

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CASE NO. EM-96-149

PREPARED REBUTTAL TESTIMONY OF
SCOTT A. SPIEWAK
ON BEHALF OF TRIGEN-ST. LOUIS ENERGY CORP.

May , 1996

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MISSOURI
PUBLIC SERVICE COMMISSION

55.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Application of Union Electric Company
for an order authorizing: (1) certain merger transactions
involving Union Electric Company; (2) the transfer of
Certain Assets, Real Estate, Leased Property, Easements,
and Contractual Agreements to Central Illinois Public
Service Company; and (3) in connection therewith, certain
other related transactions

Case No. EM-96-149

AFFIDAVIT OF SCOTT A. SPIEWAK

STATE OF NEW JERSEY

ss.

COUNTY OF BERGEN

Scott A. Spiewak, of lawful age, on his oath states: that he has participated in the preparation of the foregoing written testimony, that the answers in the attached written testimony were given by him, that he has knowledge of the matters set forth in such answers; and that such matters are true to the best of his knowledge and belief.



Scott A. Spiewak

Subscribed and sworn to before me this 3rd day of May, 1996



Notary Public

5/3/96



My Appointment Expires:
JEFFREY M. STERN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 8, 1998

REBUTTAL TESTIMONY OF SCOTT A. SPIEWAK
Case No. EM-96-149

Q. Would you please state your name, employment position and employment address?

A. My name is Scott Spiewak. I am an attorney and consultant for Trigen-St.Louis Energy Corporation ("Trigen"). My address is 3 Fairway Lane, Old Tappan, New Jersey. A brief summary of my educational background and business experience is attached as Schedule 1.

Q. What is the purpose of your testimony in this case?

A. To clarify Trigen's position on the merger involving Union Electric (UE) and Central Illinois Public Service Company (CIPS).

Q. Why is a discussion of Trigen's concerns relevant to the merger proposal before this Commission?

A. A discussion of Trigen's concerns is necessary because UE has abused its market power over transmission in the past and it continues to abuse that market power today. In addition, UE has sought to perpetuate its market power over generation by seeking to stifle competition.

Q Who is Trigen?

A. Trigen is a Missouri corporation doing business in St.Louis, Missouri, with its principal office and place of business located at One Ashley Place, St.Louis, Missouri 63102. Trigen is a wholly-owned subsidiary of Trigen Energy Corporation. Trigen Energy Corporation owns 13 district energy systems producing steam and chilled water and /or electricity. These district

energy systems are located in the cities of Trenton, New Jersey; Oklahoma City and Tulsa, Oklahoma; Golden, Colorado; Chicago, Illinois; Boston, Massachusetts; St. Louis and Kansas City, Missouri; Philadelphia, Pennsylvania; Baltimore, Maryland; Nassau County, New York; London Ontario, and Prince Edward Island, Canada.

Q. Does Trigen have any actual or planned facilities that will be affected by the proposed merger?

A. Trigen plans to build an electric generating plant at or near One Ashley Place in St. Louis, Missouri. Because Trigen will be a person that sells electric energy, Trigen will be an electric utility as defined in the Federal Power Act, 16 U.S.C. 796(22). Trigen also is considering several cogeneration possibilities in the St. Louis area—an area currently served by Union Electric. The decision on whether to proceed with these plants will depend on the availability and cost of standby and transmission services from Union Electric or, if this merger is approved, Ameren. As will be discussed, Trigen's experience to date in negotiating these services from Union Electric has been less than satisfactory. This gives Trigen a substantial interest in the outcome of this proceeding. Assuring that competitors will not be harmed by the proposed merger should be a goal of this Commission. As the Federal Energy Regulatory Commission (FERC) has noted in numerous recent proceedings, FERC seeks to introduce competition into the electric industry. Failure to address these issues in the context of this proceeding would undermine the attainment of that objective and would be contrary to the public interest.

