some class members were simply ignorant of any alleged fraud. *Id.* at 597. Because of these individual facts, the court determined that each claimant's case required individual proof, and thus that the named plaintiffs' claims could not be typical of the class. Specifically, the Court held:

[I]t simply cannot be assumed, especially because these communications were for the most part verbal that the claims of [the named plaintiffs] "have the same essential characteristics as the claims of the class at large."

Id. (quoting *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). See also *Sears Retiree Group Life Ins. Litigation*, 198 F.R.D. at 489-90; *Sprague*, 133 F.3d at 399.

Here, none of the Plaintiffs' claims are typical of those of the either the Estimating or Frequency Classes because proof of Plaintiffs' and the absent class members' claims will require individual -- not common -- evidence.

A. Proving Plaintiffs' Claims Relating to the Frequency With Which Their Meters Were Read Requires Individual -- Not Common -- Evidence and Therefore Plaintiffs' Claims Cannot Be Typical of Those in the Purported Frequency Class.

The central feature of the Plaintiffs' claims relating to the frequency with which Veolia read their meters, and the claims of the purported members of the Frequency Class, is the absence of a legitimate reason -- in Plaintiffs' words, the absence of a valid skip code -- for Veolia to have estimated their consumption in at least two consecutive months. But, resolution of this issue will require individual discovery and individual evidence from each purported class member.

First, each Plaintiff's and each class member's account will need to be examined to determine the nature of the skip codes entered for each month that was scheduled for an actual meter read, but for which the customer's consumption was estimated. Then, within any

individual customer's account, there will need to be a mini-trial to determine if the entered skip code is valid or not.

More specifically, to determine if the identified reason for conducting an estimate were true and thus whether Veolia has a valid defense to the claim of an improper estimate, Veolia will have to ask the particular customer -- and had to ask each plaintiff in this case -- questions about the unique facts of each purportedly invalid estimate, such as (1) whether he or she has a dog; (2) whether the dog, if any, goes outside without supervision; (3) whether the customer ever parks his or her car near the meter pit; (4) whether the customer ever locks any gates, preventing access to the meter pit; or (5) a raft of other potential questions, designed to understand the facts relevant to the particular situation to determine if Veolia's identified reason for not performing an actual read in the particular month was valid.

The above process would have to be repeated for each allegedly improper missed meter read, for each skip code entry, for each Plaintiff and for each purported class member. There is no other way to determine whether the missed read should be excused, and is thus not actionable, or not.

Resolution of the Plaintiffs' claims relating to the frequency with which their meters were read is necessarily an individual issue, requiring individual evidence. As a result, proof of Plaintiffs' claims will not, and cannot, prove the absent class members' claims. Plaintiffs' claims relating to the frequency with which their meters were read are necessarily not typical of such claims, if any, by the purported members of the Frequency Class.

B. Proof of Plaintiffs' Claims Relating to the Estimating Methodology Veolia Applied Also Requires Individual Evidence Thus Making Plaintiffs' Claims Not Typical of the Purported Members of the Methodology Class.

Plaintiffs contend Veolia breached a purported contract by not applying the estimating methodology described in the City's Tariff. The Tariff states that Plaintiffs' consumption will be

estimated by either a 12-month or a seasonal average. Veolia applied either a 12-month or a two-month average. Consequently, Plaintiffs' only potential claim is that a two-month average is not a "seasonable" average and that use of a two month average has caused them damages.

First, Plaintiffs' Petition fails on this point due to a complete absence of evidence. Plaintiffs have not attempted to describe what a proper seasonal average would be or how it should be determined or applied. They also have not explained how any seasonal average -- presumably determined by the particularized customer's historical usage -- could possibly be determined or applied on a class-wide basis.

Moreover, Plaintiffs have not attempted to show that Veolia's application of a two-month average, as opposed to something else, caused them to individually pay higher bills than would have resulted from a purported "seasonal" average. And most importantly, they have not attempted to explain how they can prove causation for each member of the purported class with common evidence. This complete failure of proof, is sufficient reason, alone, to deny Plaintiffs' Petition.

The truth is: proof, through common evidence, of the claims asserted by the purported Methodology Class is impossible. Regardless of the composition of the hypothetically-correct (though unidentified) seasonal average, establishing causation of harm will necessarily require individualized evidence for each purported class member.

In particular, whether a particular customer was harmed due to Veolia's application of a two-month average, versus some other (unidentified) "seasonal" average, depends upon a comparison of the particular customer's usage in any particular month to (1) the two-month average used to estimate their usage and (2) the (unidentified) correct seasonal average. Due to

the fact-specific nature of this inquiry, resolving the claims of the methodology class through class-wide evidence is impossible.

In many circumstances customers may not have suffered any harm from the estimating methodology Veolia applied. For example, a customer whose consumption in the first summer month is determined by the prior two months average -- from the spring -- may benefit since the customer likely used less water in the particular spring months, than he or she does in the average summer months.

Additionally, a particular customer may have been away from his or her Indianapolis residence for the majority of the two months that were used to estimate the customer's consumption in a subsequent month. This individual fact may benefit this customer, compared to application of a generic seasonal average.

