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April 6, 2005

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

**FILED<sup>3</sup>**

APR 06 2005

Missouri Public  
Service Commission

Re: Case No. HC-2005-0331

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of Post Hearing Brief of Intervenor City of Kansas City.

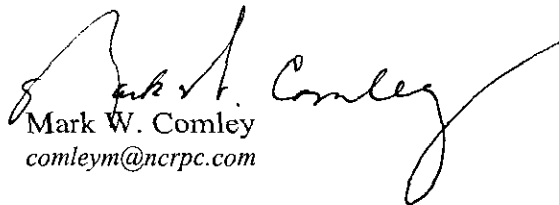
Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
Mark W. Comley  
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MWC:ab

Enclosure

cc: Office of Public Counsel  
General Counsel's Office  
William Geary  
Morris Woodruff  
All parties of record

APR 06 2005

Missouri Public  
Service Commission

COUNTY OF JACKSON, MISSOURI, )

COMPLAINANT )

v. )

TRIGEN-KANSAS CITY ENERGY )  
CORP. )

and )

THERMAL NORTH AMERICA, INC. )

RESPONDENTS )

CASE NO. HC-2005-0331

**POST HEARING BRIEF OF  
INTERVENER CITY OF KANSAS CITY**

On March 31, 2004 the Commission ordered Trigen-Kansas City Energy Corp. and Thermal North America, Inc. (collectively herein "Trigen") not to cut its steam loop in Kansas City on April 2, 2005 as directed by the City of Kansas City (the "City"). No hearing preceded the order. The Commission cited as authority Section 386.310.1.<sup>1</sup> This section grants the Commission authority to require a public utility to maintain and operate its system "in such manner as to promote and safeguard the health and safety of its employees, customers, and the public." The statute also provides:

The commission may waive the requirements for notice and hearing and provide for expeditious issuance of an order in any case in which the 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. [emphasis supplied].

<sup>1</sup> All statutory citations herein are to RSMo 2000 unless otherwise indicated.

The Commission's hearing on April 4, 2005 was held "to take evidence and argument on the question of whether Trigen will be able to provide safe, reliable, and adequate service if its steam loop is cut." The Commission also directed the parties to be prepared to address the "question of whether the Commission has the authority to grant the relief requested by Jackson County.

### **SUMMARY OF THE TESTIMONY**

The City of Kansas City is involved in the construction of a civic arena (Sprint Center) that has been designed to seat 17,000. It will consume every inch in an eight acre area bounded on the north by 13<sup>th</sup> Street, on the south by Truman Road; on the west by Grand Avenue and on the east by Oak Street. As of the time of hearing, this project was already beyond its early phases. (Tr. 157-159)

Franchised utilities in the City were advised that as part of the erection of the Sprint Center, underground utilities in the arena footprint would need to be relocated. Trigen is the beneficiary of a franchise from the City of Kansas City. (Ex. 7). Franchises to utilities are governed by provisions of the Charter of Kansas City. Trigen received notice that its lines would need to be relocated on or about October 19, 2004 by letter from Mr. Ralph Davis, the City's Project Manager for the Sprint Center (Ex. 4). Trigen was again advised of the need to relocate its lines by letter from Mayor Kay Barnes and City Manager, Wayne Cauthen, on October 27, 2004. (Ex.5) The City set a deadline of March 1, 2005 for relocation of the lines.

On February 22, 2005, Mr. Brian P. Kirk, Trigen's manager, sent customers notice of the City's directive that its lines should be removed. (Ex 6). In that notice Trigen described the actions it would be taking and advised of the outage that may affect the customers. In order to comply with the City's ordinances, Trigen intends to sever the steam loop and cap the lines while removing approximately 800 feet of the main. After severance, the system will no longer be a looped system, but will rather be a "radial" system at least for the short term (Tr. 38)

Trigen operates other central steam generating and distribution systems. Three were identified at hearing as radial systems. Trigen operates radial systems in Trenton, New Jersey, Oklahoma City, Oklahoma and Tulsa, Oklahoma. All are considered reliable systems. The system in Tulsa is considered by Mr. Kirk to be a "highly reliable system." (Tr. 38)

Complainant Jackson County is a Trigen customer. Its courthouse and jail are served by a radial line off the current Trigen loop. At hearing the County called three witnesses. Its first was Brian Kirk who explained the current layout of the Trigen system, (Tr. 25) the Company's intentions to cap the lines and remove the line per the direction of the City. (Tr. 64) He also outlined a proposed course for an alternate route to reconfigure the loop in the future. (Tr. 65-66) He also confirmed that after the severance of the loop and the capping of the terminals, the system would remain safe, reliable and adequate. During cross examination, he testified that the Trigen loop presently operates at 99.98% reliability. After the severance of the loop and capping of the lines he testified that the system will operate within the range of the Tulsa system, which operates at 99.8% (Tr.

