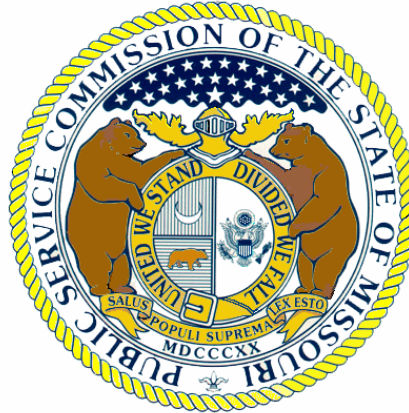


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



County of Jackson, Missouri,

Complainant,

v.

Trigen-Kansas City Energy Corp.,

and

Thermal North America, Inc.

Respondents.

Case No. HC-2005-0331

REPORT AND ORDER – DENYING INTERIM RELIEF

Issue Date: April 7, 2005

Effective Date: April 15, 2005

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

APPEARANCES

Jeremiah Finnegan, Attorney at Law, Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209 Penntower Office Center, Kansas City, Missouri 64111, for the County of Jackson, Missouri.

Paul DeFord, Attorney at Law, Lathrop & Gage, 2345 Grand Blvd., Kansas City, Missouri 64108, for Trigen-Kansas City Energy Corp.

Mark Comley, Attorney at Law, Newman, Comley & Ruth, 601 Monroe, Suite 301, P.O. Box 537, Jefferson City, Missouri 65102, for the City of Kansas City, Missouri.

Steven Dottheim, Chief Deputy General Counsel, and **Robert Franson**, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Morris L. Woodruff**

REPORT AND ORDER **DENYING INTERIM RELIEF**

SUMMARY

Following an expedited hearing, the Commission denies Jackson County's request for continuation of an interim order preventing Trigen-Kansas City Energy Corp. from cutting its steam distribution loop to comply with an order from the City of Kansas City to vacate its right-of-way through the construction site for Kansas City's downtown arena. The Commission will, however, allow Jackson County's complaint to proceed on other issues and directs Trigen to file an answer to that complaint.

Pending Motions and Other Matters

At the hearing, Kansas City requested leave to late-file several documents that it had not been able to prepare for submission at the hearing. Exhibit 9 was reserved for certified copies of relevant portions of Kansas City's City Charter. Exhibit 12 was reserved for submission of correspondence between Trigen and Kansas City regarding payment of the costs associated with the removal of Trigen's steam lines from the site of the arena project. The presiding officer directed Kansas City to submit the late-filed exhibits no later than April 5, and ordered that any party objecting to the admission to those documents raise those objections no later than Noon on April 6.

On April 5, Kansas City filed a copy of the portions of Kansas City's charter that it wished to bring to the attention of the Commission, along with a request that the Commission take official notice of those provisions. At the same time, Kansas City submitted a copy of a January 18, 2005 letter from Trigen to Kansas City, which will be designated as Exhibit 12, and a February 3, 2005 letter from Kansas City to Trigen, which

will be designated as Exhibit 13. No party raised any objection to either the admission of the letters into evidence, or the Commission's taking official notice of the provisions of Kansas City's charter. Therefore, the Commission will take official notice of the cited provisions of Kansas City's charter. Furthermore, Exhibits 12 and 13 will be admitted into evidence.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On March 29, 2005, the County of Jackson, Missouri, filed a complaint against Trigen-Kansas City Energy Corp., and against Thermal North America, Inc., the prospective corporate parent of Trigen. Trigen is a public utility operating a regulated steam service in downtown Kansas City. Jackson County is a major customer of that service.

Jackson County's complaint alleged that Trigen has informed its customers that the City of Kansas City has passed an ordinance that will require Trigen to permanently remove that portion of its steam network that lies in the area of planned construction for a downtown arena. Jackson County and Trigen's other customers will still be able to receive steam service from Trigen after the steam line is cut, but the system will no longer be a loop. Instead, Trigen's customers will be served by only one of two radial connections to

Trigen's steam plant until Trigen reconstructs its loop, a process that Trigen indicated will take a year or more.

Using the current looped system, Trigen's customers are able to receive steam from two directions. That means that if there is an interruption on one side of the loop, downstream customers can still receive steam from the other side of the loop. If the loop is cut, that redundancy will be lost. Jackson County's complaint alleged that if that happens, Trigen will no longer be providing safe, reliable, and adequate service as required by law.

