BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Trigen Kansas City Energy Corp. and Thermal North America, Inc. for the Authority Necessary for the Transfer of Control, and Sale of All Stock Currently Owned by Trigen Energy Corporation, Inc. to Thermal North America, Inc.	)))))	Case No. HM-2004-0618

STAFF'S PREHEARING BRIEF

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TABLE OF CONTENTS

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COMES NOW the Staff of the Missouri Public Service Commission and states:

Joint Application

On June 29, 2004, Trigen Kansas City Energy Corporation and Thermal North America, Inc. filed a joint application with the Commission seeking authority to transfer ownership and control of Trigen Kansas City Energy Corporation from Trigen Energy Corporation to Thermal North America, Inc. as part of a larger transaction. Trigen Kansas City Energy Corporation owns and operates a steam heat system in Kansas City, Missouri that the parties do not dispute is under this Commission's jurisdiction.

Trigen Energy Corporation is the owner of numerous subsidiaries that own and/or operate district steam heating and/or chilled water systems in several states. Although the Joint Applicants have brought their request for approval of the transfer of ownership and control of Trigen Kansas City Energy Corporation to Thermal North America, Inc. only because they consider Trigen Kansas City Energy Corporation to be subject to this Commission's jurisdiction, the transaction in question is for the transfer to Thermal North America, Inc. of all of the district

steam heating and chilled water systems located in the United States that are held by subsidiaries of Trigen Energy Corporation.

Missouri Steam Heating System

The Kansas City district steam heat system of Trigen Kansas City Energy Corporation that this Commission has regulated since before Trigen Kansas City Energy Corporation acquired it from Kansas City Power & Light Company in 1990 is just a small part of this portfolio of systems. The Kansas City district steam heat system of Trigen Kansas City Energy Corporation serves about 69 customers in downtown Kansas City, Missouri, including the City of Kansas City, Missouri, the State of Missouri, the federal government, hotels, restaurants, banks, other individual customers and entire office buildings. (Williams Rebuttal, p. 5).

Trigen Kansas City Energy Corporation acquired the Kansas City district steam heat system from Kansas City Power & Light Company after the Commission rejected Kansas City Power & Light Company's request to abandon the system and, instead, ordered Kansas City Power & Light Company to seek a buyer for the system. (Williams Rebuttal, p. 5). Although Trigen Kansas City Energy Corporation initiated a rate case in 1993 and requested a Staff review for whether rate relief was warranted in late 2000, Trigen Kansas City Energy Corporation withdrew the 1993 rate case and, for reasons unknown to the Staff, did not pursue with Staff the late 2000 review, after the Staff raised the rate impact of an asset impairment charge imposed by its parent company, Trigen Energy Corporation. The Staff has not conducted a thorough review of the books and records of Trigen Kansas City Energy Corporation for ratemaking purposes. (Williams Rebuttal, p. 11).

Recordkeeping and Information Access

In this case the Staff has reviewed the books and records for Trigen Kansas City Energy Corporation sufficiently to know that they are woefully deficient for regulatory purposes, including ratemaking. (Williams Rebuttal, pp. 12-16). Most of the conditions to authorizing the transfer of ownership and control of Trigen Kansas City Energy Corporation to Thermal North America, Inc. that the Staff proposes in this case are designed to address the existing deficiencies and to avoid similar deficiencies after the transaction. (Williams Rebuttal, pp. 34-43; Elliott Rebuttal, p. 5 and Schedule 3; Mathis Rebuttal, pp. 2-3).

Given the state of the books and records for Trigen Kansas City Energy Corporation, the Staff is concerned with the proposed buyer, Thermal North America, Inc., having access to information that may remain with the parent and affiliated companies of Trigen Kansas City Energy Corporation when they are no longer parents and affiliates. Therefore, the Staff believes that unless at least Trigen Energy Corporation, the parent of Trigen Kansas City Energy Corporation, and Tractebel North America, an affiliate, commit to provide access to any information they might have, at least through the next case where rates are set for Trigen Kansas City Energy Corporation, pertinent to establishing just and reasonable cost-based rates for Trigen Kansas City Energy Corporation, transfer of ownership and control of Trigen Kansas City Energy Corporation to Thermal North America, Inc. would be detrimental to the public.

