

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

COUNTY OF JACKSON, MISSOURI,)	
)	
COMPLAINANT)	
)	
v.)	
)	CASE NO. HC-2005-0331
TRIGEN-KANSAS CITY ENERGY)	
CORP.)	
)	
and)	
)	
THERMAL NORTH AMERICA, INC.)	
)	
RESPONDENTS)	

BRIEF OF COMPLAINANT JACKSON COUNTY, MISSOURI

COMES NOW Complainant County of Jackson, Missouri ("Jackson County" or "County") and for its brief herein states as follows:

INTRODUCTION

Because of the very short time allowed to prepare this brief and the fact that the 229 page transcript was not received until approximately 5:30 p.m. on February 5th, the citations to transcript will be few and far between, in the interest of focusing on the argument. This should not inconvenience anyone since the testimony of the witnesses on February 4th is fresh in everyone's minds.

STATEMENT OF FACTS

Complainant Jackson County is a first class county and political subdivision of the

State of Missouri. The County and some sixty (60) of its downtown Kansas City commercial, residential, and government neighbors receive steam heating service from Trigen and are totally reliant upon such steam service for all their heating needs. In the case of Jackson County, not only does the County utilize steam to heat its buildings but it also uses steam year around in conjunction with its chilled water system to regulate the temperature. Of major importance to Jackson County is the need to provide steam to the County Jail, not only for space heating purposes but also for heating the water for cooking, dishwashing and laundry purposes for the 800 bed facility, which is inhabited by mostly Class A, B and C felons, 60% of whom are in the facility on charges of murder and other violent crimes. Therefore, it is essential that the County is provided with steam at the highest level of reliability as possible. It is currently receiving such high degree of reliability through the steam loop.

Respondent Trigen-Kansas City Energy Corp. ("Trigen"), is a Delaware corporation with its principal offices located at 1990 Post Oak Boulevard, Suite 1990, Houston Texas 77056. Trigen is currently providing steam heating service to approximately 60 downtown Kansas City commercial, industrial and governmental buildings, including, *inter alia*, the Jackson County Courthouse and Jail buildings, the Federal Building and Courthouse, and the Missouri State office building as well as numerous office and residential buildings. In providing such service, Trigen is, and has been for many years, utilizing a looped system.

Intervenor City of Kansas City ("Kansas City" or "City") is a municipal corporation

located in Jackson County, Missouri, which has directed Trigen at Trigen's expense to remove its steam mains located within the footprint of the City's new Arena Project. If Trigen were to do so, it would need to cut and cap its steam main at two locations approximately 800 feet apart and then remove the 800 feet of active steam main between the two cuts. This would sever the steam loop. Thereafter, the system would no longer be a looped system. What would remain in the place of the steam loop, would be two radial lines that, according to Trigen, would remain unconnected for a period of one or more years.

Currently, with a steam loop in place, if there were a disruption, such as maintenance, a terrorist attack or other causes, on one of the legs of the steam loop, the customers downstream of the disruption would not be adversely impacted because with a looped system, customers can be served from the other leg.

Absent a steam loop, if there were a disruption on one of the legs, all customers downstream of the disruption would be totally without steam service until the cause of the disruption is located and repaired. If this disruption were to occur on the McGee Street leg, it would mean that the Jackson County Jail would be without steam service, which if it takes a protracted length of time to repair or replace in the middle of winter, means that the Jail would be without steam service until such repairs or replacement can be made. This is totally unacceptable since the County can not release over 700 inmates into the community until the steam service can be restored.

There is no question that a steam loop is the most reliable way to provide steam

service because of the redundancy it offers should there be a disruption upstream on one of the loops, customers downstream of such disruption will continue to be served by back feeding from the other steam leg. While obviously, Mr. Kirk of Trigen would be reluctant to say anything that could cause alarm among its customers and others considering to be customers, even he recognized that the steam loop is somewhat more reliable than a non-looped radial system. He recognized that without the steam loop, the number of customers who would be interrupted would be greater than without a steam loop. He recognized that the system would operate best as a steam loop and that Trigen would seek to reconnect the loop. However, as currently planned, the reconnection will not come for one or more years, leaving the public served by the steam loop at greater risk during such period.