Jackson County's complaint alleged that Trigen originally informed its customers that it would be cutting the steam loop on March 5. After Jackson County and other steam customers had talks with Trigen and Kansas City, Trigen agreed to postpone the cutting of the loop until April 2. Jackson County alleges that on March 28 it was informed that no further negotiations or delays would be allowed and that the steam loop would be cut on April 2. Jackson County asked the Commission to issue an immediate order setting a hearing on its complaint and directing Trigen to "cease and desist from severing its steam main pending final adjudication of this complaint."

On March 30, the City of Kansas City filed an application to intervene and a motion to dismiss Jackson County's complaint. Kansas City contended that the Commission lacks authority to order Trigen to disobey a valid order of the city regulating the use of the city's right-of-way. According to Kansas City, the relief sought by Jackson County would create delays in a major public works project and interfere with the duly enacted and authorized police powers of the city and its authority to enforce the terms of its utility franchises.

On March 31, the Commission issued an order that directed Trigen not to sever its steam loop on April 2, or thereafter, pending further order of the Commission. That order also granted Kansas City's application to intervene and scheduled a hearing for April 4.

A hearing was held on April 4, and evidence was presented. Jackson County, Trigen, Kansas City, and the Staff of the Commission appeared and participated in the hearing. The Office of the Public Counsel did not appear. The parties filed written post-hearing arguments on April 6.

The Service Provided by Trigen

Trigen currently provides steam service to approximately 60 customers in the downtown area of Kansas City.¹ Trigen generates the steam at a generation plant, the Grand Avenue Station, located north of downtown near the Missouri River. The steam is then transported through two 14-inch mains that leave the plant together but then diverge, one traveling up Wyandotte Street and the other up McGee Street. The two mains ultimately rejoin on 14th Street, thus forming a loop. Customers throughout downtown are served off this loop, as well as from radial lines emanating from the loop. The steam that travels through this loop is used by customers primarily for heat during the winter. However, some steam is used during the summer and the steam system remains in operation throughout the year.²

Jackson County's Use of Steam

Jackson County is one of the largest customers for the steam produced and distributed by Trigen. Jackson County owns and operates several buildings in Kansas City that are served by Trigen's steam system. The two largest are the county's Kansas City

¹ Transcript, page 34, lines 8-9.

² Transcript, page 30, lines 14-16.

courthouse, and the county detention center. The courthouse primarily uses steam as a heating source during the winter months.³ The county detention center uses steam heat during the winter, but also relies on steam to cook meals, wash dishes, operate its laundry facilities, and heat water.⁴ Neither building has its own boilers to provide steam if its supply of steam from Trigen is cut off.⁵ As a result, an extended loss of that steam supply could have dire consequences.

The consequences would be particularly severe if the steam supply were lost for the detention facility. That facility is the county's maximum security jail and holds up to 800 prisoners. Those prisoners must be fed and kept clean and warm and that cannot be done without a supply of steam. If that supply of steam were cut off for an extended period, the prisoners might have to be evacuated, and the county has no other facility capable of housing them.⁶

Cutting the Loop

Understandably, Jackson County is very concerned about the reliability of its supply of steam. In its current configuration, Jackson County receives its steam through a looped system. That means that if, for any reason one leg of the loop was blocked, Jackson County could still receive steam through the other leg of the loop.⁷ Thus the system has a built-in redundancy. That redundancy is, however, about to end.

³ Transcript, page 90.

⁴ Transcript, page 142, Lines 8-14.

⁵ Transcript, page 91, lines 20-22.

⁶ Transcript, page 145.

⁷ Transcript, page 29, 10-15.

The City of Kansas City, in a partnership with a private developer, is building a new Downtown Arena.⁸ The site of the new arena will displace the city streets under which a portion of Trigen's steam loop now runs. In fact, if the city were able to magically build the arena without moving the steam line, the steam line would run through center court approximately 15 feet above the basketball floor.⁹ Obviously, the steam line must be moved if the arena is to be built.