69), and would not fall below 99.50% (Tr. 70). He testified that as a consequence of the severance, the company anticipated no greater likelihood of ruptures to the line, increased maintenance to the lines or any service interruptions. (Tr. 67-68). In general, he knew of no "rolling heat out" for any district heating system like Trigen's. (Tr.70)

The County also called Bruce Palmer who is the Facilities Manager of the County. Mr. Palmer is an architect (Tr. 87) not an engineer (Tr. 95) and has no background in the design and operations of district heating systems. (Tr. 95) He testified to a number of services the county supplies, including the custody of charged or convicted felons (Tr. 89) and the need for uninterruptible steam service for county court systems (Tr. 103). He testified that he believed that redundant reliability of Trigen's steam system was critical to county operations. (Tr. 92)

Katheryn Shields, County Executive for the County, was also called. She testified that she believed the non looped system would be a less reliable system than the looped system; (Tr. 109) that the district heating and cooling system for the Kansas City area is a benefit to the City (Tr. 108); that other customers might be affected by outages or interruptions on the system if it is a radial system (Tr. 109) and that this may influence economic growth in the City.<sup>2</sup> (121-122) She admitted on cross examination that the steam system was safe at this time, and that it would remain safe after the severance of

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<sup>2</sup> It appeared during Ms. Shields testimony that she disagrees with how the City of Kansas City has approached the construction of the Sprint Center and she may have other objections to the manner in which the City pursues economic development in the city including how the district heating system can be utilized as an economic development tool. The Public Service Commission Law does not recognize those objections as a basis for complaint against a public utility. Section 386.390.

the loop, (Tr. 119) but that severance had the potential of causing a negative impact in the future (Tr. 120).

The County also called Mr. Graham Morris who is the Director of the Corrections Department of for the County. (Tr. 139) He explained the services the County must provide to meet constitutional requirements. His chief concern was that when the loop was severed, the radial system that resulted would not be able to reach the temperatures required for proper dishwashing temperatures and laundering of inmate garments. (Tr. 144-145).

Warren Wood, Energy Department Manager in the Utility Operations Division of the Commission, was called by the staff. (Tr. 188) Mr. Wood is a licensed professional engineer and testified that after the Commission entered its order last Thursday, he dispatched staff and others to investigate the claims of unsafe or inadequate service raised in the complaint. (Tr. 189) He testified that in his opinion the Trigen steam distribution system would be safe and adequate after the severance of the loop. (Tr. 190) On cross examination he confirmed that the measures to be taken by the Company in complying with the City's directives would not render the system unsafe or inadequate and even though the severance would diminish the reliability of the system, it would not create an unreliable system. (Tr. 191).

The City called Mr. Ralph Davis, who was identified above, and who testified in general to the progress of construction of the arena, the parties involved in the effort, the schedule of construction and the urgency of completing the relocation of buried utilities

in this arena area. He testified to the nature of the penalties or additional charges faced by the City and its civic partners if Trigen's lines were not removed in time. (Tr. 170)

## **ARGUMENT**

**A. Trigen's service in Kansas City will continue to be safe, reliable and adequate when the loop is severed and the lines capped.**

At paragraph 7 of its complaint, the County alleges that "[w]ith the steam system no longer being looped, Trigen would no longer be providing safe, reliable and adequate service as required by law." The County had earlier cited Section 393.130 in this paragraph which provides in part:

1. 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.

In order to prevail on its complaint and in order to have any justification for seeking a permanent order either from this Commission or the appropriate circuit court, the County must prove that the alterations Trigen intends to make on its system will render it unsafe or inadequate. The County failed in that effort.

The unassailable proof in the record is that 1) radial systems are in place for other central heating configurations; 2) that radial systems are safe, reliable and adequate; 3) Trigen has a record of operating radial systems safely, reliably and adequately; 4) after Trigen converts its looped system in Kansas City to a radial system, it will operate at the level of 99.5% reliability as opposed to 99.85% reliability, a difference of .35%; 5) the system is safe now and will not pose a danger or imminent threat of serious harm to the

lives or property of the employees or customers of the Company when the loop is severed and the lines are capped.