Q. Will this proposed merger affect the availability of transmission services?

A. This fact is best demonstrated by this passage from the 1994 CIPS Annual report:

Our transmission system is a unique asset, located at the hub of 12 major utility systems joined by 39 interconnections of 138,000 volts or more. We serve major markets in every geographic direction, with ties to some of Americas largest utility systems: American Electric Power, Commonwealth Edison Company, PSI Energy, the Tennessee Valley Authority and Union Electric Company. Our strategic location allows us to actively broker electric energy, buying from one party and selling to a third party (1994 CIPS Annual Report pp.6-8)

Q. Has Trigen sought transmission service from UE?

A. For almost six months now Trigen has sought firm point-to-point service to move 57 MW from the facility site to Union Electric's interconnection with CIPS, with nonfirm service to other interconnections. Trigen sought to obtain these services under rates as well as terms and conditions comparable and equivalent to those being provided to other users of Union Electric's transmission system, including Union Electric.

Q. What is the current state of these negotiations?

A. In response to Trigen's filing of a complaint with the FERC, seeking transmission access from UE, (TX96-8) and Trigen's intervention in UE's merger proceedings before the FERC (EC96-7-000), UE on May 1, 1996 faxed a draft transmission agreement to Trigen for review. However, given UE's expressed attitude toward providing Trigen with transmission access, this belated draft only provides limited comfort. Union Electric continues to maintain, among other things, that it does not have an obligation to transmit the power if the facility operates as a QF. It also maintains that the announced merger between Union Electric and CIPS makes this issue moot

since by the time the service is needed UE expects to have an open access tariff in place. These objections are so obviously without merit that they amount to an attempt by UE to use its market power to foreclose competition.

Q. Why is UE's contention that it is under no obligation to transmit power from a QF invalid?

A. While Trigen is undecided as to whether the facility will be a QF or exempt wholesale generator (EWG) or both, this distinction is without a difference for this purpose. As FERC concluded in the Western Regional Transmission Association decision, QFs and domestic EWGs that have not begun operating are eligible to request section 211 orders for transmission service. Docket No. ER91-195-013 (February 16, 1994)(slip op at 8). See also Western System Power Pool, Docket No. ER94-1288 (October 27, 1994). The law is clear that Union Electric is obligated to provide transmission services to both an EWF or a QF. UE's failure to recognize past precedents in this case can only be taken as a bad faith effort to exploit its market power over transmission.

Q. Why can't Trigen wait until the outcome of the merger to settle these issues?

A. As Union Electric has been made aware, Trigen cannot afford to wait for the uncertain outcome of this merger. If the plant is to meet its scheduled in-service date, Trigen and its representatives will be seeking to market the plant's output now. The ability to market this power to the large number of utilities aside from Union Electric which have interconnection agreements with CIPS depends on Trigen's ability to show that it can move the power from the facility's site to its interconnection point with CIPS. Moreover, Union Electric's failure to

provide a proposed price or terms and conditions governing the transmission services has kept Trigen from being able to tell prospective customers what the delivered cost of that power might be. These entities are unlikely to await the outcome of the merger between Union Electric and CIPS to finalize their resource commitments.

Q. How has UE used its control over key generation assets to stifle competition?

A. The availability and cost of partial requirements services play a key role in the decision to proceed with cogeneration projects. Yet more than seventeen years after the passage of the Public Utility Regulatory Policies Act (PURPA), Union Electric has yet to develop costing data sufficient to design proper supplementary and standby service rates. Union Electric provides partial requirements service under its Rider E. Rider E purports to apply to all services where a customer seeks to supplement or replace any other source of power *i.e.*, it applies to supplemental, backup and maintenance power. Rider E provides that power will be supplied during the four monthly billing periods of June through September at the Customer Charge, plus \$210 and all kW at \$15.85. For the remainder of the year, power shall be priced at the Customer Charge, plus \$210, and all kW at \$7.20. The rates in Rider E are, on their face, neither just nor reasonable.¹ Union Electric's one size fits all approach yields rates which are inconsistent with the provisions of 16 U.S.C. 824e as well as MOPSC and FERC implementing regulations, 4 CSR 240-2.060 and 18 C.F.R. 292.303(b) and 292.205.

¹ Trigen has filed a Complaint with this Commission, Case No. EC-96-164, seeking the revision of Rider E.