On October 19, 2004, the City of Kansas City sent a letter to Trigen informing it that the city would be vacating the right-of-way of the streets and alleys through the construction area. Trigen was directed to remove its steam line from the affected area by March 1, 2005. In the same letter, Trigen was informed that the cost of removing and relocating the line was Trigen's responsibility and that its costs would not be reimbursed by the city.¹⁰

On February 22, 2005, Trigen sent a letter to its customers, including Jackson County, indicating that it would be cutting and capping the steam loop at either end of the construction area. The portion of the line between the caps would then be removed to make way for the arena. The letter also indicates that once the line is cut at the construction site, the steam system will no longer operate as a loop. Instead, steam will be distributed to Trigen's customers on two separate radial connections. Trigen indicated that it was its "intention" to restore the loop by reconnecting the terminals once a new routing path is determined, but that such reconnection might not happen for one or more years.¹¹

⁸ Transcript, pages 156-159.

⁹ Transcript, page 165, lines 1-12.

¹⁰ Exhibit 4.

¹¹ Exhibit 6.

The February 22 letter indicated that the loop would be cut, with a resulting short service outage, on Saturday, March 5. Subsequently, Trigen delayed the cut date until April 2, to avoid having an outage during the heating season.¹² In an effort to avoid having the loop cut on April 2, Jackson County filed its complaint with this Commission on March 29, alleging that its property and the health of its citizens would face the likelihood of imminent threat of serious harm to life or property if the loop were cut as scheduled. Faced with those serious allegations, the Commission issued an order on March 31, ordering Trigen not to cut the loop, and scheduling a hearing for April 4.

The Reliability of Trigen's Steam System with and without the Loop

Jackson County's complaint is based on the assertion that without the loop, Trigen's steam distribution system will become unreliable, resulting in harm to Trigen's customers. Common sense indicates that a system that delivers steam over only one radial line will be somewhat less reliable than a system that uses a loop design to allow for steam to be delivered to a customer from more than one direction. Obviously, there is a greater risk of an outage if there is only one pathway for the delivery of steam. However, an undetermined reduction in reliability of the system does not constitute proof that Trigen's customers are facing a "likelihood of imminent threat of serious harm to life or property" if the loop is cut.

The only testimony that Jackson County offered regarding the amount by which the reliability of the steam distribution system might be reduced came from Brian Kirk, general manager for Trigen's steam and chilled water systems in Kansas City. Kirk is an engineer

¹² Transcript, page 41, lines 17-24.

and has worked in the utility and district energy industry for the past 18 years.¹³ Kirk acknowledged that the reliability of a radial distribution system would be somewhat less than the reliability of a looped system.¹⁴ For that reason, he indicated that the system worked best as a loop and that he thought Trigen would want to reconnect it in the future.¹⁵

However, when asked to quantify the amount by which the reliability of the system might be reduced by a change from a loop to a radial system, Kirk testified that Trigen currently operates radial steam systems in Trenton, New Jersey, Oklahoma City and Tulsa, Oklahoma.¹⁶ He further testified that the Tulsa radial system was a highly reliable system, currently operating at a reliability rate of 99.8 percent. He also testified that Kansas City's current looped steam system was operating with a reliability rate of 99.98 percent. He expected that if Kansas City's looped system became a radial system it would operate at a reliability rate comparable to that of the Tulsa system and that he would not expect it to drop to a reliability rate of less than 99.5 percent.¹⁷ He also testified that the conversion to a radial system would not require greater maintenance on the line, would not increase the risk of rupture on the line, and would not require more service interruptions.¹⁸ Finally, Kirk testified that even if the radial line should fail, there are alternative means for supplying steam to Trigen's customers. Specifically, Kirk testified that portable, truck mounted boilers

¹³ Transcript, page 23, lines 15-18.

¹⁴ Transcript, page 35, lines 7-8.

¹⁵ Transcript, page 46, lines 17-19.

¹⁶ Transcript, page 38, lines 9-10.

¹⁷ Transcript, pages 69-70.

