

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

County of Jackson, Missouri,)	
)	
Complainant,)	
)	
v.)	
)	
Trigen-Kansas City Energy Corp.,)	Case No. HC-2005-0331
)	
And)	
)	
Thermal North America, Inc.)	
)	
Respondents.)	

STAFF'S BRIEF

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and respectfully submits as its brief the following:

Procedural History

On March 29, 2005, the County of Jackson, Missouri (Jackson County) filed a Complaint with the Missouri Public Service Commission (Commission) against Trigen-Kansas City Energy Corp. (Trigen).¹ (Complaint And Motion For Expedited Treatment And For Issuance Of An Interim Order By March 31, 2005 Ordering Trigen Not To Sever Its Steam Loop On April 2, 2005). The Complaint specified that:

5. By letter dated February 22, 2005, Complainant County was notified by Trigen that approximately 800' of its existing 14" steam line in 14th Street between Grand and McGee between 14th and 13th Streets needs to be permanently removed for the development of a future arena site... In such letter Trigen advised that on February 3, 2005, the City Council of Kansas City enacted Ordinance No. 050084 requiring such action by Trigen...According to Trigen's letter, such removal was to commence on March 5, 2005 and that steam service through most of Trigen's network would be unavailable for a minimum of 12 hours that day....the City and

¹ The Commission in a Report And Order issued on December 21, 2004 in Case No. HM-2004-0618 authorized Thermal North America, Inc. to acquire up to and including 100 percent of the equity interests of Trigen. This transaction has not yet been consummated.

Trigen agreed that removal of the steam line set for March 5, 2005 would be postponed for a month until April 2, 2005. The County was notified on March 28, 2005, that no such further talks will take place, and therefore, the steam loop will be severed in two locations commencing on April 2nd and the steam lines between such locations will be removed...

6. In such letter, Trigen also notified Complainant Jackson County that after the cutting of the main steam loop, Trigen proposes to operate the system without a loop for one or more years before it reconnects the terminals with new mains following a different route and, at such time, once again provides the necessary steam loop.

The Complaint sought a Commission Order directing Trigen to not cut the steam loop until it built an alternate steam main route that would be capable of providing continuous operation of the steam loop without interruption. (Complaint at 9). The Complaint also sought a Commission Order directing Trigen to negotiate and/or institute litigation against the owners of the arena project for cost recovery of the relocation of the steam mains to provide an alternate steam loop. (Complaint at 10).

On March 30, 2005, Kansas City filed its Application To Intervene And Motion To Dismiss Complaint. Kansas City asserted that the relief sought by Jackson County would create delays in the construction of the Sprint Center arena. Kansas City further asserted that the relief sought by Jackson County would interfere with the police powers of the City and its authority to enforce the terms of its utility franchises.

On March 31, 2005, the Commission entered its Order Directing Respondents Not To Sever Their Steam Loop, Granting Application To Intervene, And Scheduling A Hearing. The Order directed Trigen not to cut their steam main loop on April 2, 2005, or thereafter, pending further order of the Commission. The Commission set a hearing on April 4, 2005 and granted Kansas City's Motion To Intervene.

An evidentiary hearing was held on April 4, 2005. The Commission ordered the Parties to file Briefs by noon on April 6, 2005.

Staff's Activity

Staff understands that the Commission relies, in part, on its Staff for information and analysis in “emergency” situations when time does not permit extensive review and at other times. At the same time, the Staff does not believe that entities, whether it be the entities that the Commission regulates, e.g., presently Trigen, or soon Thermal, or those entities generally appearing before the Commission as intervenors, e.g., Jackson County or Kansas City, should be encouraged to expect that Staff can render far reaching analysis on less than a reasonable amount of time for review and investigation.

Time did not allow Staff to engage in formal discovery. On March 30, 2005, Staff generally became aware of the situation now presented to the Commission. Staff contacted parties by phone and sent two Staff members to Kansas City to perform an on site inspection on March 31, 2005. Staff prepared for and participated in the evidentiary hearing.

Staff has some concerns about the production of relevant documents, some of which were provided at the evidentiary hearing and others that were provided by Kansas City on April 5, 2005. It is not clear what other relevant documents may exist.

A major dispute apparently has been raging between Trigen and Kansas City for months and neither of these two parties, in particular Trigen, has kept the Commission and its Staff apprised of the situation. It has required Jackson County to bring the dispute to the attention of the Commission through its Complaint, and Jackson County has made its own concerns known to the Commission and the Staff on an “emergency” basis. Given the seriousness of the matters raised, Staff is concerned that none of the parties deemed it advisable to make the situation

known to the Commission any earlier. Jackson County, in particular, is now looking to the Commission to make major decisions entailing extraordinary relief.

