

**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 POSTHEARING BRIEF

COMES NOW Missouri Gas Energy ("MGE"), by counsel, and for its posthearing brief,¹ respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

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.

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. *See In Re Tartan Energy*, GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994); *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri*, 848 S.W.2d 593 (Mo.App. W.D. 1993).

¹ In its posthearing brief, MGE responds to the questions presented by Commissioner Gaw at the conclusion of the hearing with regard to factors one (there must be a need for the service) and five (the service must promote the public interest) of the *Intercon Gas* standard. There are many cases from this Commission, Missouri appellate courts, and the regulatory commissions and courts of other states other than those cited herein which deal with the issues of need and the public interest. The undersigned counsel, however, was unable to fully brief the issues within the time allotted.

MGE asserts that Trigen's application should be denied and asserts that the conditions proposed by Staff will not aid MGE's customers. Accordingly, MGE did not conduct the research necessary to respond to Commissioner Murray's question regarding Staff's second condition.

Factor 1 and the Question of Need

In *State ex rel. Public Water Supply District No. 8 of Jefferson County, Missouri v. Public Service Commission*, 600 S.W.2d 147 (Mo.App. W.D. 1993), the court considered the issues of “need” and “unnecessary duplication of services,” holding the following:

The determination of what is necessary and convenient has long been, and continues to be, a matter of debate. From analysis of court decisions on this subject, the general purpose of what is necessary and convenient encompasses regulated monopoly for destructive competition, prevention of undesirable competition and prevention of duplication of service. The underlying public interest is and remains the controlling concern, because cut-throat competition is destructive and the public is the ultimate party which pays for such destructive competition.

Id. at 154.

In *State ex rel. Electric Co. v. Atkinson*, 204 S.W. 897 (Mo. banc 1918), the court ruled that the Commission properly granted a certificate to the applicant based upon the needs of the city and the current provider's inability or unwillingness to provide electricity at reasonable rates. The court, however, also discussed the public policy underlying the restriction on the unnecessary duplication of services and recognized that there should not be a finding of necessity when another utility is adequately rendering the service proposed.

(T)he act establishing the Public Service Commission, defining its powers and prescribing its duties is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental. **The policy covers a particular case when competition would impair or destroy a utility and, as a consequence, eventually entail an increase of rates charged the public.** There are other considerations, of course, but that mentioned forms the principal basis of the rule. A corollary is that, ordinarily, high rates do not call for the introduction of competitive conditions. These, generally, are said to be correctable through appropriate regulation by the Commission.

Id. at 338. (emphasis added)

In *People's Telephone Exchange v. Public Service Commission*, 186 S.W.2d 531 (Mo.App. 1945), the court concluded that the Commission did not act arbitrarily or unreasonably in denying the CCN application of a regulated utility for the operation of a telephone system and that the Commission had the power to prevent the spread of competition by denying certificates to new enterprises. If telephone service was available on fair and reasonable conditions that were approved by the Commission, then there was no public necessity for another telephone utility in the area. Citing the Commission's decision, the court held as follows:

Public convenience and necessity is not proven merely by the desire for other facilities. It must be clearly shown there is failure, breakdown, incompleteness or inadequacy in the existing regulated facilities in order to prove the public convenience and necessity requiring the issuance of another certificate. The 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.

Id. at 536.

The Commission proceeding of *Cuivre River Electric Service Co. v. Union Electric Company*, 1987 Mo. PSC Lexis 18, dealt with a regulated utility (Union Electric Company) extending services into the certificated area of another regulated utility (Cuivre River Electric). While this was a complaint case involving an extension without the approval of the Commission, the order contains language that accurately describes the dangers of duplication:

The case law indicates that cut-throat competition is a destructive element which is to be avoided. The Commission was established to control the certification of utilities and in considering the granting of such certificates the Commission must seek to avoid the duplication of services which is one of the potentially destructive elements which can lead to cut-throat competition.

Id. at 15. (See also *In the Matter of the Application of Sho-Me Power Corporation*, 1988 Mo. PSC Lexis 12, regarding the denial of a CCN application based, in part, on the lack of need.)

Factor 5 and the Meaning of “Public”

Staff witness 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. The legal standards to be applied by the Commission, however, are not so narrowly defined.

It is within the Commission’s discretion to determine when the evidence indicates the public interest would be served in the award of the certificate,² but the ultimate interest to be considered by the Commission is that of the public as a whole³ – not just Truman Medical Center and not just existing Trigen 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 22nd day of May, 2006, to all parties of record.

/s/ Diana C. Carter

² *State ex rel. Intercon Gas*, 848 S.W.2d at 597-598.

³ *See Public Water Supply Dist. No. 8*, 600 S.W.2d at 156.