

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

Trigen-Kansas City Energy Corporation's)	
Application for Expansion of its Certificate of)	
Convenience and Necessity to Provide Steam)	Case No. HA-2006-0294
Heat Service in Kansas City, MO)	

MGE'S PREHEARING BRIEF

COMES NOW Missouri Gas Energy ("MGE"), by counsel, and, pursuant to the Order Adopting Procedural Schedule entered herein, files this prehearing brief and respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

On January 10, 2006, Trigen-Kansas City Energy Corporation ("Trigen") filed an application requesting that the Commission grant it a Certificate of Convenience and Necessity ("CCN") to construct, install, own, operate, control, manage, and maintain a steam heat distribution service for the public in Kansas City, Jackson County, Missouri. Trigen requests a CCN for an expanded area adjacent to the area currently certificated to it in downtown Kansas City as further described in appendices A and B attached to Trigen's application.

A. Should the Commission grant Trigen's requested CCN as an expansion of its current service territory as being "necessary or convenient for the public service" pursuant to Sections 393.170 and 393.290?

In its application, Trigen avers that the proposed service area does not have other steam heat suppliers at present. MGE, however, as a "gas corporation" and "public utility," serves the area pursuant to a CCN issued to it by the Commission. MGE serves numerous customers within the area for which Trigen seeks a CCN, and MGE is unaware of any customer in that area whose heating-related energy needs have not been met, or are not capable of being met, by MGE as a supplier of natural gas. As such, there does not appear to be a need for Trigen's service, and the granting of the requested CCN to Trigen will create unnecessary duplication of services.

Additionally, because MGE has already invested in the infrastructure to serve many customers in this area, granting the requested CCN to Trigen may cause revenue losses for MGE and result in under-utilization of MGE's investment, all to the detriment of MGE and its customers. Loss of gas service revenue from customers being targeted by Trigen may have a detrimental impact on the remainder of MGE's customer base.

When reviewing CCN requests, the Commission has traditionally looked at a variety of factors, including whether there is a need for the service and whether the requested CCN will create unnecessary duplication of services. In *In Re Tartan Energy*,¹ the Commission articulated the legal standard to be met by applicants for a CCN:

- 1) there must be a need for the service,
- 2) the applicant must be qualified to provide the service,
- 3) the applicant must have the financial ability to provide the service,
- 4) the applicant's proposal must be economically feasible, and
- 5) the service must promote the public interest.

Generally, positive findings with regard to factors 1-4, will, in most instances, support a finding that an application for a CCN will promote the public interest. *In Re Tartan Energy* at 189. It is, of course, Trigen's burden to prove that it satisfies this standard.

The Courts of Appeals have articulated the standard and policy similarly to the Commission. See *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri*, 848 S.W.2d 593, 597-598 (Mo.App. W.D. 1993) (what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service), and *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission of Missouri*, 600 S.W.2d 147, 154, 156 (Mo.App. W.D. 1980) (any harm to the utility, as opposed to the public interest, is of only secondary importance in determining whether the requested CCN should be granted).

¹ September 16, 1994, GA-94-127, 3 Mo. P.S.C. 3d 173, 177.

Further, “(t)he fact that one does not desire to use present available service does not warrant placing in the field a competing utility. . . . Public convenience and necessity requires the availability of service and when that exists and is complete and reasonable and pursuant to law, the regulatory body has a duty to preserve it for public use.” *People's Telephone Exchange v. Public Service Commission*, 186 S.W.2d 531, 536 (Mo.App. 1945).

In his testimony, Staff witness V. William Harris defines “public” as at least those consumers taking and receiving utility service from Trigen’s steam operations in downtown Kansas City, and he defines “public interest” as referring to the nature and level of the impact or effect that the proposed expansion of Trigen’s steam operations will have on Trigen’s customers. In fact, Mr. Harris seems to be arguing that the Commission should deny Trigen’s application only if the requested CCN would “result in adverse or negative impacts to Trigen’s existing steam customers.” (Harris Rebuttal, p. 6) The legal standards to be applied by the Commission, however, are not so narrowly defined.

Missouri Gas Energy has a considerable customer base in the proposed Trigen expansion area. (Noack Surrebuttal, p. 4) Those customers include all classes of customer including Residential, Small General Service, Large General Service and Transportation. (*Id.*) It is not enough to simply look at the effect that the expansion will have on MGE related to Truman Medical Center. Several other large customers taking transportation service from MGE are at risk in the proposed expansion area. (*Id.*) One customer being targeted by Trigen is the fourth largest MGE customer. (*Id.*)

According to the testimony of David Wagner, Truman Medical Center will be able to operate its utility system in a more economical manner by obtaining steam from Trigen. (Wagner Direct, p. 3) Truman, however, arrived at this conclusion by simply comparing its bills from MGE with a tariff rate from Trigen. (*Id.*, p. 4) Truman apparently did not consider that Trigen’s

rate may rise with the proposed expansion. Additionally, although permitted by MGE's tariff, Truman has not requested a special contract rate from MGE.

The ultimate interest to be considered by the Commission is that of the public as a whole – not just Truman Medical Center and not just existing Trigen customers. Pursuant to past Commission cases and Appellate Court proceedings, the Commission should consider many factors including whether there is a need for the expansion and if duplication of services will be created, whether the applicant is qualified to provide the service, whether the applicant has the financial ability to provide the service, whether the applicant's proposal is economically feasible, and whether the expansion and the resulting service will promote the public interest. Trigen's application should not be taken lightly.

MGE will suffer a substantial revenue shortfall if the requested CCN is granted. (Noack Surrebuttal, p. 4) Additionally, MGE will have substantial infrastructure investment in place which will be underutilized – infrastructure being paid for by MGE customers. This will likely result in customers' bills going up. (*Id.*) MGE's customers are a part of the "public" which must be considered by the Commission, and the impact on their bills should be taken into consideration as a part of the "public interest." When deciding if the proposed expansion is in the public interest, the Commission should take into consideration all factors discussed in *Intercon Gas*, including whether there is truly a need for the service.

The Commission should also consider whether having customers cherry-picked by Trigen is in the public interest. "(T)he general purpose of what is necessary and convenient encompasses regulated monopoly for destructive competition, prevention of undesirable competition and prevention of duplication of service." *State ex rel. Public Water Supply Dist. No. 8 v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo.App. W.D. 1980). As the court explained, the underlying public interest is the controlling concern, because "cut-throat

competition is destructive and the public is the ultimate party which pays for such destructive competition.” *Id.* Granting the requested CCN to Trigen may cause revenue losses for MGE and result in under-utilization of MGE’s investment, all to the detriment of MGE and its customers.

B. If the requested CCN is granted to Trigen pursuant to its application, should any conditions be imposed on the CCN?

As explained above, MGE believes that the requested CCN should not be granted to Trigen, as an unnecessary duplication of services would be created thereby and the CCN would not serve the public interest. The Commission Staff has suggested certain conditions in the rebuttal testimony of V. William Harris. Although these conditions may hold Trigen’s existing customers harmless from operating losses which may result from the proposed expansion, the conditions do nothing to protect MGE or its remaining customers.

WHEREFORE, MGE respectfully requests that the Commission consider all relevant factors with regard to the requested CCN, and, thereafter, deny Trigen’s application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was hand-delivered, sent by U.S. mail, or electronically transmitted on this 11th day of May, 2006, to all parties of record.

/s/ Diana C. Carter