Similarly, individual customers' usage may increase during specific times of the year due to facts unique to their families, such as times when more or less people are in the home using water. A seasonal average that reflects these circumstances may cause the particular customer to pay more than did application of a two-month average.

There are innumerable, individualized facts that would determine the existence or non-existence of harm from application of an estimating methodology different from the methodology applied by Veolia. Such individualized factors will necessarily determine, in each case, whether any particular Plaintiff and any purported member of the Estimating Class were injured as a result of Veolia's application of a two-month versus some "seasonal" average.

The only way to determine whether any particular Plaintiff or purported class member was in fact harmed is to conduct individual discovery and to present individual proof on this

issue of causation. Resolving the claims of the purported members of the Estimating Class will necessarily devolve into thousands of mini-trials.

Given the individualized nature of evidence necessary to prove Plaintiff's claims relating to the applied estimating methodology, Plaintiffs' claims necessarily cannot be typical of those of the purported Estimating Class.

IX. There Is No Commonality Among The Purported Class Members' Evidence Necessary to Prove Their Claims.

Plaintiffs cannot satisfy Rule 23's commonality requirement merely by pointing out that the named Plaintiffs and the purported class members seek relief under the same legal theories or by showing that their claims share facts inconsequential to the merits of their respective claims, which is the extent of Plaintiffs' analysis in this case. *See* Petition at 12.

As the Sixth Circuit has noted: "It is not every common question that will suffice . . . at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague*, 133 F.3d at 397.

More particularly, the prerequisite of "commonality" requires the identification of shared issues, "*the resolution of which will advance the litigation.*" *Sprague*, 133 F.3d at 397 (emphasis added). Immaterial issues are irrelevant to the commonality inquiry. The law requires the Court to focus on the elements of each claim asserted by the purported class members, as these are the issues that move the litigation forward. *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 94 (W.D. Mo. 1997) (plaintiffs cannot identify shared questions on issues with no legal effect to prove the requisite commonality); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 270-71 (S.D. Fla. 2003) (commonality not met when elements of claim required individual proof)

The nature of the evidence that will be submitted on the material elements of the class claims determines whether common questions exist with respect to those claims. The Eighth Circuit has defined the appropriate inquiry:

The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual . . . If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005).

Stated conversely, “[w]hen the resolution of a common legal issue is dependent upon factual determinations that will be different for each purported class plaintiff . . . courts have consistently refused to find commonality and have declined to certify a class action.” *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 76 (D. N.J. 1993). See *Sprague*, 133 F.3d at 398 (“given [the] myriad variations [in relevant facts], it seems to us that the plaintiffs’ claims clearly lacked commonality.”).

Thus, Rule 23 requires Plaintiffs in this case to show common evidence will resolve the material elements of each purported class claim, something they have not even attempted to do, because it is impossible.

As noted above, resolution of the claims by each purported class member of the Frequency Class that Veolia breached a contract by not reading his or her meter every other month will require individual discovery and individual evidence at trial regarding, at a minimum, the reasons for each string of two or more consecutive estimates, if any. If these consecutive estimates are excused by circumstances beyond Veolia’s control, or other reasonable excuses, then according to the DOW Rules and the Plaintiffs’ own description of their class, Veolia did not commit any breach.

The only way for Veolia and the Court to resolve this issue is to develop and hear individual evidence from each purported class member and from Veolia, addressing each purported class member's unique circumstance. There is simply no other way to determine whether on a particular occasion Veolia should have read a customer's meter or whether Veolia's estimate of consumption was justified due to facts unique to each customer, such as a dog in the customer's yard, inclement weather on a particular day, or some other customer-specific fact that prevented Veolia from performing an actual meter read.

Resolving the claims by the purported members of the Frequency Class will require thousands of mini-trials, addressing individual evidence on a material element of their claims. This reality means there is no commonality among the claims of the purported member of the Frequency Class, as Trial Rule 23 requires.

The same is true for the purported members of the Methodology Class. Whether a particular customer was harmed due to Veolia's application of a two-month average, versus some other (unidentified) "seasonal" average, depends upon the particular customer's usage and the particular two months used to determine the average in relation to the month for which consumption is estimated. Individualized -- not common -- factors will necessarily determine, in each case, whether any particular Plaintiff and any purported member of the Estimating Class was injured as a result of Veolia's application of a two-month versus some "seasonal" average. The only way to determine whether any particular Plaintiff or purported class member was harmed is to conduct individual discovery and to present individual proof on this issue of causation.

In short, the undisputed, known evidence and Plaintiffs' own descriptions of the classes for which certification is sought shows "the resolution of . . . common legal issue[s] is dependent

upon factual determinations that will be different for each purported class plaintiff.” *See Liberty Lincoln Mercury, Inc.*, 149 F.R.D. at 76. Thus, no commonality exists for either the purported Frequency Class or the Methodology Class. For this additional reason, Plaintiffs’ Petition for Class Certification should be denied.

