

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 27<sup>th</sup> day  
of November, 2007.

In the Matter of the Application of Trigen- )  
Kansas City Energy Corporation for a )  
Certificate of Public Convenience and )  
Necessity Authorizing It to Construct, Install, )  
Own, Operate, Control, Manage and Maintain )  
a Steam Heat Distribution System to Provide )  
Steam Heat Service in Kansas City, Missouri, )  
as an Expansion of Its Existing Certified Area )

**Case No. HA-2006-0294**

**ORDER IMPOSING SANCTIONS**

Issue Date: November 27, 2007

Effective Date: December 7, 2007

**Background**

On January 10, 2006, Trigen-Kansas City Energy Corporation ("Trigen") filed an application for a certificate of convenience and necessity seeking authority to expand its service area in Kansas City, Missouri. Trigen wished to expand its service area to serve a prospective customer, Truman Medical Center (TMC), who had requested that Trigen provide TMC's property with steam heating service. The proposed expansion to the service area also contained other potential steam heat customers.

An evidentiary hearing was held in this matter on May 15, 2006, and the Commission issued its final Report and Order on May 25, 2006, bearing an effective date of June 1, 2006. In that Order, the Commission granted Trigen's application subject to the condition that TMC fund the cost of construction for the proposed extension of Trigen's

facilities to serve TMC. In ordered paragraph number 4 of the Report and Order, the Commission directed Trigen and TMC to file a written agreement setting forth the details of their construction and funding plans for the project, as well as their agreement regarding the mechanism for any refund to TMC for advancing construction costs.

On May 21, 2007, Trigen filed two highly confidential documents purporting to satisfy the Commission's order for filing the written agreements as directed in ordered paragraph 4 of the Commission's Report and Order. Trigen asked the Commission to receive these documents and find it to be in full compliance with the Commission's May 25, 2006 Report and Order. Consequently, the Commission directed its Staff to review the newly filed documents and file a report and recommendation as to whether Trigen was in full compliance with the Commission's Report and Order and as to whether this case could be finally closed.

On June 11, 2007, Staff filed its recommendation. Staff recommended that Case No. HA-2006-0294 remain open until such time as the proposed construction was complete and service was established with TMC. In the interest of ensuring full compliance with the Commission's May 22, 2006 Report and Order, the Commission directed Trigen to file a report and recommendation at the time the construction and all payments were complete so that Staff could review all costs, payments and reimbursements associated with the construction. Trigen's final report is due no later than December 31, 2007.

#### **MGE'S October Pleading and Trigen's Motion for Sanctions**

On October 16, 2007, at approximately 4:00 p.m., Missouri Gas Energy (MGE) filed a pleading entitled "Suggestions of Missouri Gas Energy" recommending the Commission, as part of this docket, require Trigen to complete a specific study in its next general rate

case.<sup>1</sup> On October 17, 2007, Trigen filed a response asserting that MGE had publicly disclosed a portion of one of the highly confidential documents in its Suggestions to the Commission. Trigen sought immediate reclassification of MGE's Suggestions so as to prevent any continuing or future harm from the disclosure of this information. Trigen alleged that the disclosure of this portion of its highly confidential documents was misleading when taken out of context and the disclosure was likely to harm Trigen's ability to negotiate other contracts in the future.

Trigen's request was granted, and MGE's Suggestions were reclassified as being highly confidential at approximately 1:00 p.m. on October 17, 2007. The Commission also directed MGE to respond to Trigen's October 17, 2007 pleading.

On October 19, 2007, MGE responded stating that: (1) MGE had not directly quoted the one provision of the contract that was referenced in its Suggestions; (2) MGE was under the belief that no confidential information was being disclosed; and, (3) MGE felt the Commission should consider the issue it raised because it believed that the contractual provision at issue was at odds with the Commission's orders in this matter. MGE clarified that the highly confidential documents were viewed only by Mr. Jay Cummings, an outside consultant who had entered a non-disclosure agreement. MGE further asserted that Michael Noack, MGE's Director of Pricing and Regulatory Affairs was the only MGE employee to view the October 16, 2007 Suggestions.

On October 29, 2007, Trigen filed its response to MGE's response. Trigen asserted that MGE's Suggestions revealed, in part, the substance of one provision in its highly

---

<sup>1</sup> The Commission will not reveal the specifics of MGE's suggestions because that information is the subject of Trigen's response; namely that the information revealed in MGE's request was highly confidential.

confidential contract. Trigen claims that MGE was aware of the confidential nature of this material as evidenced by an e-mail exchange that occurred between counsels for the respective parties, where counsel for Trigen informed counsel for MGE that Trigen regarded the documents in question as being highly confidential and not for quotation in a public document.<sup>2</sup> Trigen alleges that MGE's Suggestions are misleading, improperly based upon pulling one contract provision out of context, and that disclosure of this information is likely to negatively impact Trigen's ability to negotiate other contracts in the future. Consequently, Trigen seeks an order from the Commission: (1) finding MGE's Suggestions were misleading; (2) denying MGE's request in its Suggestions for certain studies to be conducted in a future rate-making case; (3) maintaining the confidentiality of the contracts at issue; and, (4) imposing sanctions against MGE. MGE filed no response to Trigen's response within the time allowed for responsive pleadings in Commission Rule 4 CSR 240-2.080(15).