The cost to cap, remove and relocate Trigen's steam loop is estimated at \$950,000 to \$1,000,000, which amount is equal to approximately 17.5% to 19.5% of Trigen's 2004 total revenues of \$4.6 million. Trigen has been advised by the City that Trigen is to bear the entire cost of this removal and relocation project to clear the way for the new arena construction. If Trigen were to incur such cost, this would mean a substantially increased rate base and expenses, which would more than likely be followed by a rate case to attempt to recover such costs from its customers. The end result would be increased rates for Trigen's 60 customers for a project that severs the steam loop and makes the steam system less safe, less reliable and inadequate. It is County's position that the owners of the arena project, the beneficiary of the removal of the lines, should rightly bear this cost,

not Trigen and the ratepayers on the steam system, whose service is being downgraded. This is also the belief of Cary Featherstone, a Staff regulatory auditor.

ARGUMENT

A. The Commission's authority.

Pursuant to Section 393.290, RSMo., Trigen is subject to regulation by the Commission, under Chapters 386 and 393, RSMo., including regulation of the safety and adequacy of its service instrumentalities and facilities pursuant to Sections 393.130 and 393.140, RSMo.

Also, in addition to its general powers to regulate utilities under Section 386.250 and 386.320, RSMo., the Commission is granted the broad power pursuant to Section 386.310, RSMo., to require Trigen, after hearing:

...to maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand...

The state has vested the police power over public utilities exclusively in the Public Service Commission. The Commission has the exclusive power to regulate the rates and service of utilities under its control. It has been held by the Missouri Supreme Court since the inception of the Commission that municipal ordinances, which invade the province of the Commission, are inoperative and void. See *State ex rel. United Railways*

Company v. Public Service Commission, 192 SW 958 (Mo. 1917); *Ex parte Packman*, 296 SW 366 (Mo. 1927); *State ex rel. Kansas City Public Service, Co. v. Latshaw*, 30 SW2d 105 (Mo. 1930). Thus, irrespective of the ordinance in this case requiring Trigen to remove its lines from the footprint of the Arena project, the Commission by order can supersede the ordinance in the interests of "safe and adequate service and in all respects just and reasonable" as required by Section 393.130, or "to promote and safeguard the health and safety of its ... customers and the public" as required by Section 386.310.

Inasmuch as it is obvious that the severing of the steam loop and reducing its reliability will not "promote and safeguard the health and safety of its ...customers and the public", the Commission should exercise its regulatory powers over Trigen by ordering it to cease and desist from cutting its mains and severing the steam loop until such time as Trigen has constructed lines in an alternate route to assure the continued existence of the steam loop without unnecessary interruption.

An alternative proposed by County Executive, Katheryn Shields, would be if the Commission were to lift its stay and allow the severing of the steam loop, but order Trigen to reconnect its steam loop no later than October 1, 2005, the start of the winter heating season. While such would put the County and its Jail at risk of more or longer interruptions during this one summer season, the impact on the health and safety of the customers and the public would not be as great as if an interruption in service were to occur in the winter season. While this latter option is not the County's first choice, it does not wish to stand in the way of the Arena project, and such seems to be a reasonable

alternative for all parties.

B. Who pays.

Further, Trigen should be ordered to take all necessary action, including litigation, if necessary, in an effort to impose upon the arena project and its owners, the costs of severing the steam mains, the removal of the steam mains and the relocation of the steam mains to provide an alternate steam loop. The testimony in this case by Cary Featherstone as to the possible disallowance of the costs in a future rate case, if it does not take the action necessary to attempt to place the cost on the cost causer, should be incentive enough for Trigen to take such action, but an order from the Commission would assure that Trigen would take such action.