Not one qualified expert witness testified that elimination of the loop in Trigen's system will render it inadequate or unsafe. The County's witnesses voiced concerns over the future of the system, but their testimony is no more than a concerned citizen's voice. No experts were called to dispute Mr. Kirk or Mr. Wood in their professional assessment of the effects of altering Trigen's system.

The County's theory appears to be that if it shows a particular alteration to a public utility's delivery system will render it "less reliable" than before the alteration, then it has established a violation of the Section 393.130.1. Presuming for argument only that "reliability" is related to "adequacy" in this statute, the Commission should not adopt a standard of comparisons in applying Section 393.130. For some, it would be arguable that a nuclear generation plant connected to a transmission grid is the most adequate of service alternatives compared to a coal plant connected to the same facilities. Others may argue that a coal plant is safer, more reliable and more adequate than a nuclear based system, and others would argue that wind power is the only way in which electrical energy can be safely and adequately delivered. In truth, each of these systems can be regulated, and configured to independently provide a customer base with safe and adequate energy. To hold every utility to a gold standard of delivery would unnecessarily increase the costs of utility service. Every utility does not need to install every conceivable safety or delivery device for its service. The statute requires safe and adequate service and also requires **just and reasonable facilities**, not extraordinary



facilities. In this matter, Trigen can comply with the statute even though its system is converted (temporarily) to a radial system.

The record will support findings that a looped system may be preferred by customers and companies alike; may enhance the conveniences for customers; may reduce customer interruptions caused by emergencies, but the record confirms that a radial system is still adequate and can be safely operated. The County has tried to invent gloom where none exists.

The record does not support a finding that the severance of the loop or the capping of the lines by Trigen will pose an imminent threat to the lives and property of the employees or customers of the company. Therefore, there is no basis upon which to enter an order stopping Trigen from complying with the City's ordinances. The Commission's order of March 31, 2005 ordering Trigen not to cut the main steam loop was improvidently granted and should be dissolved immediately.

**B. Ratemaking treatment of Trigen's costs of relocating its steam mains is beyond the scope of the complaint.**

At paragraph 11 and again at paragraph 16 of its complaint, Jackson County alleges that the owners of the arena project should bear Trigen's cost of severing its lines, moving those lines and later providing an alternative loop. The County also claims that Trigen should be ordered to litigate with the owners of the arena to shift those costs to the owners. The County asks for an order directing Trigen to not only negotiate with, but also institute litigation against, the arena project owners to impose the relocation costs elsewhere. This gives every indication that the complaint is not really about the safety or

adequacy of the steam system but rather is about an expected rate impact. The County's concerns about Trigen's rates for service are premature and should be disregarded.

At hearing, Cary Featherstone was called by the Staff to explain his initial impression of the recommendation Staff would make if Trigen brought this matter to the Commission in a rate case. In short, he testified that staff would recommend disallowance of the costs of relocation and the rejoining of the loop since the "cost causer" should bear the cost, meaning the City of Kansas City. (Tr. 202-203)

On cross examination Mr. Featherstone acknowledged that consideration of those costs first depends upon Trigen bringing a rate case and including the costs of relocation and any costs of reconnecting the loop as part of its request for relief. (Tr. 204-205) He also acknowledged that filing for rate relief was the company's option; that it was possible the company may not bring a rate case and if it did, it may not include the relocation and associated costs as part of the package. He affirmed that as far as treatment of these costs it should be reserved for a rate case in the future. (Tr. 206)

The issue of whether and how Trigen's rates will reflect the costs of relocating its lines as directed by the City is, as Mr. Featherstone confirmed at hearing, a matter reserved for the processes and procedures of a rate case brought by Trigen pursuant to Commission rule and Section 393.150. The rate case would explore and consider "all relevant factors" not just the costs the Company claims to have incurred in connection with the relocation of its lines in obedience to its franchise with the City. The County's complaint raises no objection to present contracts or rates and furthermore, lacks the requisite twenty five complainants under Section 386.390.1. to assert a rate complaint.

The rate effect, if any, customers may experience as a result of Trigen's compliance with City ordinances is beyond the scope of the complaint and should not be considered by the Commission.