Acquisition Adjustment, Net Original Cost, and Current Net Plant

Thermal North America, Inc. and Trigen Kansas City Energy Corporation have indicated that they will not seek at any time recovery of the acquisition adjustment resulting from the transaction that is the subject of this case, or resulting from any prior transactions. (Siddiqi Surrebuttal, p. 3) Since the amount of an acquisition adjustment is the purchase price less the

book value (i.e., net original cost, which equals original investment less accumulated depreciation), the Staff does believe that the value of net original cost needs to be determined as a step in the evaluation of whether grant of the requested authority would be detrimental to the public; however, since the potential impact on customers of acquisition adjustments are all that the Joint Applicants are waiving, the Staff does not believe that the Commission need determine current net plant in deciding whether to grant the authority to transfer ownership and control of Trigen Kansas City Energy Corporation to Thermal North America, Inc. as requested.

For context, the Staff notes that the only other steam system now regulated by the Commission is the steam system of Aquila, Inc. that is located in its Aquila Networks-L&P service area. Until the mid-1980s, the Commission also regulated a steam system owned by Union Electric Company in St. Louis, Missouri. The Commission authorized transfer of ownership of that system to Thermal Resources of St. Louis, Inc., which was "the instrumentality chosen by Bi-State [Development Agency] to carry out [Bi-State's] powers." Bi-State was an unregulated entity and because Thermal Resources of St. Louis, Inc. was merely an instrumentality of Bi-State, it too was not regulated by the Commission. *Love 1979 Partners v. Public Service Commission*, 715 S.W.2d 482 (Mo. *banc* 1986).

Chilled Water

Also included in the portfolio of systems that Thermal North America, Inc. is acquiring is Trigen-Missouri Energy Corporation, which has owned and operated chilled water systems in Kansas City, Missouri since 1998. Trigen-Missouri Energy Corporation serves about five customers with chilled water service through two separate systems that provide chilled water to about a dozen specific locations in Kansas City, Missouri. The parties dispute whether these chilled water systems are subject to this Commission's jurisdiction. Based on the facts and law

as set forth later in this brief, the Staff takes the position that the Commission has jurisdiction over these operations. For context, the Staff notes that the chilled water system of Trigen-Missouri Energy Corporation is the only chilled water system that the Staff is aware of that has ever operated in the state of Missouri, past or present.

The breadth of the Commission's jurisdiction is a fundamental question of a nature that the Commission has indicated that it should determine in the first instance. Thus, the issue of the Commission's jurisdiction over the chilled water operations of Trigen-Missouri Energy Corporation in Kansas City, Missouri is presented to the Commission for its decision. The applicable facts, statutory provision and case law are presented below.[1]

Description of Chilled Water System

Based on statements made by the general manager of Trigen Kansas City Energy Corporation, the Kansas City, Missouri District Chilled Water Operations of Trigen Missouri Energy Corporation are described at pp. 28 to 31 of Staff Witness Williams' rebuttal testimony as follows:

> Trigen Missouri Energy Corporation has two separate chilled water systems. A system referred to as the "East Loop" and a system referred to as the "West Loop."
>
> Trigen Missouri Energy Corporation both owns and operates the "East Loop." It leases the physical plant that it operates on the "West Loop."
>
> To operate the "East Loop" Trigen Missouri Energy Corporation purchases steam from its affiliate Trigen Kansas City Energy Corporation and uses that steam in the process that cools the water that it then circulates to its customers for their use. Trigen Missouri Energy Corporation serves ** HC
>
> HC

[1] Section 386.020(20), RSMo. 2000; *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo.banc 1934)(emphasis supplied); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

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The physical plant where the steam is used in the process to cool the circulating water is located in the same building at 115 Grand Avenue, Kansas City, Missouri, where Trigen-Kansas City Energy Corporation has its steam generating plant. The chilled water leaves that building and travels about 1.5 miles in a north/south direction along or in Oak and McGee Streets in Kansas City, Missouri to the greatest extent of the loop it travels in. The chilled water then returns to the steam generating plant building where it is cooled and recirculated.

The "West Loop" has a much shorter run of distribution piping than the "East Loop." Trigen Missouri Energy Corporation serves ** HC

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Trigen-Missouri Energy Corporation obtained authority from the City of Kansas City, Missouri to lay its chilled water system in public rights-of-way in the City of Kansas City, Missouri through a municipal ordinance enacted by the City of Kansas City, Missouri in 1989 that grants such authority for a period of 30 years.