None of these parties are strangers to communicating with and appearing before the Commission. Trigen is regulated by the Commission and it has indicated that it will want to recover from the steam system's customers the costs of cutting, capping, removing and reestablishing its steam loop facilities and the costs of constructing any new steam loop facilities. Kansas City and Jackson County have appeared before the Commission on a regular basis for decades. The Commission should be able to expect, if not order, that these parties engage in an adequate level of communications with the Commission and its Staff in the future and the Commission should make this very clear in its Report And Order on this matter.

In summary, Staff witness Warren Wood, the Commission's Utility Regulatory Manager, testified on April 4, 2005 that based on the very limited review that the Staff has been able to perform since March 30, 2005, the Staff does not believe that the cutting, capping and removing of a portion of the Trigen steam system loop in Downtown Kansas City at the Sprint Center arena construction site will render the remaining district steam system unsafe or inadequate for the provision of steam service.

Downtown Kansas City Steam District Case History

As Staff witness Cary Featherstone testified, there are present members of the Staff that have been involved in Commission cases respecting the Downtown Kansas City steam loop going back to the early 1980's. The appearance of Jackson County Executive Katherine Shields before the Commission on April 4, 2005 is not the first appearance before the Commission of a noted Kansas City civic leader or elected official.

In the last twenty-five (25) years, KCPL and Trigen have filed a number of steam cases, including the following:

- (1) KCPL, Case No. HR-81-15, Report And Order, 24 Mo.P.S.C.(N.S.) 255 (1981): steam rate increase case;
- (2) KCPL, Case No. HR-82-67, Report And Order (1982): steam rate increase case;
- (3) KCPL, Case No. ER-83-149, Report And Order, 26 Mo.P.S.C.(N.S.) 104, 137-39 (1983): electric rate increase case/steam allocations issue;
- (4) KCPL, Case No. HR-83-245, Order Dismissing Certain Tariffs And Modifying Notice To Customers (1983): steam rate increase case filed but later withdrawn;
- (5) KCPL, Case No. HO-83-274, Report and Order, 26 Mo.P.S.C.(N.S.) 396 (1983): filing of tariffs designed to define the boundary lines of the service area in which KCPL is authorized or obligated to provide steam service;
- (6) KCPL, Case Nos. EO-85-185 and EO-85-224, Report And Order, 29 Mo.P.S.C.(N.S.) 228, 414-15 (1986): steam service issue in Wolf Creek nuclear generating station in commercial service case;
- (7) KCPL, Case No. HO- 86-139, Report And Order, 29 Mo.P.S.C.(N.S.) 232 (1987);
- (8) KCPL, Case No. HM-90-4 and HA-90-5, Report And Order 30 Mo.P.S.C.(N.S.) 69 (1989); and
- (9) Trigen, Case No. HM-2004-0618, Report And Order, (2004).

Burden of Proof

First, Staff would note that various sections of Chapters 386 and 393 are made applicable to “heating companies” (Section 386.020(20)) by Section 393.290.

Jackson County has the burden of proof since it filed this Complaint. Section 386.310 RSMo 2000. Staff did not find any cases on the burden of proof standard regarding a complaint before the Commission but notes the reference to “clear and satisfactory evidence” in Section 386.430.² Pursuant to Section 393.150.2 RSMo 2000, the burden of proof to show that a

² Section 386.430 RSMo. 2000 states as follows: “In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted

proposed increase in rates should be ordered by the Commission is upon the utility seeking such an increase.

The next question is what exactly does Jackson County have to prove in order to succeed with its Complaint and what standard applies to it. Jackson County mixes and matches several different statutes in its Complaint. Jackson County cites Section 386.310 as the basis for its Complaint and its seeking of a Commission Order directing Trigen not to sever its steam loop on April 2, 2005. (Complaint at 8-10). The Commission issued its Order pursuant to that statute. (Order at 3).

Section 386.310 is a broad granting of power to the Commission. The Commission is granted authority to require every person, corporation, municipal gas system and public utility to maintain and operate its line, plant, system, equipment, apparatus and premises in such manner as to promote and safeguard the health and safety of its employees, customers and the public. The statute also gives the Commission expansive authority over utilities regarding the health and safety of the public and utility employees.