Additionally, Trigen operates its system within the public rights of way of the City of Kansas City which has the lawful and absolute control of their use. Trigen obtained a franchise from the City for purposes of constructing and operating steam or chilled water lines; it was not required to condemn the easements or other rights in property it needs to provide safe and adequate service. The City's franchise has saved Trigen significant expense in providing service. The terms of the franchise and the City charter provisions governing those franchises leave no room for doubt that

[a]ll rights granted [by the City] for the construction and operation of public utilities shall be subject to the continuing right of the council to require such reconstruction, relocation, change or discontinuance of the appliances used by the utility in the streets, alleys, avenues, highways, parks and public places of the city, as shall in the opinion of the council be necessary in the public interest.

Charter of the City of Kansas City, Article XV, § 409. The right of the council to require relocation is unconditional. This charter section, as well as the terms of the franchise issued to Trigen (Ex. 7), contain no suggestion that relocation orders are subject to City reimbursement for costs of relocation. The Commission has no authority to negate or nullify the terms of the city's franchise with Trigen. The Commission's entry of the order requested by the County would be meaningless.

- C. On the evidence alone the Commission may deny the relief requested in the Complaint. Moreover, the Commission lacks authority to enter the relief requested by Jackson County.**

The County has requested the Commission to enter an order:

Ordering Trigen to cease and desist from cutting and capping its steam lines and removing a portion of this steam main, thereby severing the steam loop, until such time as Trigen has built an alternate steam main route that would be capable of providing continuous operation of the steam loop without interruption immediately upon the removal of its lines on McGee Street and 14<sup>th</sup> Street for the arena project;

The County premises its request for this order on Section 386.310. Section 386.310 is a "safety" statute. It grants the Commission authority to insist on and order safety measures if the actions of a public utility are such that an imminent threat to life or property exists. Under this law that gives authority to the Commission to take extraordinary measures to assure safety, the County requests an order that preserves the perceived reliability of the system, not its safety. Although this brief has already developed the argument, it bears repeating that the evidence established that no imminent threat to anyone is anticipated by Trigen's severance of the line and capping its terminals. The powers of the Commission in Section 386.310 have not been triggered. On the basis of the evidence, the County is not entitled to the relief it requests.

As indicated earlier in this brief, the County has also requested a Commission order

Requiring Trigen to negotiate and , if necessary, institute litigation for the purpose of imposing upon the arena project and its owners, the costs of cutting Trigen's steam mains, the removal of the steam mains and the relocation of the steam mains to provide an alternate steam loop;

What has been written already suffices to support the conclusion that rate relief of this nature is reserved for the rate case which Trigen may or may not file, or the rate issue that Trigen may or may not raise. No rate case has yet been filed, and treatment of this matter is beyond the scope of the complaint.

Even though the evidence in the record alone supports denial of the relief requested by the County, it is also certain that as a matter of law, the County's complaint should be dismissed. In this respect, the City incorporates by reference herein the suggestions it printed in support of its motion to dismiss the complaint.

### **CONCLUSION**

The County's complaint is based entirely upon conjecture and speculation. The record is devoid of any present danger, or future danger, to the health or safety of any person-- whether they are employed by or customers of Trigen---resulting from Trigen's severing of the loop and relocating its mains in compliance with City ordinance. The County has supplied the testimony of worried officials who admit to no other qualifications but their official positions. There has been no proof that the system will be anything other than safe and adequate after the loop is severed. The proof shows that a radial system is safe and adequate, and as Trigen's record with other radial systems will affirm, there is every reason to believe that the system in Kansas City will be safe and adequate even though it remains a radial system.

The Commission has limited powers. The County's complaint asks for Commission relief that exceeds the Commission's powers and interferes with the City's rights to control its rights of way and enforce the clear terms of the franchises it issues.

Based on the above and foregoing, the Commission should 1) immediately dissolve its order enjoining Trigen from cutting its steam loop and capping the terminals; and 2) dismiss the complaint.

Respectfully submitted,

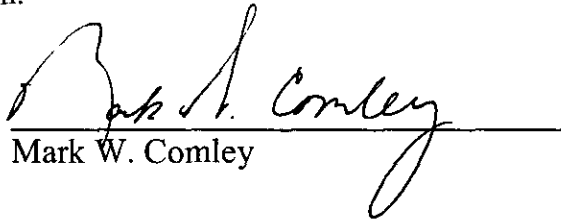


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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 6th day of April, 2005 to Morris Woodruff at morris.woodruff@psc.mo.gov; Office of General Counsel at gencounsel@psc.mo.gov; Office of Public Counsel at opcservice@ded.mo.gov; Paul DeFord at pdeford@Lathropgale.com; and Jeremiah Finnegan at jfinnegan@fcplaw.com.



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