Trigen Kansas City Energy Corporation uses this same authority from the City of Kansas City to provide district steam heating service to its customers. Trigen-Missouri Energy Corporation requested this authority before it completed acquisition of the district steam heating

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system from KCPL and before it began providing chilled water service. The district steam heating system and chilled water system are interrelated in that both use steam from the same boilers, which are located at the Grand Avenue Plant, 115 Grand Avenue, Kansas City, Missouri. (Elliott Rebuttal, p. 2).

Law Applicable to Chilled Water

Section 386.020(20), RSMo. 2000 defines "heating company" to include

> every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers, appointed by any court whatsoever, owning, operating, managing or controlling any plant or property for manufacturing and distributing and selling, for distribution, or distributing hot or cold water, steam or currents of hot or cold air for motive power, heating, cooking, or for any public use or service, in any city, town or village in this state; provided, that no agency or authority created by or operated pursuant to an interstate compact established pursuant to section 70.370, RSMo, shall be a heating company or subject to regulation by the commission . . . .

and section 393.290, RSMo. 2000 makes

> [a]ll provisions of chapters 386, 387, 390, 392 and 393, RSMo, in reference to railroad corporations, street railroad corporations, common carriers, gas corporations, electrical corporations, water corporations, telephone and telegraph corporations, and sewer corporations, in reference to hearings, summoning witnesses, taking of testimony, reports, approval of incorporation and certificates of franchises, the approval of issues of stocks, bonds, notes and other evidence of indebtedness, consolidation, lease, transfer of franchises, valuation of property, grants and franchises, keeping of accounts, complaints as to quality, price, facilities furnished, the fixing of just and reasonable rates and adequacy of service, forfeitures of all descriptions, forfeitures for noncompliance with the orders, summary proceedings under chapters 386, 387, 390, 392 and 393, RSMo, excessive charges for product, service or facilities, proceedings before the commission, and proceedings in any court mentioned in chapters 386, 387, 390, 392 and 393, RSMo, and in all other sections, paragraphs, provisions and parts of chapters 386, 387, 390, 392 and 393, RSMo, in reference to any other corporations subject to any of the provisions of chapters 386, 387, 390, 392 and 393, RSMo, so far as the same shall be practically, legally or necessarily applicable to heating companies in this state, are hereby made applicable to such heating companies as designated in said chapters, and shall have full application thereto.

Applicable Standard

Section 393.190.1, RSMo 2000 requires that to authorize the transfer of ownership and control of Trigen Kansas City Energy Corporation (Kansas City, Missouri District Steam Heating Operations) from Trigen Energy Corporation to Thermal North America, Inc., the Commission must determine that the transfer of ownership and control is not detrimental to the public.

In the 2003 decision, *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732 (Mo. *banc* 2003), the applicants presented a merger transaction to the Commission for approval and offered a five-year regulatory plan that included recoupment of the $92,000,000 acquisition premium associated with the merger. The Commission rejected the proffered plan and approved the merger without addressing recoupment of the $92,000,000 acquisition premium. In its opinion reversing the Commission's approval of the transaction and remanding the case for further action by the Commission, the Missouri Supreme Court stated that, in evaluating a merger transaction under the standard of not detrimental to the public, "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 [now, Aquila, Inc.] being allowed to recoup the acquisition premium."

As reflected in the surrebuttal testimony of Joint Applicants' Witness Riaz Q. Siddiqi, Vice President of Thermal North America Inc., the Joint Applicants agree that there should be no recoupment of acquisition premium from ratepayers in any future rate proceedings as a result of this proposed transaction or as a result of any prior acquisition, including the acquisition of the steam heating system from Kansas City Power & Light Company in 1990 and the corporate reorganization of the Trigen Energy affiliates in 2000. While the Joint Applicants have stated

their agreement that there should be no recoupment of acquisition premiums from ratepayers, they have neither quantified nor defined their use of the term "acquisition premium." Thus, the Staff believes that until there is certainty as to just what it is that the Joint Applicants are foregoing to seek recoupment of, *i.e.*, what they mean by the term "acquisition premium," determination of the acquisition premiums is still a "necessary or essential issue" in this case that must be decided under the not detrimental to the public standard.