X. Individual Issues of Fact Predominate Over Any Common Issues, Thus Making Class Certification Improper.

In addition to establishing that they are adequate class representatives, that their claims are typical of those of the purported class members and that there are common issues of fact and law among the class members’ claims, Plaintiffs must prove that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that class action is superior to other available methods for fair and efficient adjudication of the controversy.” T.R. 23(B).

This “predominance” inquiry required by Trial Rule 23(B) “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). While this predominance test is related to the commonality and typicality requirements addressed above, the test of predominance is “far more demanding.” *Id.* at 624; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 186 (3d Cir. 2001) (“the predominance requirement is more stringent than commonality and typicality”).

The focus for the predominance inquiry (like the commonality and typicality inquiries) “must be on the substantive elements of the plaintiffs’ cause of action and . . . the proof necessary for the various elements.” *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981). *See also Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331, 335 (N.D. Ill. 1974) (resolution of the predominance issues “requires an analysis of the specific issues to be litigated and of the proof

that will be required at trial”); *Johnston*, 265 F.3d at 186 (the predominance analysis begins “by examining the elements of the underlying cause of action”).

In *Associated Medical Networks Ltd. v. Lewis*, 824 N.E.2d 679 (Ind. 2005), the plaintiffs argued that “merely showing a common course of conduct will establish predominance.” *Id.* at 683. The trial court certified a class on this basis. The Supreme Court reversed the class certification. The Supreme Court held that “just because the claims may arise from ‘a common nucleus of operative facts’ does not mean that the common claims necessarily predominate.” *Id.* at 685 (quoting *Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1206 (Ind. Ct. App. 2004)). Rather, predominance exists based upon a common course of conduct theory, only if “the common course of conduct could establish a main issue with respect to the case, such as the negligence of the party.” *Id.*

“If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.” *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3rd Cir. 2001). The predominance requirement is not met, even if the same legal theories and course of conduct are alleged, where resolution of the allegedly common issues “breaks down into an unmanageable variety of individual legal and factual issues.” *Andrews v. American Telephone & Telegraph Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996).

It is not sufficient for Plaintiffs to claim that they can somehow prove their individual and the absent class members’ claims without reference to individualized evidence. Such a contention is wrong as demonstrated above, but it would be irrelevant even if it were correct.

No matter what evidence Plaintiffs intend to rely on, *Veolia* is entitled to present individual evidence in *defense* of the purported class claims -- and that is sufficient to defeat predominance, as well as commonality and typicality. *Newton*, 259 F.3d at 188.

As the court stated in *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000), in finding lack of predominance on this ground: “[B]asic to the right to a fair trial -- indeed basic to the very essence of the adversarial process -- is that *each party* have the opportunity to adequately and vigorously present any material claims *and defenses*.” (Emphasis added.)

As noted above, resolution of the claims by the purported members of both the Frequency Class and the Methodology Class necessarily “breaks down into an unmanageable variety of individual legal and factual issues.” *Andrews*, 95 F.3d at 1023. Even if Plaintiffs think they can somehow prove their claims through some form of minimal, common evidence, Veolia will need to engage in individualized analysis of each purported class members’ circumstances to properly defend itself.

For example, with respect to the Frequency Class, if there is no skip code for a particular estimated consumption that was scheduled for an actual meter read, or if Plaintiffs dispute the validity of any entered skip code, Veolia, to defend against Plaintiffs’ allegation of breach, will necessarily have to investigate and take discovery into the particular circumstances that cause an estimate to exist. It will have to depose the particular plaintiff to determine or confirm the condition of the plaintiff’s property on the particular day; it will have to take discovery from the applicable meter reader to determine or confirm the reason the plaintiff’s consumption was estimated on the particular occasion instead of read; it will have to examine each purported class member’s account history to even begin this individualized analysis.

Each claim will then be determined by the unique evidence generated and resolution of these claims by the Court will require unique evidence, creating mini-trials for each purported class member’s claim. Individual issues for the Frequency Class will certainly predominate.

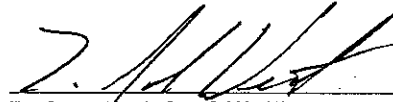
Individual issues will also predominate in resolution of the Methodology Class. Whether a particular customer was harmed due to Veolia's application of a two-month average, versus some other (unidentified) "seasonal" average, depends upon a comparison of the particular customer's usage in the relevant time frame to (1) the particular two months used to determine the average and (2) the charge that would result from application of the individual customer's "seasonal" average.

As described above, investigating and resolving this issue would require discovery and evidence on these individual circumstances because these individualized factors will necessarily determine, in each case, whether any particular Plaintiff and any purported member of the Estimating Class were injured as a result of Veolia's application of a two month versus some "seasonal" average. As a result, individual, not common, issues will also predominate in resolving the claims asserted by the purported Methodology Class.

XI. Conclusion.

For each and all of the above reasons, Plaintiffs have not attempted to, and cannot, satisfy the requirements of T.R. 23. Plaintiffs' Petition for Class Certification should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record, via hand-delivery and electronic mail, on this the 22nd day of October, 2010:

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