There is substantial precedent for municipalities being required to bear the cost of utility relocation, if the project requiring the relocation were in the City's proprietary function. According to the general common law rule in Missouri, it is only when a city acts in its purely governmental function, may it require the utility to relocate its system at the utility's expense. See *McQuillin on Municipal Corporations*, (3rd Ed.) Vol. 12, §34.74a, pp. 183-184 (1986). Such is cited by the Missouri Supreme Court in *Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis, et al.*, 555 S.W. 2d 29 (Mo. 1977) at p. 32. See also *Home Builders Association of Greater St. Louis, et al. v. St. Louis County Water Company*, 784 S.W. 2d 287 (Mo. App. 1989) at p. 289. In this case, the removal of the steam loop so that the City and a private developer can construct an arena, is clearly a proprietary purpose of the City. The

City clearly is not acting in its governmental function for a purely governmental purpose.

The *Union Electric* case, while holding that the utility must pay for removal to allow the City and its Redevelopment Authority for the primary purpose of redeveloping a blighted area, is distinguishable from the instant case. In this case, it is clear that the primary purpose of the removal of Trigen's mains from the footprint of the Arena project is for the City in cooperation with a private developer to build a new arena. In *Union Electric*, the case turned on the primary purpose of the project and the Court found that the primary purpose of the project was the redevelopment of a blighted area.

In this case, the primary purpose is to construct an arena. The blight in the area can be remedied with a bulldozer and does not require relocation of Trigen's mains. The mains only need to be relocated because the City and a private developer are building an arena, which is clearly a proprietary purpose, and the steam mains would be in the middle of the arena (Ex. 11) if they were not relocated.

Because Trigen would seek to pass on its costs to relocate its steam loop to its ratepayers, it should not be allowed to do so until it has exhausted all other avenues, including court action, if necessary. While City would no doubt rely on *Union Electric*, each case stands on its own peculiar state of facts as to whether the purpose of the removal is to advance the City's governmental purpose or its proprietary purpose as one of the cases cited by the Court held that it depends upon what the primary purpose of the project is. In *City of Baltimore v. Baltimore Gas & Electric Co.*, 192 A. 2d 87 (1963), a case involving the relocation of gas mains to accommodate a housing project and a city

market, the Maryland court determined that with respect to the housing project the utility must remove and relocate its mains at its own expense because the authority and the city were performing a governmental function. However, with respect to the city market, the Court ruled differently and held that the city must pay the cost of relocation because the operation and maintenance of a market was the exercise of a proprietary function. Such is the case here, the cost of relocation should be borne by the City and its developer, since the construction of the arena is clearly not a governmental purpose but a proprietary purpose. Before the ratepayers are called upon to bear the utility's costs through increased rates, Trigen should seek to negotiate further with the City and its developer and if such fails to seek relief in the Courts.

WHEREFORE, Complainant Jackson County requests an order from this Commission:

1. Requiring Trigen not to sever 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 14th Street for the arena project;

2. In the alternative, if the Commission were to remove its stay and allow Trigen to remove its mains and sever the steam loop, it should order Trigen to relocate its mains so as to reconnect the steam loop no later than the next heating season, which begins on October 1, 2005.

3. Direct Trigen to negotiate and, if necessary, institute litigation for the purpose of imposing upon the arena project and its owners, Trigen's costs of cutting, capping, removing and relocating the steam mains so as to provide an alternate steam loop and advise Trigen that the failure to so act in good faith could result in denial of such items in Trigen's cost of service; and

4. Such further and other relief as the Commission may deem just and equitable.

Respectfully submitted,

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ATTORNEYS FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Complaint has been e-mailed to Paul S. DeFord, Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108, Mark W. Comley, Newman, Comley and Ruth, 601 Monroe, Suite 301, Jefferson City, MO 65102, Steven Dottheim & Robert Franson, P.O. Box 360, 200 Madison Street, Jefferson City, MO 65102 and John B. Coffman, Office of the Public Counsel, P.O. Box 2230, Jefferson City, MO 65102, this 6th day of April 2005.

/s/ Jeremiah D. Finnegan