In two recent cases decided after the Missouri Supreme Court's opinion in *AG Processing*, this Commission has expounded on the "not detrimental to the public" standard. The earlier of these two cases is *In the Matter of the Application of Aquila, Inc. for Authority to Assign, Transfer, Mortgage or Encumber Its Utility Franchise, Works or System in Order to Secure Revised Bank Financing Arrangements*, Case No. EF-2003-0465 and the latter is *In the Matter of the Application of Union Electric Company, Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108.

In its February 24, 2004 Report and Order in Case No. EF-2003-0465, the Commission declined to authorize Aquila, Inc. to encumber its regulated assets in Missouri and, pertinent to this case, stated at pages 6-7, the following:

> The Commission concludes a detriment to the public interest includes a risk of harm to ratepayers. In reviewing a recent merger case involving the same parties, the Supreme Court of Missouri ruled that . . . "(w)hile (the Commission) 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 (the premium) . . . when evaluating whether the proposed merger was

> detrimental to the public."[12] In other words, the Commission could not have known whether the acquisition premium would result in rate increases. But it should have looked at the premium's reasonableness. Likewise, the Commission cannot know whether the encumbrances will result in rate increases. But the Commission should look at the reasonableness of the risk of the increases. This analysis conforms to the concept that . . . "(n)o one can lawfully do that which has a **tendency** to be injurious to the public welfare."[13]

In its more recent October 6, 2004 Report and Order in Case No. EO-2004-0108, the Commission conditionally authorized Union Electric Company to transfer its electric and natural gas retail operations in Illinois, including associated system assets, to Central Illinois Public Service Company under the not detrimental to the public standard. With regard to that standard the Commission stated at pages 41-46 in the Report and Order the following:

> Section 393.190.1 does not contain a standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest."[25] A court has said of Section 393.190.1, that "[t]he obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."[26] To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently.[27] None of these factors are at issue in the present case; neither is UE's ability to continue to provide adequate service to its customers.
>
> The parties do not agree on the interpretation or application of the "not detrimental to the public" standard. UE asserts that the Commission must grant approval unless it finds the transfer would be detrimental to the public interest.[28] UE emphasizes the opinion of one court, quoted above, that the purpose of the

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[12] *State ex rel. AG Processing Inc., v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo.*banc* 2003).

[13] *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 399-400 (Mo.*banc* 1934)(emphasis supplied).

[25] Commission Rule 4 CSR 240-2.060(7)(D).

[26] *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

[27] *See In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220.

[28] *St. ex rel. City of St. Louis v. Public Service Commission,* 73 S.W.2d 393, 400 (Mo. *banc* 1934).

statute is to ensure the continuation of adequate service to the public.[29] UE quotes prior decisions of this Commission to the effect that denial requires compelling evidence on the record that a public detriment is likely to occur.[30] According to UE, while the Applicant has the burden of proof, those asserting a specific detriment have the burden of proof as to that allegation.[31] Finally, UE notes that the Applicant is not required to show that the transfer is beneficial to the public.[32]

Staff points out that this is the Commission's first contested case under Section 393.190.1 since *AG Processing,* a decision in which the Missouri Supreme Court reversed a Commission decision under that section.[33] That case held, Staff asserts, that the Commission must evaluate both the present and future impacts of a transfer at the time it makes its decision. Staff further contends that, while the "not detrimental" standard applies to the transfer itself, UE seeks some additional relief that is governed by other, higher standards. For example, Staff argues that UE seeks several ratemaking determinations that are subject to the "just and reasonable" standard and that UE seeks a waiver from the Commission's affiliate transaction rules governed by the "best interests of the regulated customers" standard.

Public Counsel, in turn, agrees that Section 393.190.1 requires prior Commission authority for a utility to transfer any part of its system or assets; such authority is to be granted only where the proposed transfer is "not detrimental to the public interest."[34] The applicant utility bears the burden of proof and, contrary to UE's notion, this burden does not shift. Public Counsel urges the Commission to ignore UE's quotations of erroneous language from past Commission orders that approval must be granted unless "compelling" evidence shows that a "direct and present" detriment is "likely" to occur. Instead, as recently articulated by the Missouri Supreme Court in *AG Processing,* and restated by the Commission itself,[35] "a detriment to the public interest includes a risk of harm to ratepayers." Thus, Public Counsel takes the position that the mere risk itself of higher rates in the future is a detriment to the public. Public Counsel

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[29] *Fee Fee Trunk Sewer, supra.*

[30] *In the Matter of KCP&L,* Case No. EM-2001-464 (*Order Approving Stipulation & Agreement and Closing Case,* issued Aug. 2, 2001).