### **Relevant Statutes, Rules and Case Law**

Commission Rule 4 CSR 240-2.135(4) provides that highly confidential information may only be disclosed to the attorneys of record and outside experts retained for the case, and subsection (A) further states that employees, officers or directors of the parties are not outside experts. Commission Rule 4 CSR 240-2.135(15) provides that "[p]roprietary or highly confidential information may not be **quoted** in briefs or other pleadings unless those portions of the briefs or other pleadings are also treated as proprietary or highly confidential." Commission Rule 4 CSR 240-2.135(16) provides, in pertinent part, "[a]ll persons who have access to information under this rule must keep the information secure

---

<sup>2</sup> Again, the Commission will not reveal the specific substance of those e-mails to prevent the disclosure of any confidential information.

and may **neither use nor disclose such information for any purpose** other than preparation for and conduct of the proceeding for which the information was provided.”

The Commission’s rule on confidential information delineates the specific disclosure guidelines for highly confidential information; however, it does not prescribe sanctions for violations of the rule in the same manner in which Commission Rule 4 CSR 240-2.090(1) does for violations of the discovery rule. In fact, the only reference to sanctions in the Commission’s procedural rules is contained in Commission Rule 4 CSR 240-2.090(1), which applies exclusively to discovery violations.

While the Commission’s rules do not expressly authorize or delineate sanctions for violation of Rule 4 CSR 240-2.135, Section 386.250(7), RSMo 2000, provides: “The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: [t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as herein appear, either expressly or impliedly.”<sup>3</sup> Additionally, Section 386.570, RSMo 2000, allows the Commission to seek penalties against any corporation, person or public utility which violates or neglects to obey, observe or comply with any Commission order or rule.

Clearly the statutory authority of the Commission encompasses the power to impose sanctions for violations of Commission Rule 4 CSR 240-2.135; however, there are no reported judicial decisions or any prior Commission decisions providing guidance on this point. Lacking additional guidance, the Commission looks to the analogous situation of imposing sanctions for discovery violations to determine the appropriate course of action in

---

<sup>3</sup> “In addition to certain positive powers expressly conferred upon the commission it is also vested with all others necessary and proper to carry out fully and effectively the duties delegated to it.” *State ex rel. and to Use of Public Service Commission et al. v. Padberg*, 145 S.W.2d 150, 151 (Mo banc 1940).

this case.

A trial court has broad discretion on whether to impose sanctions for discovery violations.<sup>4</sup> This discretion is equally vested in administrative tribunals such as the Commission: “The Commissioner, like a trial judge, has discretion in deciding whether to impose sanctions for failure to comply with his orders for discovery.”<sup>5</sup> This discretion extends to the trial court's choice of remedies in response to the non-disclosure of evidence or witnesses during discovery.<sup>6</sup>

Commission Rule 4 CSR 240-2.090(1) allows for the imposition of sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery and prescribes these sanctions to be the same as those provided for in the rules of civil procedure. Sanctions for violations of discovery rules are encompassed in Supreme Court Rule 61.01. The exact sanction for any alleged violation or noncompliance will vary depending upon the circumstances. Relevant sanctions for discovery violations include, but are not limited to: (1) striking pleadings or parts thereof; (2) dismissing the action or proceeding or any part thereof; (3) rendering a judgment by default against the disobedient party; (4) treating a party as being in contempt of the Commission; and/or, (5) ordering the party to pay reasonable expenses, including attorney's fees, caused by the failure to comply.<sup>7</sup>

Missouri courts have found discovery sanctions to be appropriate where there is a finding of (1) an order compelling discovery; (2) a willful violation of that order; and (3)

---

<sup>4</sup> *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997).

<sup>5</sup> *Mueller v. Ruddy*, 617 S.W.2d 466, 478 (Mo. App. 1981).

<sup>6</sup> See *St. Louis County v. Pennington*, 827 S.W.2d 265, 266 (Mo. App. 1992); *Wilkerson*, 943 S.W.2d at 647-48.

<sup>7</sup> Supreme Court Rule 61.01.

prejudice.<sup>8</sup> The party moving for sanctions is responsible for proving the allegations relied on in its motion.<sup>9</sup> Having examined these elements, the Commission notes that the situation before it cannot be pigeon-holed within the exact confines of the language dedicated to sanctions for discovery violations and the Commission emphasizes its broad discretion with crafting the appropriate remedy for a violation of its rules.

### **Decision**

Applying the analogous guidelines from discovery violations to the situation at hand, the Commission determines first that there was a public disclosure of highly confidential information in violation of the Commission's Rule and the protective order issued in this case.<sup>10</sup> MGE filed its Suggestions as a public document and admitted in its pleadings that it shared this document with an MGE employee who is not an outside expert. However, based upon the information before it, the Commission cannot conclusively find that MGE maliciously disclosed the confidential information. Trigen's recounting of the e-mail exchange between counsel is unverified hearsay, and even if established as fact is inconclusive with regard to the intent behind MGE's wording of its Suggestions. In the emails, Trigen's counsel informs MGE's counsel that the contractual provisions **are not quotable**, and MGE, technically, did not specifically **quote** the provision at issue – it summarized and paraphrased the information.