Jackson County also relies on Sections 393.130 and 393.140. Section 393.130 requires, among other things, that heating companies furnish and provide such service instrumentalities and facilities as shall be safe and adequate. Section 393.140 provides for the general powers of the Commission in regard to various entities, including heating companies.

Staff has compiled an attachment, attached hereto as Appendix 1 and incorporated by reference, containing these and other possibly applicable statutes and cases. Staff believes that all of these statutes must be read in the aggregate. However, the most immediate question is

herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.”

what must Jackson County prove? Staff suggests that the level of decrease in reliability³ of the steam system that will occur due to the cutting, capping and removing of a portion of the Downtown Kansas City district steam system is not close to justifying leaving in place the Commission's Order directing Trigen not to cut, cap and remove the portion of the steam system at the site of the Sprint Center arena. Staff believes that it would take evidence showing much more to justify the staying of the planned action. A serious degradation in safety and adequacy would be required for the Commission to continue the stay. Such a matter is not present herein.

Evidence At Hearing Does Not Justify The Continued Action Sought By Jackson County

In opening statement, counsel for Jackson County stated that Jackson County had concern with the downgrading of the steam system by planned cutting of the loop (Tr. 6, lines 2-4). Counsel for Jackson County stated that the steam service is currently adequate because it is provided by a looped service (Tr. 8, lines 2-4). Jackson County first offered Mr. Brian Kirk as an adverse witness. Mr. Kirk is the general manager of Trigen, an engineer and has 18 years in the energy industry with district heating systems (Tr. 23, lines 6-22; Tr. 24 lines 16-19). The steam system is comprised of a looped network, two 14-inch mains that exit the Grand Avenue steam plant. The two 14-inch mains are joined at the southern end of the system and the customers are served off of a piping network (Tr. 25, lines 22-26). Mr. Kirk conceded that there is somewhat less reliability on a radial versus a looped system (Tr. 35, lines 2-8).

Trigen operates radial steam systems in Trenton, New Jersey, Oklahoma City, Oklahoma, and Tulsa, Oklahoma (Tr. 38, lines 4-10). Mr. Kirk knew that the Tulsa system is highly reliable in the neighborhood of 99.8 percent (Tr. 38, lines 15-18, Tr. 69, lines 9-15). Mr. Kirk expects no greater likelihood of a rupture in the system even if it is a radial system and no greater

³ The term "reliability" does not appear in the statutes applicable to the Commission, but the terms "safe" and "adequate" do appear. See Appendix 1; also see reference to "efficient facilities" in Section 386.610.

likelihood of higher maintenance on the lines (Tr. 67, lines 6-23). Mr. Kirk expects no greater likelihood of no more service interruptions than in that last 15 years (Tr. 67, lines 1-5). Trigen has not experienced any catastrophic events that have affected service in the past and in the event there were a major outage action can be undertaken including supplying temporary boilers which would in essence effectuate service restoration by Trigen (Tr. 68, line 17 through Tr. 69, line 3).

Mr. Kirk stated that the reliability of the looped system in Kansas City is approximately 99.98 percent and that if it is a radial system it should be in the range of the Tulsa, Oklahoma system of 99.8 percent reliable and should not go below 99.5 percent (Tr. 69, line 9 through Tr. 70, line 6). Jackson County put on other evidence but none of its other witnesses provided expert opinions about the reliability of the steam system in Kansas City.

Staff witness Warren Wood, a professional engineer and manager of the Commission's Energy Department testified for Staff (Tr. 187-197). Mr. Wood explained that Staff had reviewed the pleadings, contacted the parties by phone, and dispatched two Staff members to the site (Tr. 189, lines 6-14). Mr. Wood explained that based on the limited information available to Staff including the site visit and lack of complaints of reliability from parties regarding the steam system, that nothing would indicate to Staff that the system will be unsafe or inadequate as a dual radial system (Tr. 190, lines 12-18). Nothing at the evidentiary hearing changed Mr. Wood's expert opinion (Tr. 190, lines 19-21).

In view of the foregoing, it is clear that Jackson County has only elicited some evidence suggesting that a minor reduction in the reliability of the steam system in Downtown Kansas City will occur when it becomes a dual radial system instead of a looped system. Staff suggests that Jackson County has not shown that there is any threat or danger to the health and safety of Trigen employees, customers or the public in general by the proposed change from a looped

system to a dual radial system pursuant to Section 386.310 nor has it shown any lack of adequacy or safety in the system.