[31] *Anchor Centre Partners, Ltd. v. Mercantile Bank, NA,* 803 S.W.2d 23, 30 (Mo. *banc* 1991); *In the Matter of Gateway Pipeline Co., Inc.,* Case No. GM-2001-585 (*Report & Order,* issued Oct. 9, 2001).

[32] *In the Matter of Sho-Me Power Corp.,* Case No. EO-93-259 (*Report & Order,* issued Sep. 17, 1993).

[33] *AG Processing, Inc. v. Public Service Commission,* 120 S.W.3d 732 (Mo. *banc* 2003).

[34] *City of St. Louis, supra.*

[35] *In the Matter of Aquila, Inc.,* Case No. EF-2003-0465 (*Report & Order,* issued Feb. 24, 2004) pp. 6-7, *(sic) In the Mater of Aquila, Inc.,* Case No. EF-2003-0465 (*Report & Order,* issued Feb. 24, 2004) pp. 6-7,

insists that the law requires that the Commission deny the proposed transaction even if the detriments found are the result of events that would simply be set into motion or which involve the probability of significant harm which could likely occur, but is not certain to occur.

In the *AG Processing* case, the Commission approved an acquisition and merger by Aquila, Inc. – then called UtiliCorp – that involved an acquisition premium of $92,000,000.[36] Although the Commission rejected Aquila's proposed regulatory plan, under which a portion of the acquisition premium would be recovered in rates, the Commission refused to consider the recoupment of the acquisition premium on the grounds that it was a rate case issue. The Missouri Supreme Court reversed, saying:

> 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.[37]

The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing,* but rather restated the existing "not detrimental to the public" standard. In particular, the Court clarified the analytical use of the standard. What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. Approval should be based upon a finding of no net detriment. Likewise, contrary to UE's position, the *AG Processing* decision does not allow the Commission to defer issues with ratemaking impact to the next rate case.

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[36] An acquisition premium is the amount by which the purchases price exceeds the book value of the assets purchased (i.e., net original cost, which equals original investment less accumulated depreciation).

[37] *AG Processing, supra,* 120 S.W.3d at 736 (internal footnotes omitted).

Such issues are not irrelevant or moot because UE is under a temporary rate freeze; the effects of the transfer will still exist when the rate freeze ends.

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides sale and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.

Staff's Analysis of Acquisition Adjustment and Asset Impairment of Steam Heating Operations

It is the Staff's position that the detriment of the uncertainty of the "acquisition premiums" which the Joint Applicants agree should not be recouped from ratepayers in any future rate proceedings as a result of this proposed transaction or as a result of any prior acquisition, including the acquisition of the steam heating system from Kansas City Power & Light Company in 1990 and the corporate reorganization of the Trigen Energy affiliates in 2000, is a detriment that is not overcome by any of the tangible benefits that would result from this transaction. The uncertainty in the amounts of the acquisition premiums is the result of the failure of Trigen Kansas City Corporation to maintain its books and records in accord with Commission requirements. (Williams Rebuttal, pp. 13-19).

Additionally, the Staff is of the view that the asset impairment write-down of Trigen Kansas City Corporation assets under Statements of Financial Accounting Standards 121 for the

year 2000, subsequently superseded by SFAS 144, results in no asset value upon which to set rates and, consequently, all, or nearly all, of the purchase price of the subject transaction that is allocable to Trigen Kansas City Corporation is "acquisition premium." (Williams Rebuttal, pp. 19-23).

Law Regarding Commission Jurisdiction

As indicated above the Staff and the Joint Applicants differ as to whether this Commission has jurisdiction over the Kansas City, Missouri District Chilled Water Operations of Trigen Missouri Energy Corporation. The Staff has found no Missouri court decision that addresses the Commission's jurisdiction over chilled water operations; however, the Staff has found cases where the scope of the Commission's jurisdiction over electric, telephone (at a point in time where the incumbent local exchange providers' service was rate-of-return regulated) and steam heating utilities was addressed. The first of those cases is *State ex rel. Buffum Telephone Company v. Public Service Commission*, 272 Mo. 627, 199 S.W. 962 (*banc* 1917), where the Missouri Supreme Court, sitting *en banc*, held that because it was a mutual telephone company—a voluntary association, the Commission was without jurisdiction to grant the Auxvasse Company's complaint seeking to force the Buffum Telephone Company to send and receive long distance messages over its lines from the members and subscribers of the Auxvasse Company. In reaching its holding the Court stated:

> The constitution and by-laws and the oral testimony all point to the conclusion that the Auxvasse Company is primarily a private organization not operated for hire. Operation for hire is a prerequisite to supervision by the commission. The reason is plain. The commission was created, as is evident from the entire statute defining its powers, not to interfere with individual action except where same assumes a public nature, but to provide regulations and give plenary power as defined by the statute to the commission to control such utilities as from their nature and operations may affect the interests of the general public. All such

> organizations are commercial in their nature in that they are not conducted for favors, but for fees. Recognizing this fact, the framers of the Public Service Act made this a condition precedent to commission control.

The next reported case the Staff found is *State ex rel. Danciger & Co. v. Public Service Commission of Missouri*, 275 Mo. 483, 205 S.W. 36 (1918). In that case a brewery installed generation capacity that exceeded its needs. It established an affiliate that sold the excess capacity to between twenty and thirty businesses, ten residences and the Town of Weston within a three-block area of Weston. Those obtaining electricity from the excess capacity were required to arrange transport of it to their locations and the adequacy and reliability of the service was not guaranteed. Of the 30 or 32 street lights powered, the town only paid for service to five or six at the cost of $19.50 per month. The affiliate stopped providing service to one customer who complained to the Commission seeking restoration of service. On the foregoing facts, the Commission found the affiliate to be a public utility, but the courts reversed. In its opinion, the panel of the Supreme Court states that the matter is one of first impression in Missouri with scant precedence from other jurisdictions. The fundamental theme of the decisions and treatises upon which the Court relies for its decision is that to fall under the jurisdiction of the Public Service Commission an entity must either expressly, or impliedly, devote its plant to public use and that entering into special contracts for service is not, in and of itself alone, a devotion of plant to public use.

In *State ex rel. Buchanan County Power Transmission Company v. Baker*, 320 Mo. 1146, 9 S.W.2d 589 (banc 1928), the Missouri Supreme Court held, in determining whether the state tax commission had authority to assess taxes on an electric transmission line located in Buchanan County used solely to transmit power it purchased from the Kansas Public Service Company to sell to the St. Joseph Railway, Light, Heat & Power Company, that the transmission line owner

was not a public utility. The parties in the case stipulated that the owner of the transmission line had only one customer, did not hold itself out as seeking or desiring other customers, has refused to sell to any other user of electricity, has never asserted the power or right of eminent domain and never sought any franchise in the nature of a contract to serve the public from any state or municipality. Based on the stipulated facts presented the Court held that "the mere purchase, transmission, and sale of electric energy, a commercial product, without more, contains no implication of public service" and that the transmission line owner was not a public utility. The Court did note that had the record disclosed that St. Joseph Railway, Light, Heat & Power Company was a public utility distributing electric energy it purchased from the transmission line owner and that the transmission line owner was an important link in the sale and distribution, the question presented would have been different.

In *State ex rel. Lohman & Farmers Mutual Telephone Company v. Brown*, 323 Mo. 818, 19 S.W.2d 1048 (1929), the Missouri Supreme Court stated that Lohman and Farmers Mutual Telephone Company "was organized as a mutual telephone company; whether it is a public utility is to be determined from what it does; and what it does, with one exception, is to operate a telephone exchange for itself. The one exception is: It affords 'telephonic communication for hire' over its line from Lohman to Jefferson City. That one line is the only one of its properties that it has invited the public to use; it is the only one dedicated to public use. To the extent of its operation of that line it is a public utility, and no further." In response to positions taken that the company was either a public utility or it was not, the Court, quoting from *State ex rel. Danciger*, stated: "That language, when applied to the facts of this case, means: The company as an owner and operator of the telephone line from Lohman to Jefferson City, and to that extent only, 'is a public utility . . . within the whole purview and for all inquisitorial and regulatory purposes of the

Public Service Commission Act.' And we so hold." In addition to the facts that the company jointly with Capital City Telephone Company owned and operated a commercial line between Lohman and Jefferson City charging users 10 cents per call and allowing the public access to that line at the company's exchange in Lohman, the facts the Court held to be public utility operations, the Court declined to find a special arrangement whereby the Lohman station of the Missouri Pacific Railway Company was given telephonic connection at a flat rate of $1 per month constituted operation of a public utility.