¹⁸ Transcript, pages 67-68.

could be rented to restore steam within 8 to 24 hours after the disruption of the steam supply.¹⁹

Kirk's conclusion that Trigen's system would retain a high degree of reliability after the conversion to a radial system was supported by the only other witness to offer expert testimony on the reliability of the system. Warren Wood, energy department manager for the Commission's Staff and a professional engineer in Missouri and Kansas,²⁰ concluded that while the radial system would be somewhat less reliable than the existing loop system, there was no indication that it would become unsafe or inadequate when converted to a radial system.²¹

The other witnesses presented by Jackson County did not attempt to challenge Kirk's assessment of the effect on reliability resulting from the cutting of the loop.²² Even if they had wished to make such a challenge, they clearly lacked the expertise in the design and management of a steam distribution system that would be required to make such an assessment. They were only able to testify that the steam system was vital to the county and that bad things would happen if the county were to lose its supply of steam. However, the only assessment of reliability that they were able to offer was to confirm that the steam service offered by Trigen has been reliable in the past.²³

¹⁹ Transcript, page 86, lines 8-14.

²⁰ Transcript, page 188.

²¹ Transcript, page 190, lines 12-21.

²² Jackson County's other witnesses were Bruce Palmer, Director of Facilities Management for Jackson County; Katherine Shields, Jackson County Executive; and Graham Morris, Jackson County's Director of the Department of Corrections.

²³ Transcript, page 103.

The testimony offered by Kirk and Wood regarding the reliability of a radial system was credible and will be accepted as the only available indication of the amount by which the reliability of Trigen's distribution system would be affected by the cutting of the loop.

The Construction Schedule for the Arena

Kansas City plans to complete the arena project by the fall of 2007. To meet that goal, it must maintain a tight construction schedule. Any delay could potentially be very costly, especially if the city is otherwise able to attract an NBA or NHL franchise for the 2007 season.²⁴ Thus far the Commission's order to delay the cutting of the loop has not caused any delay for the overall project.²⁵ But, in order to stay on schedule, Kansas City needs to have Trigen's pipeline removed beginning no later than April 26. That means that Trigen would need to cut the loop no later than Saturday, April 23.²⁶

If Trigen chooses to recreate the loop by laying new pipe through the grounds of the arena, which may be a less expensive alternative, it would not be able to do so until the fall of 2006 because of the ongoing construction of the arena.²⁷ If Trigen chooses to relocate the loop using the street right-of-way around the perimeter of the arena construction area, it could begin work sooner and could likely complete the relocation project and restore the loop by the fall of 2005.²⁸

Aside from its request that the Commission order Trigen not to cut the loop at all, Jackson County's complaint also expresses concern that Trigen may choose not to recreate the loop, thus making the diminishment of the system's reliability permanent.

²⁴ Transcript, page 176.

²⁵ Transcript, page 176, lines 1-5.

²⁶ Transcript, page 171.

²⁷ Transcript, page 169, lines 3-6.

²⁸ Transcript, page 184, lines 10-25.

There are some facts that would indicate that Jackson County has good reason to be concerned.

The first cause for concern is the uncertainty surrounding the ownership of Trigen. At the moment, Trigen is owned by the Suez – Tractebel Corporation. However, this Commission has approved the sale of Trigen to Thermal North America, Inc., the other named respondent. The sale is awaiting regulatory approval in another state and it may be ready to close in the very near future.²⁹ With the change in ownership, any assurances by the current ownership that the loop will be recreated could become meaningless.

The second cause for concern is the high cost associated with recreating the loop. Brian Kirk testified that he estimated the cost of relocating and recreating the loop would be approximately \$750,000 - \$800,000.³⁰ Although Staff and Jackson County argue that the City of Kansas City should be required to reimburse Trigen for all or part of that expense, Kansas City has made it quite clear that it believes that it is not required to pay any such costs and that it does not intend to offer any reimbursement to Trigen. Trigen is a relatively small company and an expense of \$800,000 is a large percentage of the company's annual income. Therefore, it would not be surprising if Trigen strongly considered the possibility of choosing not to recreate the loop.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

²⁹ Transcript, page 222, lines 11-21.

³⁰ Transcript, page 33, lines 6-10.

Trigen-Kansas City Energy Corp. is a “Heating Company” and a “Public Utility,” as those terms are defined at Section 386.020 (20) and (42), RSMo 2000. As such it is subject to regulation by this Commission.

Section 393.130.1, RSMo 2000, provides that:

Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. ...

