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AREA CODE 314
342-0532

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FILED

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Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Judge
Missouri Public Service Commission
Harry S Truman Building
301 W. High Street, 5th Floor
Jefferson City, MO 65101

RE: Case No. HX-99-443

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding is an original and fourteen copies of a "Motion to Adopt Contested Case Procedures" filed by Laclede Gas Company, Missouri Gas Energy, Trigen-Kansas City Energy Corporation and Associated Natural Gas Company. Please file stamp the extra copy of this pleading which I have enclosed and return it to me in the enclosed self-addressed, stamped envelope. Thank you for your assistance.

Sincerely,

Michael C. Pendergast
Associate General Counsel

MCP:af

cc: All parties of record

Enclosure

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Proposed Affiliate Transaction Rules for Steam Heating Companies	)	Case No. HX-99-443
In the Matter of the Proposed Affiliate Transaction Rules for Gas Corporations	)	Case No. GX-99-444
In the Matter of the Proposed Marketing Affiliate Transaction Rules for Gas Corporations	)	Case No. GX-99-445

MOTION TO ADOPT CONTESTED CASE PROCEDURES

COME NOW Associated Natural Gas Company, Laclede Gas Company, Missouri Gas Energy and Trigen-Kansas City Energy Corporation (hereinafter "Joint Movants") and, in support of their Motion to Adopt Contested Case Procedures in the above-captioned cases, state as follows:

1. On June 1, 1999, the Commission caused to be published in the Missouri Register four proposed rules. Three of the proposed rules would establish extensive standards and requirements to govern how gas, electric and steam heating utilities, respectively, may engage in affiliate transactions. These include a broad array of financial and evidentiary standards, various recordkeeping requirements, and specific standards of conduct prescribing the conditions under which these utilities must render public utility service to their customers. The fourth proposed rule issued by the Commission prescribes, among other things, standards of conduct to govern the conditions under which gas utilities with marketing affiliates must render public

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utility service. The proposed rules addressing affiliate transactions for steam heating and gas utilities, and marketing affiliate transactions for gas utilities, which are the subject of this pleading, are hereinafter collectively referred to as the "Proposed Rules."

2. In the notices accompanying the Proposed Rules, the Commission indicates that interested parties may file initial comments within thirty days of the publication of the Proposed Rules and reply comments thirty days thereafter. The notices also indicate that a one day public hearing will be held in connection with each of the Proposed Rules, during which interested persons may "appear and respond to commissioner questions."

3. As discussed below, the procedures adopted by the Commission for promulgating any final rules in these proceedings are deficient and inadequate as a matter of law, and as a matter of sound public policy. Simply put, the far reaching matters addressed by the Proposed Rules are too important to the long-term future of the energy industry in Missouri, and to the interests of utility consumers in general, to be resolved without the type of rigorous examination afforded by the use of contested case procedures. In view of these considerations, the Commission should modify its procedures for these dockets in accordance with the recommendations set forth herein.

Why Procedures are Inadequate as a Matter of Law

4. In each of its Proposed Rules, the Commission cites Sections 386.250 (RSMo. Supp. 1998) and 393.140 (RSMo. 1994) as authority for the Commission's promulgation of such rules. Each of these statutory sections, or subparts thereof, relate in some degree to the matters addressed by the Commission's Proposed Rules.[1] For example, subsection (6) of Section 386.250 confers authority on the Commission to adopt rules which "prescribe the conditions of rendering public utility service, disconnecting or refusing

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[1]Although the statutory provisions cited by the Commission may address the same general subject matter covered by the Proposed Rules, a number of those provisions actually operate to cast substantial doubt on the lawfulness of at least some aspects of the Proposed Rules. For example, subsection (12) of Section 393.140 (RSMo. 1994) specifically provides that the non-utility business activities of electric and gas utilities shall not be subject to the provisions of Chapter 393 or the regulatory authority of the Commission so long as such activities are kept substantially separate from their jurisdictional activities that are subject to regulation. The Proposed Rules contain a number of provisions, particularly in the area of recordkeeping and access to affiliate information, that would directly violate the clear meaning of this statutory provision by requiring access to the records of an affiliate, which by virtue of its function or corporate structure, conducts activities that are substantially separate from the utility's jurisdictional business. In addition to the procedural and substantive flaws addressed herein, Trigen-Kansas City Energy Corporation also believes there are additional reasons why the Commission lacks authority to adopt the Proposed Rules which have been issued in connection with steam heating companies. Such additional reasons will be addressed separately in Trigen's Comments in the rulemaking proceeding involving those companies.

to reconnect public utility service and billing for public utility service." Obviously, by specifying various standards of conduct to govern how utilities should provide utility services in order to avoid any preferential or discriminatory treatment, each of the Commission's Proposed Rules purports to "prescribe the conditions of rendering public utility service." Similarly, consistent with some provisions of the Proposed Rules, subsection (5) of Section 393.140 authorizes the Commission to investigate whether the rates or practices of a gas or electric utility are unjustly discriminatory or unduly preferential and, in the event it finds that they are, to order changes in such rates and practices. Subsection (8) of Section 393.140 also touches upon matters relating to some of the recordkeeping requirements set forth in the Proposed Rule in that it confers upon the Commission the power to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."