The Missouri Court of Appeals in Kansas City decided in the case, *State ex rel. Cirese v. Public Service Commission*, 178 S.W.2d 788 (Mo. App. *per curiam* 1944), that, as the Commission had determined, the actions of the Cireses constituted the provision of utility service without requisite authority to do so. Kansas City Power & Light Company filed a complaint with the Commission alleging that the Cireses were unlawfully selling electricity to the public in competition with Kansas City Power & Light Company. In its *per curiam* opinion the Court stated:

> The record in this case is replete with evidence of the personal solicitation of business from places of business and from private homes, and the public solicitation of business, indiscriminately, from any and all sources, through a newspaper article, through handbills, and through the indiscriminate distribution of customers' bills heretofore described. Such evidence is virtually uncontradicted.
>
> But there are other circumstances that tend to prove the nature of the business that was being carried on by appellants. They almost doubled their productive capacity at a time when, it may be inferred from the evidence, they already had ample production to supply the needs of their own buildings and tenants. At about the time this addition to their plant capacity was made they, for the first time, began soliciting the business of outside customers and began running service lines to properties other than their own. They acquired a large number of meters and large quantities of poles and wire, and Mr. Cirese stated that it would be a happy day when such equipment had been installed and connected. They sought to sell to complainants, for a substantial consideration, all of their facilities not needed for the production and distribution of energy for

use in buildings owned by appellants, and announced that if the sale was not made they expected to continue their previous course. It will be remembered that they had but recently acquired this surplus generating equipment. The fact that they proposed to sell it, together with 500 meters (which latter could not reasonably have been needed in buildings owned by appellants) is strong evidence that the surplus energy which, they contend, was all they sought to sell, was not produced as incidental to their operations for their own use, but was deliberately produced for sale to others. The situation thus presented is quite different from that presented in the *Danciger* case.

From a consideration of the testimony and an examination of the plats depicting the character and location of appellants' properties, the relation of its properties to those of complainant, and the undisputed evidence of what appellants did over a period of years, it can only be said that appellants not only are engaged in producing electricity for their own use and that of tenants of buildings owned by them, but that they are also engaged in the production, distribution and sale of electricity to the public within the territory of several blocks where their plant and distribution system is located. It follows that the finding of the Commission, to the effect that appellants are engaged in business as a public utility so as to render them amenable to the jurisdiction and regulation of respondent, is fully sustained by the evidence.

In arriving at the foregoing conclusion we have not overlooked appellants' contention that they sold service only on private contract. We think the evidence is sufficient to support a finding to the effect that they held themselves out as willing to sell to all comers who desired service in the immediate vicinity of their plant, a district consisting of several blocks, and that they did sell to all such customers.

In the most recent Missouri court decision uncovered, *Love 1979 Partner v. Public Service* Commission, 715 S.W.2d 482 (Mo. *banc* 1986), the Missouri Supreme Court held that this Commission did not retain jurisdiction over the steam operations of Union Electric Company that were transferred to Thermal Resources of St. Louis, Inc. In the pertinent part of its opinion, the Court said:

Under the contract arrangement, however, Thermal will supply steam only under contract with Bi-State, which is exempt from regulation. The Commission properly concluded that Thermal is involved in the transaction only as the instrumentality chosen by Bi-State to carry out its powers. Bi-State, rather than Thermal, has the ultimate responsibility for serving the customer. The rates are established by contracts between Bi-State and Thermal. Bi-State's exemption insulates Thermal from regulation by the Commission. Thermal does not hold

> itself out as available to, and is not bound to, serve the public. Cf. *State ex rel. M.O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W.2d 36 (1918); *State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown*, 323 Mo. 818, 19 S.W.2d 1048 (1929). (Footnote omitted.)