Pursuant to Section 393.290, RSMo 2000, the powers of the Commission to regulate other utilities as provided in chapters 386, 392 and 393 are made applicable to Trigen, as a heating company,

Jackson County is authorized to bring a complaint against Trigen by terms of Section 386.390, RSMo 2000.

Section 386.310.1, RSMo, provides as follows:

The Commission shall have power, after a hearing had upon its own motion or upon complaint, ... 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, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand, ...

This section gives the Commission the authority to order Trigen to take appropriate and necessary actions needed to maintain the safety and reliability of its steam distribution system.

Section 386.310.1, RSMo 2000, further provides as follows:

The commission may waive the requirement for notice and hearing and provide for expedited issuance of an order in any case in which

commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property, provided that the commission shall include in such an order an opportunity for hearing as soon as practicable after the issuance of such order.

On the basis of this statutory provision, the Commission issued its March 31 order directing Trigen not to sever its steam loop until further order of the Commission.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

Jackson County's March 29 complaint alleged that Trigen's intention to cut its steam loop on April 2 would endanger the public and that there would be no practical means for remedying the danger once the loop was cut. Based on that representation, the Commission issued an order on March 31 directing Trigen not to cut the loop on April 2, or thereafter, pending further order of this Commission. In order to quickly review its rather extraordinary order, the Commission scheduled an expedited hearing for April 4, only six days after Jackson County filed its complaint, and before Trigen even had an opportunity to file an answer to that complaint. The only issue from that expedited hearing that the Commission needs to address at this time is whether to continue its order preventing Trigen from cutting its loop.

It is abundantly clear that Trigen must act to cut and cap its steam distribution line, and thereby sever the loop, if Kansas City's downtown arena project is to go forward without delay. In fact, Trigen must take that action no later than April 23 if delay is to be avoided. No one, including Jackson County, wants to be responsible for causing that civic project to fail. It is also clear that Jackson County has not presented any evidence to suggest that the public will suffer any imminent threat of serious harm to life or property if

the loop is cut. On the contrary, the evidence shows that while the reliability of the steam service offered by Trigen would be slightly reduced, there is no indication that its service would be rendered unsafe, unreliable, or inadequate after the loop is cut and the company begins providing services over two radial lines.

The Commission's March 31 order required Trigen to defy an apparently lawful order from the City of Kansas City to vacate the right-of-way granted to it by the city. Based on the evidence presented to the Commission on April 4, there is no reason to continue that order in effect.

Even if the order preventing Trigen from cutting the loop is lifted, Jackson County continues to request that Trigen be ordered to restore the loop by relocating the line before the beginning of next winter's heating season. That request will not be granted in this order because, again, Jackson County was not able to establish the need for such an expedited, interim order. The decision of whether to relocate the line, and the best manner for doing so, is a decision that will have a tremendous financial impact on Trigen and its customers and should not be made based on the limited record established at an expedited hearing.

This report and order does not, however, finally resolve Jackson County's complaint against Trigen. The question of whether, and in what manner, the distribution loop is to be restored is still very much alive. Jackson County was not able to demonstrate the need for an extraordinary remedy that would disrupt a major civic construction project at this expedited hearing. However, given a reasonable opportunity to prepare its case and to seek testimony from additional experts, it may be able to present evidence to show the need for the restoration of the distribution loop. Furthermore, the question of who is to pay for the cost of relocation and restoring the loop is also raised in Jackson County's

complaint. That issue is not relevant to this expedited hearing and thus has not yet been addressed. However, that question can be further explored in future proceedings.

Trigen will be ordered to file an answer to Jackson County's complaint, and the Commission will proceed to consider the other elements of that complaint expeditiously.

IT IS THEREFORE ORDERED:

1. That the Commission's March 31 order directing Trigen-Kansas City Energy Corp. and Thermal North America, Inc., not to cut their steam main loop on April 2, 2005, or thereafter, pending further order of this Commission is lifted.

2. That Trigen-Kansas City Energy Corp. and Thermal North America, Inc., are directed to file an answer to the complaint filed by the County of Jackson, Missouri, no later than April 29, 2005.

3. That this Report and Order shall become effective on April 15, 2005.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Davis, Ch., Murray, Gaw, Clayton and Appling, CC.,
concur and certify compliance with the provisions of
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 7th day of April, 2005.