

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

In the Matter of the Trigen-Kansas City Energy	)	<u><b>Case No. HR-2008-0300</b></u>
Corporation's Tariffs to Increase Rates for	)	Tariff Nos. YH-2008-0553
Customers of its Steam Service	)	and YH-2008-0554

**ORDER DENYING TRIGEN-KANSAS CITY ENERGY CORPORATION'S**  
**MOTION TO RESTRICT ACCESS TO HIGHLY CONFIDENTIAL**  
**INFORMATION**

Issue Date: May 14, 2008

Effective Date: May 14, 2008

On May 1, 2008, Trigen-Kansas City Energy Corporation ("Trigen") filed a motion requesting the Commission to issue an order preventing **any** employees, officers or directors of any party, or an affiliate of a party, from having access to Trigen's highly confidential information, and ordering that Trigen's highly confidential information may be disclosed only to the outside attorneys of record and outside experts that have been retained for the purposes of this case and who have executed an acceptable non-disclosure agreement pursuant to Commission Rule 4 CSR 240-2.135. Specifically the motion seeks to exclude Kansas City Power and Light Company's in-house attorney from viewing the HC filings in this case.

Trigen maintains that the Commission's Rule on Confidential Information, i.e. 4 CSR 240-2.135, only allows disclosure of HC information to attorneys of record and retained outside experts and does not contemplate the situation where an in-house attorney, thus a company employee, who would not normally have access to HC information, is involved in

the case. Trigen further requests the order to provide that such highly confidential information or proprietary information may only be used in the manner and for the purposes as provided in Commission Rule 4 CSR 240-2.135.

**Trigen states:**

As stated in Trigen's direct testimony filed herein on or about March 11, 2008, Trigen has only approximately 56 retail customers. Given the relatively small number of customers of Trigen as compared to the thousands of customers of KCPL, each of Trigen's customers is extremely important to Trigen's profitability and viability. Even though Trigen is regulated by the Commission, each and every one of Trigen's customers has competitive options for space heating (as well as building humidification, domestic water heating and food service applications). A primary competitive option to Trigen's steam service is KCPL's electric service. KCPL does not itself contend with any competition for the light and power portion of its customers' requirements. KCPL is also, by definition, an incumbent electric provider in each and every building in the overlapping territory of Trigen. This advantage, coupled with access by a KCPL employee (whether attorney or not) to Trigen's most sensitive (*i.e.*, highly confidential) information could result in irreparable harm to Trigen's business interests. Given that KCPL's territory completely overlaps Trigen's territory, and that KCPL is considerably larger than Trigen, allowing *any* employees (whether attorneys or non-attorneys) of KCPL (or its affiliates) access to Trigen's highly confidential information in this case would place Trigen at an extreme competitive disadvantage, as KCPL could use this information to compete with Trigen and take customers from Trigen. KCPL's past actions have demonstrated a willingness on the part of KCPL to "cherry-pick" customers of Trigen (see discussion of the GSA – Bolling Building contained in Trigen's Motion to Dismiss, Strike and Sanction filed in Case No. EE-2008-0238 on April 18, 2008).

Furthermore, it would not be sufficient to simply keep the names of Trigen's customers hidden from KCPL's (or its affiliates') employees (whether attorneys or non-attorneys) while allowing those employees access to all other information, since KCPL could easily figure out the identities of such customers given the relatively small number of Trigen customers and that KCPL already has a certain amount of knowledge due to the fact that its territory overlaps Trigen's. In addition, highly confidential information is not limited to customer specific information, but also includes employee information, marketing analyses, strategies under consideration, and additional competitive information (such as, but not limited to, fuel costs and other costs).

**On May 9, KCPL responded:**

The gravamen of Trigen's position comes down to the fact that it draws a false distinction between in-house and outside counsel. Trigen argues that the distinction is relevant because the same in-house counsel for KCPL that reviews highly confidential information in this proceeding might some day represent KCPL in commercial contract negotiations with Trigen. That argument is equally true for outside counsel [sic]. The same outside counsel that reviews highly confidential, commercially sensitive information in KCPL's rate cases might some day represent Trigen in commercial contract negotiations with KCPL. Rule 4 CSR 240-2.135(4) does not distinguish between in-house counsel for KCPL and outside counsel for Trigen.

KCPL also respectfully disagrees with Trigen's claim that "it is not clear that in-house attorneys of record (in reality, direct employees who happen to be attorneys) are precluded from having access to highly confidential information pursuant to the language of the rule." To the contrary, the rule is perfectly clear on this point. The rule provides:

(4) Highly confidential information may be disclosed only to the attorneys of record, or outside experts that have been retained for the purpose of the case.

(A) Employees, officers, or directors of any of the parties in the proceeding, or any affiliate of a party, may not be outside experts for the purposes of this rule.

Section A quoted above makes an express distinction between in-house and outside experts, *i.e.*, in-house experts do not have access to highly confidential information; outside experts hired for the case do have such access. There is no such distinction in all of Rule 4 CSR 240-2.135(4) for attorneys of record. The Commission could have treated experts and attorneys of record similarly in this regard when it promulgated the rule, but it did not. A plain reading of the rule clearly conveys that attorneys of record have access to highly confidential information, period. The rule does not distinguish between in-house and outside counsel. It should also be noted that Rule 4 CSR 240-2.135 holds in-house and outside counsel to the same standard concerning their duty to control access to and the distribution of highly confidential information.