Cost Recovery Of Cutting, Capping and Reestablishing the Looped District Steam Heat System

Jackson County states at page 6, paragraph 11 in its Complaint that it is Jackson County's understanding that "the cost to cap, remove, and relocate Trigen's steam loop is estimated at \$800,000 to \$900,000, which amount is equal to approximately 17.5% to 19.5% of Trigen's 2004 total revenues of \$4.6 million" and "Trigen has been advised that it is to bear the entire cost of this removal and relocation project to clear the way for the new arena construction." In addition to requesting that "the Commission should exercise its regulatory powers over Trigen by ordering it to cease and desist from cutting its mains and severing the steam loop until such time as Trigen has constructed lines in an alternate route to assure the continued existence of the steam loop without unnecessary interruption," Jackson County asks that Trigen be "ordered to take all necessary action, including litigation, if necessary, in an effort to impose upon the arena project and its owners, the cost of severing the steam mains, the removal of the steam mains and the relocation of the steam mains to provide an alternative steam loop." Mr. Kirk's testimony at the evidentiary proceeding seemed to indicate that, indeed, Trigen will seek to recover the costs of cutting, capping, removing and reestablishing the steam loop from its steam customers which are approximately 60 in number.

The Commission and its Staff traditionally have taken the position that ratemaking decisions should be made in rate increase/decrease cases, not in some proceeding where the Staff has not had the opportunity to audit and the Commission is not considering all relevant factors. The Missouri Supreme Court's decision in *State ex rel. AG Processing v. Public Serv. Comm'n*,

120 S.W.3d 732 (Mo. banc 2003) seems to have altered that approach to some extent with its holding that: The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.

120 S.W.3d at 736; footnotes omitted.

The Staff does not believe that *AG Processing* is applicable to the instant case. The underlying reason that there is a Commission proceeding regarding the instant matter is not because statute or case law requires that the Commission make some determination at this time respecting an act requiring Commission authorization. If *AG Processing* were deemed to apply in this situation, then seemingly every action to be taken, or decision to be made, by a utility would first require a Commission determination of prudence for, among other things, a later determination of associated ratemaking treatment.

Nonetheless, the Staff does not want Trigen or other parties to have the mistaken impression that because the Staff did not take the position that the Commission should order Trigen “to take all necessary action, including litigation, if necessary, in an effort to impose upon

the arena project and its owners, the cost of severing the steam mains, the removal of the steam mains and the relocation of the steam mains to provide an alternative steam loop,” the Staff believes that these costs should be recovered from Trigen’s steam customers and that the Staff would not oppose such recovery. The Staff has not determined its ultimate position on this matter, but the Staff wanted to indicate that the Staff intends to carefully review this matter in the context of Trigen seeking to recover these costs in rates.

The Staff called Mr. Featherstone as a Staff witness on this matter in order to try to impress upon both Trigen and Kansas City the Staff’s approach. The Staff also assumed that the Commissioners would want the Staff to clearly indicate to all involved the Staff’s approach. Mr. Featherstone related that should Trigen incur these costs, in order for the Staff to recommend to the Commission that Trigen recover these costs, Trigen must take prudent action to recover these costs from the cost causer(s), whoever that may be.

The Staff’s experience regarding the Downtown Kansas City steam heating district when KCPL owned the system was that KCPL’s electric customers subsidized the steam customers and even with the subsidy, KCPL would under file in its steam rate increase cases fearing that too large of rate increases would drive customers from the system. Beyond the principle of cost causers paying the costs which they cause, the Staff believes that a real concern should be the loss of customers from the system to the point that the system is no longer viable. The Staff believes that Jackson County’s March 29, 2005 Complaint And Motion For Expedited Treatment at pages 6-7, paragraph 11 all but states this, if it does not literally do so: “the cost to cap, remove, and relocate Trigen’s steam loop is estimated at \$800,000 to \$900,000, which amount is equal to approximately 17.5% to 19.5% of Trigen’s 2004 total revenues of \$4.6 million. . . . If

Trigen were to incur such cost, this would surely be followed by a rate case to attempt to recover such costs from its customers.”

A letter dated October 19, 2004 from Kansas City Manager of Project Delivery, Ralph S. Davis to Mr. Kirk, Exhibit No. 4 in the evidentiary proceeding, requests that Trigen remove and relocate any and all conduit, facilities or installations from within the right of way of the alleys and streets of the area in question and states as follows:

. . . The removal and relocation of conduit, facilities or installations is required to be completed by **March 1, 2005**. The costs associated with their removal and relocation will not be reimbursed by the City and will be at your company’s expense.

This request is made pursuant to Sec. 19-34(a), Code of Ordinances of the City of Kansas City, Missouri. . . . The City is vacating these streets and alleys for the construction of the new Downtown Arena which is a governmental purpose and a public necessity and benefit to the public welfare.