5. Although the statutory provisions cited above address substantive matters that are similar to those covered by the Proposed Rules, they do not provide authority for the Commission to promulgate rules in these areas in the manner that the Commission has chosen to do so in this instance. For each of these statutory provisions also contains specific directives on how such authority must be exercised. Of particular significance here is the fact that <u>they all require that the Commission conduct a hearing before it takes</u>

any action in these areas. Thus, subsection (6) of Section 386.250 specifies that before the Commission may adopt any rules prescribing the conditions of rendering utility service "...a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule." (Emphasis supplied). To ensure that the evidentiary purposes served by such a hearing are actually fulfilled, subsection (6) also mandates that the rules promulgated by the Commission must be "supported by evidence as to reasonableness." Like subsection (6) of Section 386.250, subsections (5) and (8) of Section 393.140 also specify that the Commission may only exercise its authority in those areas after a hearing.

6. Because a hearing is clearly and unambiguously required before the Commission may exercise the authority upon which it has relied in issuing the Proposed Rules, the instant proceeding must be considered a "contested case" under Missouri law. Under Section 536.010 (2) (RSMo. 1994) of the Administrative Procedure Act, a contested case is defined as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."[2] All of the

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[2]It should be noted that Missouri courts have broadly interpreted the phrase "required by law" as encompassing any
(Footnote Continued)

elements of this statutory definition are fully satisfied in this case.

7. To begin with, it is clear that each of the docketed cases initiated by the Commission to consider its Proposed Rules qualifies as a "proceeding before an agency." It is equally clear that the Proposed Rules would determine the "legal rights, duties or privileges of specific parties." Indeed, the Proposed Rules on their face purport to impose extensive duties and substantially redetermine, in numerous ways, the rights of the specific gas and steam heating utilities that are subject to the Commission's regulatory jurisdiction. Moreover, the degree to which the duties and rights of specific parties would be determined is further illustrated by the fiscal notes which accompany the Proposed Rules. If nothing else, they demonstrate in concrete terms how the costs incurred by these specific utilities would be increased in the event the additional duties mandated by the Proposed Rules were, in fact, adopted and imposed. Finally, for the reasons discussed above, it is clear that the rights, duties and privileges addressed by the Proposed Rules are "required by law to be determined after hearing." In view of

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(Footnote Continued)
statute, ordinance or provision of the State or Federal Constitutions that mandates a hearing. State ex rel. Yarber v. McHenry, 915 S.W.2d 325, 328 (Mo. banc 1995).

these considerations, this proceeding must be treated as a contested case as a matter of law.[3]

8. Since the instant proceeding clearly qualifies as a "contested case" under Missouri law, the full range of procedural rights and requirements applicable to a contested case must be observed in this proceeding. Among others, these include: (1) the right to receive notice (Section 536.067 (RSMo. Supp. 1998)); (2) the right to conduct discovery through the use of various discovery mechanisms (Sections 536.073 (RSMo. Supp. 1998) and 536.077 (RSMo. 1994)); (3) the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses and to rebut opposing evidence (Section 536.070(2) (RSMo. 1994)); (4) the right to have all oral evidence received only on oath or affirmation (Section 536.070(1) (RSMo. 1994)); (5) the right to have a printed transcript of all proceedings

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[3]Another hallmark of a contested case within the meaning of the Administrative Procedure and is that the proceeding in question is "adversarial in nature." Conlon Group, Inc. v. City of St. Louis, 944 S.W.2d 954, 957 (Mo. App. W.D. 1997). Anyone with even a passing familiarity of how this proceeding evolved knows that the provisions of the Proposed Rules, including whether they are needed, whether they would serve their intended purpose, whether and to what extent they are lawful, and whether they promote or damage the public interest, have been and will continue to be hotly contested by the Commission Staff and the Office of the Public Counsel on the one hand and the regulated utilities on the other. Under such circumstances, it is simply not possible to conclude that this proceeding is anything but "adversarial in nature."