---

<sup>8</sup> *Gallagher v. DaimlerChrysler Corp.*, --- S.W.3d ----, 2007, 2007 WL 2238816 (Mo. App. 2007); *Spacewalker, Inc. v. American Family Mutual Insurance Co.*, 954 S.W.2d 420, 423-24 (Mo. App. 1997); *Laws v. City of Wellston*, 435 S.W.2d 370, 375 (Mo. banc 1968).

<sup>9</sup> *Spacewalker*, 954 S.W.2d at 423-24.

<sup>10</sup> It should be noted that this case was filed prior to the Commission adopting the current form of Rule 4 CSR 240-2.135, effective January 30, 2007, and that a protective order was issued in this matter on January 11, 2006. The protective order tracks the Commission's current Rule regarding the protections for highly confidential information, and the particular sections of the rule at issue are applicable to the current controversy.

However, the Commission is not persuaded by MGE's subtle implication that public disclosure of highly confidential information in a paraphrased form as opposed to it being directly **quoted** is somehow outside the parameters of the Rule. While Commission Rule 4 CSR 240-2.135(15) expressly only prohibits **quoting** confidential material, subsection (16) requires the parties to keep such information secure, and subsection (4) is quite explicit with regard to who can view such information. To accept the proposition that paraphrasing confidential information could qualify it for public disclosure would create an exception that would swallow the Rule. There was a public disclosure, even if it was indirect in nature and even if the intent behind the disclosure is unclear.

The Commission notes that MGE's pleading concerned only one paragraph of the highly confidential document at issue and the information disclosed was only publicly available for a period of 21 hours before its reclassification. Additionally, other than to state that MGE's Suggestions "seem to imply that Trigen may not have complied with an order of the Commission," Trigen offers no evidence to establish how MGE's disclosure would prejudice it any way in the current proceeding or in any future proceedings before the Commission. Obviously, Trigen has had ample opportunity to respond to MGE's Suggestions, and the contractual documents filed by Trigen speak for themselves.

Despite the fact that this situation does not exactly track the elements for imposing sanctions in discovery violations, the Commission, in the proper exercise of its authority and discretion, finds that a sanction is warranted because the protection of confidential information is of paramount importance to preserve the integrity of Commission proceedings. Bearing in mind the limited nature of this disclosure and the fact that no prejudice has been established, the Commission finds the appropriate sanction is to strike



MGE's October 16, 2007 pleading, "Suggestions of Missouri Gas Energy." Indeed, striking the pleading, and thus consideration thereof, prevents any possible prejudice to Trigen.

The Commission finds that Trigen's speculation that MGE's disclosure would negatively affect Trigen's ability to negotiate other contracts in the future is simply that, speculation. Trigen acknowledges that "it is impossible to tell at this time how many of Trigen's customers, or potential future customers, obtained a copy of MGE's filing while it was publicly available." It is also impossible to tell how any entity obtaining this information would react to it – presently or in the future. Moreover, this claim, while artfully pled, is really a statement of a claim for tortious interference with a business expectancy.

Trigen can always raise a claim of tortious interference with a business expectancy before a court of competent jurisdiction and attempt to prove out the elements of its claim.<sup>11</sup> To adjudicate such a claim here, however, particularly when raised under the guise of a motion for sanctions, would be far beyond the jurisdiction and authority of this Commission. Moreover, to evaluate such a claim, an adjudicatory body may be required to interpret the provision of a contract or contract negotiations, and it is well-settled law that the Commission cannot construe contracts, grant monetary relief for damages, order pecuniary reparation or refund, or grant equitable relief.<sup>12</sup>

#### **IT IS ORDERED THAT:**

1. Missouri Gas Energy's October 16, 2007 pleading, "Suggestions of Missouri

---

<sup>11</sup> To establish a submissible case of tortious interference, a plaintiff must adduce evidence of: "(1) a valid business expectancy; (2) defendant's knowledge of the relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages." *BMK Corp. v. Clayton Corp.* 226 S.W.3d 179, 190 (Mo. App. 2007). A business expectancy need not be based on an existing contract. *Id.* at 251. Rather, "a probable business relationship that gives rise to a reasonable expectancy of financial benefit is enough." *Id.*

<sup>12</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680, 696 (Mo. App. 2003); *Am. Petroleum Exch. V. Pub. Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943); *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937).

Gas Energy,” is hereby stricken and the Commission’s Data Center is directed to remove it from the case file and appropriately destroy it.

2. The parties are cautioned to strictly adhere to the Commission’s confidentiality rules and the protective order that was issued in this matter throughout the pendency of this case.

4. This order shall become effective on December 7, 2007.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Clayton, Appling,  
And Jarrett, CC., concur

Stearley, Regulatory Law Judge