This request is being made pursuant to Sec. 409 of the City Charter and Sec. 19-34(a), Code of Ordinances as applicable. . . . The City is vacating these streets and alleys for the construction of the new Downtown Arena. Therefore, the relocation of utilities is required by public necessity and benefit to the public welfare in the City’s exercise [sic] its governmental functions.

Section 409 of the Kansas City Charter states as follows regarding the distribution of space relocation or discontinuance:

The council shall at all times control the distribution of space in, over, under or across all streets or public grounds occupied by public utility fixtures. All rights granted for the construction and operation of public utilities shall be subject to the continuing right of the council to require such reconstruction, relocation, change or discontinuance of the appliances used by the utility in the streets, alleys, avenues, highways, parks and public places of the city, as shall in the opinion of the council be necessary in the public interest.

Section 19-34(a) of the Kansas City Code of Ordinances states as follows regarding vacating any street, reconstructing conduits and removing and relocating conduit at the operator’s expense:

Request of the city. Whenever because of public necessity or the welfare of the public generally, the city elects to change or alter the grade of any street or to sell or vacate any street or to construct or reconstruct any water lines, sanitary or storm sewers, watercourses, drainage ditches, conduits, playgrounds, traffic control devices or other public improvements, an operator shall, after 30 days written request from the city, remove, relay and relocate its poles, wires, cables, conduits and other fixtures at its own expense.

A letter dated October 27, 2004 from Kansas City Mayor Kay Barnes and City Manager Wayne Cauthen to Thomas Casten, Trigen Energy Corporation, White Plains, New York, Exhibit No. 5 in the evidentiary proceeding, states as follows respecting relocation of utilities at the arena site:

We need your help in meeting the critical milestone of March 1, 2005, the date by which all utilities in the arena site area must be relocated. . . . We have already been in touch with your company to discuss this fast track schedule, including the need to meet the March 1, 2005 milestone. If you know of any potential delays or reasons this project cannot continue to move at this rapid pace, please contact us immediately, as we will have the groundbreaking ceremony on March 9, 2005.

The Staff would note two cases that may be argued to be of relevance to the recovery question are *Union Electric Co. v. Land Clearance For Redevelopment Authority*, 555 S.W.2d 29 (Mo. banc 1977) and *Home Builders Assoc. v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. App. 1989). In the first case, the Missouri Supreme Court stated as follows:

This relocation of facilities required of Union Electric was necessitated by an urban renewal project: the DeSoto Carr Urban Renewal Project said by Union Electric's petition to include the Convention Plaza and a privately owned and operated hotel as a part of St. Louis' new downtown Convention Center to be developed under authority of the Land Clearance for Redevelopment Authority Law. The primary purpose of the project, the redevelopment or renewal of what is implicitly a blighted area of the city, has been declared legislatively to be a public purpose. The vacation of this block of the city thoroughfare and the requirement that Union Electric remove its facilities therefrom to make the thoroughfare available for use as a part of this project were acts of the City and the Authority in the exercise of a governmental rather than a proprietary function. *City of Baltimore v. Baltimore Gas and Electric Co.*, supra; *State on Inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City*, 364 Mo. 974, 270 S.W.2d 44 (banc 1954); *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965); *In Matter of Urban Renewal Agency of*

City of Eugene v. Pacific Northwest Bell Telephone Co., 542 P.2d 908, 911-912 (Or.App.1975); ss 99.300 to 99.660, supra; St. Louis ordinance No. 56831, s 1. The requirement that Union Electric remove its facilities at its expense is not a "taking" of its property or a denial of due process within the meaning of the provisions of the federal and state constitutions referred to in Union Electric's petition. Under the facts alleged it has no cause of action.

555 S.W.2d at 33.

Conclusion

Based on the Staff's limited review of the matters at issue, the Staff does not believe that the consequences of the planned cutting, capping and removing of a portion of the Downtown Kansas City steam district heating system at the Sprint Center arena location rises to the level of a decrease in the safety and adequacy of the system that would warrant the Commission continuing its stay of this planned activity.

Should the Commission lift its stay of the cutting, capping and removing of the steam facilities at the location of the Sprint Center arena, the Commission may want to consider opening an investigatory docket regarding the questions whether the Trigen/Thermal Downtown Kansas City district steam system should be reestablished as a looped system, when, by what route, at what cost and under what basis of cost recovery.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 6th day of April 2005.

/s/ Robert V. Franson