Statutory Construction

In construing a statute, the court is to look at the plain language of the statute and is not permitted to read into the statute a contrary legislative intent. *Home Builders Association of Greater St. Louis, Inc. v. City of Wildwood*, 107 S.W.3d 235 (Mo. *banc* 2003). Among the definitions of "water" found at the Internet website dictionary.com is the following: "An aqueous solution of a substance, especially a gas: *ammonia water.*" And among the definitions for "chilled" found at the same website is: "To lower in temperature; cool." In his surrebuttal testimony Joint Applicant Witness Zien testifies:

> A. No. The east piping loop circulates a brine solution, which was introduced into the pipes upon the establishment of the system in the 1990s. This brine solution was created by mixing approximately 89% water with a patented chemical product that was delivered to Trigen Missouri Energy Corporation in railroad tanker cars. Since being mixed and introduced into the east pipe loop, this brine solution has not left the pipes, other than in small amounts for testing purposes.
>
> Q. Why is it called brine?
>
> A. Brine is a term used for a liquid solution made up of some parts water and some parts salty chemicals.

His testimony also shows that the water is chilled:

> The service that Trigen Missouri Energy Corporation provides to its customers is air conditioning. The technology used to accomplish this is a closed loop piping system through which a fluid is circulated; the fluid leaves the plant at a low temperature, circulates via the pipe system through customer premises, and then is returned to the plant at a higher temperature before being refrigerated again to repeat the cycle.

Staff Conclusion

With the foregoing facts and definitions, Trigen Missouri Energy Corporation is providing "chilled water" within the meaning of that term as used by the Legislature in section 386.020(20) RSMo 2000.

While possibly a closer question, in light of the above facts describing the system and how Trigen Missouri Energy Corporation has expanded and the quoted authority, the Staff is of the view that Trigen Missouri Energy Corporation has conducted its chilled water business in such a fashion that it has held itself out as available to, and is bound to, serve the public and, therefore, falls under the jurisdiction of this Commission.

Potential Repercussions

Under section 393.190.1, RSMo 2000, if the operations of Trigen Missouri Energy Corporation are now subject to Commission jurisdiction and Thermal North America, Inc. acquires it without Commission authorization, then the acquisition is void as a matter of law. Therefore, the Staff believes that the Commission should, despite the lack of a request in the Joint Application for it to do so, make a determination now as to whether the transfer of ownership and control of Trigen Missouri Energy Corporation to Thermal North America, Inc. is not detrimental to the public, unless the Commission determines that the operations of Trigen Missouri Energy Corporation are not within the Commission's jurisdiction.

If the Commission does not determine its jurisdiction over the operations of Trigen Missouri Energy Corporation now and also does not determine whether transfer of ownership and control of Trigen Missouri Energy Corporation to Thermal North America, Inc. is not detrimental to the public, and if the subject transaction closes, the Commission could in the

future determine that it had jurisdiction over the operations of Trigen Missouri Energy Corporation at the time the transaction closed. If the Commission were to make such a future determination, then the transfer of ownership and control of Trigen Missouri Energy Corporation would be void, since the Commission would not have issued an order authorizing the transfer. Such a result is of benefit to no one.

Based on the Staff's review, including what the Joint Applicants have presented, the Staff believes that the plant investment that Trigen Missouri Energy Corporation uses to provide chilled water service was exclusively made by Trigen Missouri Energy Corporation, not contributed by customers or a third party and, therefore, would be included in rate base if chilled water rates were cost-based. Presently, Trigen Missouri Energy Corporation is providing chilled water service to customers pursuant to special contracts. The Staff has made no determination that there should be any change to these contracts or that chilled water service should only be provided through generally applicable rates and charges in tariffs rather than through special contracts, if the Commission asserts jurisdiction over this chilled water service.

WHEREFORE, the Staff recommends that, because without conditions the transaction would be detrimental to the public, the Commission not authorize the Joint Applicants to transfer of ownership and control of Trigen Kansas City Energy Corporation from Trigen Energy Corporation to Thermal North America, Inc. unless the authorization is dependent upon each of the conditions set out in the rebuttal testimonies of Staff Witnesses Phillip K. Williams (pp. 34-43), David W. Elliott (Schedule 3), and Jolie L. Mathis (pp. 2-3) being met. Further, the Staff recommends that the Commission determine that it has jurisdiction over the chilled water operations of Trigen Missouri Energy Corporation and, because without conditions the transaction would be detrimental to the public, the Commission not authorize the transfer of

ownership and control of Trigen Missouri Energy Corporation to Thermal North America, Inc. unless the authorization is dependent upon each of the same conditions set out in the rebuttal testimonies of Staff Witnesses Phillip K. Williams (pp. 34-43), David W. Elliott (Schedule 3), and Jolie L. Mathis (pp. 2-3).

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 16th day of November 2004.

/s/ Nathan Williams