Trigen also incorrectly claims that preventing KCPL's in-house counsel from having access to highly confidential information will not burden the Company. This is incorrect for several reasons. First, such a restriction would require KCPL to incur greater legal expenses for outside counsel than it otherwise

would. Second, KCPL intends for in-house counsel to participate in the selection of an outside expert for use in this case. Counsel needs to review Trigen's case in total to determine what skill sets it seeks in such an expert. Lastly, Trigen should not be permitted to dictate how KCPL allocates its legal resources or how in-house and outside counsel for KCPL interact. As Trigen points out, "substantial portions" of information undersigned counsel has already requested from Trigen "are deemed highly confidential by Trigen." Denying in-house counsel access to that information will greatly limit his ability to interact with outside counsel concerning the Company's legal strategy in this case.

**On May 13, 2008, Trigen responded to KCPL's response stating:**

In paragraph 3 of its Response, KCPL states that Trigen's argument is that KCPL's in-house counsel might some day represent KCPL in commercial contract negotiations *with Trigen*. This was not Trigen's argument in its Motion; Trigen's argument on this point was, and continues to be, that KCPL's in-house counsel could use – and in fact would be unable to avoid using – Trigen's confidential information in negotiations *with customers*, be they existing or potential customers of KCPL, not in negotiations with Trigen.

KCPL's Response also denies that there is any distinction between in-house counsel and outside counsel; such a denial flies in the face of common sense and simple logic. If nothing else, proximity to other KCPL employees distinguishes in-house counsel from outside counsel. For easy example, if in-house counsel had a document on his desk and another KCPL employee walked into the office while he was away from the desk, such employee might well be able to view such document. Such an inadvertent disclosure could not occur in the case of outside counsel, since outside counsel offices are not shared with KCPL employees. Furthermore, while KCPL claims the Commission's rule on confidential information (4 CSR 240-2.135) is clear in regard to attorneys, although some subsections of the rule may distinguish between attorney employees and non-attorney employees, subsection (6) makes no such distinction and simply refers to "[a]ny employee of a party." Therefore, as stated in Trigen's Motion, it is not clear that in-house attorneys of record are or are not precluded from having access to Highly Confidential information. In any event, for the reasons set forth in Trigen's Motion, in the instant case the Commission should issue an order preventing *any* employees (whether or not they are attorneys) of KCPL (or its affiliates) from having access to the highly confidential information of Trigen produced in this case.

**Commission Rule 4 CSR 240-2.135 provides, in pertinent part:**

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(3) Proprietary information may be disclosed only to the attorneys of record for a party and to employees of a party who are working as subject-matter experts for those attorneys or who intend to file testimony in that case, or to persons designated by a party as an outside expert in that case.

(A) The party disclosing information designated as proprietary shall serve the information on the attorney for the requesting party.

(B) If a party wants any employee or outside expert to review proprietary information, the party must identify that person to the disclosing party by name, title, and job classification, before disclosure. Furthermore, the person to whom the information is to be disclosed must comply with the certification requirements of section (6) of this rule.

(C) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as proprietary.

(4) Highly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case.

(A) Employees, officers, or directors of any of the parties in a proceeding, or any affiliate of any party, may not be outside experts for purposes of this rule.

(B) The party disclosing highly confidential information, may, at its option, make such information available only on the furnishing party's premises, unless the discovering party can show good cause for the disclosure of the information off-premises.

(C) The person reviewing highly confidential information may not make copies of the documents containing the information and may make only limited notes about the information. Any such notes must also be treated as highly confidential.

(D) If a party wants an outside expert to review highly confidential information, the party must identify that person to the disclosing party before disclosure. Furthermore, the outside expert to whom the information is to be disclosed must comply with the certification requirements of section (6) of this rule.

(E) Subject to subsection (4)(B), the party disclosing information designated as highly confidential shall serve the information on the attorney for the requesting party.

(F) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as highly confidential.

(5) If any party believes that information must be protected from disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

(6) Any employee of a party that wishes to review proprietary information, or any outside expert retained by a party that wishes to review highly confidential or proprietary information must first certify in writing that he or she will comply with the requirements of this rule.

(A) The certification must include the signatory's full name, permanent address, title or position, date signed, the case number of the case for which the signatory will view the information, and the identity of the party for whom the signatory is acting.

(B) The signed certificate shall be filed in the case.

(C) The party seeking disclosure of the highly confidential or proprietary information must provide a copy of the certificate to the disclosing party before disclosure is made.

(7) Attorneys possessing proprietary or highly confidential information or testimony may make such information or testimony available only to those persons authorized to review such information or testimony under the restrictions established in sections (3) and (4).

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**(16) All persons who have access to information under this rule must keep the information secure 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.** This rule shall not prevent the commission's staff or the Office of the Public Counsel from using highly confidential or proprietary information obtained under this rule as

the basis for additional investigations or complaints against any utility company. (emphasis added)

**Decision**

The Commission's rule is clear and unambiguous with regard to who can have access to highly confidential information and how that information may be used. Moreover, the rule has adequate safeguards for protecting access to and the use of that information. Trigen's motion shall be denied.

**IT IS ORDERED THAT:**

1. Trigen-Kansas City Energy Corporation's "Motion for Order Restricting Access to Highly Confidential Information," filed on May 1, 2008, is hereby denied.
2. This order shall become effective on May 14, 2008.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

(S E A L)

Harold Stearley, Regulatory Law Judge,  
by delegation of authority pursuant to  
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 14th day of May, 2008.