(Section 536.070(4) (RSMo. 1994)); (6) the right to present oral arguments or written briefs at or after the hearing (Section 536.080.1 (RSMo. 1994)); (7) the right to have all portions of the record which are cited by the parties in the oral argument or briefs reviewed and considered by each official of the agency who renders or joins in rendering a final decision (Section 536.080.2 (RSMo. 1994)); and (8) the right to a final written decision accompanied by findings of fact and conclusions of law (Section 536.090 (RSMo. 1994)).

9. It is obvious that the procedures currently contemplated by the Commission for addressing its Proposed Rules do not begin to comply with these procedural requirements. There is nothing in the Notices accompanying the Proposed Rules to suggest that parties will be permitted to conduct discovery, cross-examine opposing witnesses, introduce evidence, rebut the evidence of opposing parties, or present oral arguments or written briefs upon conclusion of the one-day hearings scheduled in these cases.

10. Nor are the procedures adopted by the Commission in any way conducive to the exercise of such rights. The only pleading provided for in this proceeding that is comparable to a brief or the summary that might be provided in an oral argument are the comments and reply comments that parties are entitled to file within thirty and sixty days, respectively, of the issuance of the Proposed Rules. Unlike briefs or oral argument, however, these comments must be submitted before

any significant discovery could possibly be completed (assuming discovery is even permitted) and before the factual contentions of those who favor or oppose the rule could be tested in an evidentiary hearing. Moreover, the one day hearings themselves are obviously not designed to permit the introduction and testing of evidence, limited as they are to the making of oral statements that will presumably be subject solely to questions from the bench. Indeed, any meaningful opportunity to present and test evidence on the numerous and complex matters addressed by the Proposed Rules could not possibly be exercised in a single day of hearings.

11. In view of these considerations, it is clear that the procedures adopted by the Commission in this proceeding are inadequate under relevant Missouri law. The Commission should accordingly revise such procedures in a manner that will afford all interested parties the requisite level of due process required for a contested case.

Why Procedures are Inadequate as a Matter of Sound Public Policy

12. In addition to being inadequate as a matter of law, the procedures adopted by the Commission in this case are also inadequate as a matter of sound public policy. Simply put, the matters addressed by the Proposed Rules are too far reaching and too critical to the long-term future of the energy industry in Missouri, and the consumers who depend on it, to be resolved through the highly abbreviated and clearly

insufficient procedures adopted by the Commission in this case.

13. The Proposed Rules would do nothing less than establish all of the ground rules, potentially for years to come, by which every regulated gas and steam heating utility in the state of Missouri would be permitted to engage in unregulated activities, either through the utility itself or through the use of utility assets by an affiliate. To that end, the Proposed Rules contain numerous provisions that would determine how utilities must conduct themselves in competitive situations, how transfers of assets to unregulated operations or affiliates must be priced, what type of records must be maintained by the utility, and what structural changes in the operations of the utility must be made to "prevent subsidization or discrimination." As evidenced by the fiscal notes attached to the Proposed Rules, the direct costs imposed on utilities (and ultimately their customers) to comply with these numerous and complex requirements would be substantial, ranging into the millions of dollars. Moreover, the indirect costs imposed on utility customers and consumers in general could be even higher, given the degree to which the Proposed Rules would effectively foreclose utilities from offering consumers competitive alternatives in various markets, and limit their ability to manage utility assets in the most efficient manner possible.

14. Despite the expansive scope and long-term significance of the matters addressed by the Proposed Rules, and their substantial cost impact on Missouri utilities and consumers alike, the procedures adopted by the Commission to consider these issues fall well short of those that would normally be afforded to litigate a minor ratemaking issue in a utility rate case. Regardless of where one stands on the merits of the important matters at issue in these cases, it is simply not tenable to argue that they should be resolved in such a summary manner. The obligation to determine what will, in fact, serve the public interest is a difficult task, particularly when issues are as complex as those presented in these proceedings. If that obligation is to be properly discharged in these cases, however, public policy demands that it be undertaken through use of the very contested case procedures that have been developed and employed to arrive at that result in so many other proceedings before this Commission. Simply put, the matters addressed by the Proposed Rules are too important to Missouri utilities and their customers to be decided based on the limited and untested information that would be provided under the procedures currently in place.

WHEREFORE, for the foregoing reasons, Associated Natural Gas Company, Laclede Gas Company, Missouri Gas Energy, and Trigen-Kansas City Energy Corporation respectfully request that the Commission revise its procedures in these cases to

afford all parties the procedural rights mandated for contested cases by Missouri law and the public policy considerations discussed herein.

Respectfully submitted,

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