Q. Why is UE's "one size fits all" approach inconsistent with PURPA, MOPSC and FERC regulations?

A. First, PURPA requires utilities to provide QFs with both supplementary and standby services. Supplementary power is that power which a utility provides a QF in addition to that which the facility generates itself. Maintenance service is used during scheduled outages. Backup service is used during scheduled outages. All three of these services must be available to a QF on a firm and interruptible basis. These are separate and distinct services, each having different and unique cost characteristics. FERC has noted that the delineation of these services in this manner is designed largely to measure the impact of the service on the utilities' need for new capacity. In the Industrial Cogenerators case, FERC struck down the Florida Commission's partial requirements tariff for, *inter alia*, not establishing separate rates for standby and maintenance service. Industrial Cogenerators v. Florida Public Service Commission, 43 FERC 61,545 (1988). In that case, FERC noted that absent a factual showing by the utility justifying a proposed rate, the rates of maintenance and backup power should be priced differently.

Q. What should these rates be based on in accordance with established law?

A. Missouri PSC and FERC regulations require that the rates for standby services shall be based on accurate data and consistent system-wide costing principles. 4 CSR 240-2.060(6)(A) and 18 C.F.R. 292.305(a)(2). These rules also require that rates for maintenance and backup power (a) do not include unrealistic assumptions about coincident outages, and (b) shall take into account the QF's ability to coordinate with the utility. 4 CSR 240-2.060(6)(C) and 18 C.F.R. 292.305(c)

Q. Has UE undertaken the studies needed to set these rates?

A. No, despite this clear instruction that the rates for individual service must be based on actual cost and load data for the backup and supplementary service classes, Union Electric does not appear to have undertaken studies to determine the proper costing for these services. A 1991 EEI survey contained a survey of the practices of 90 utilities, including Union Electric. Union Electric's standby rates are classified as using the methodology of the general service rate, no special standby rate method applies.²

Q. Are these rates reasonable?

A. The charges in Rider E apparently are based on the large primary service rate (Service Classification No.11(M)). Under that rate power will be supplied during the four monthly billing periods of June through September at the Customer charge, plus \$210, and all kW at \$15.85. For the remainder of the year, power shall be priced at the Customer Charge, plus \$210, and all kW at \$7.20. Backup power is akin to an insurance policy purchased by a cogenerator for the provision of service when its plant fails to operate. Union Electric's rate is akin to an insurer which demands a premium equal to 100% of its potential liability. No consumer would buy such an insurance policy and any rate containing such a premium cannot be found to be just and reasonable. Likewise, supplementary service is billed at the higher standby rate than under regular service. Supplementary service is akin to the service received by a utility's full requirements customers and should be billed accordingly.

²Edison Electric Institute, Standby Rates: Methods and Descriptions, p. A-241(1991).

Q. How do these rates contravene the nondiscrimination provisions of PURPA and the implementing regulations of the Missouri PSC and the FERC?

A. The rates contained in Rider E contravene the nondiscrimination provisions of PURPA and the implementing regulations of the Missouri PSC and the FERC in at least five ways: 1) Rider E is provided at Union Electric's option. Section B of Rider E provides these services will be supplied whenever, in the opinion of the Company, it will have capacity available for the supply of such service. 2) Rider E does not distinguish between supplementary and standby services. In Industrial Cogenerators FERC noted the difference between supplementary and standby services and said the failure to distinguish between them would constitute discrimination. 3) Rider E has no relationship to the cost of providing service, unlike other rates which presumably are cost-based. 4) Rider E deprives a QF of its option to purchase power under the existing retail rates that otherwise would have been applicable had the QF not generated part of its electrical needs. The rates contained in Rider E are substantially higher than the rates contained in service classification 4(M), which has a demand charge of \$3.07 for the four summer months and \$1.12 for the remainder of the year and no demand ratchet (see below). 5. The billing determinant in Rider E is significantly more onerous than that contained in Union Electric other rates.

Q. Why is the billing determinant in Rider E significantly more onerous than the other rates?

A. Number 5 merits more detailed discussion. Rider E provides for a lifetime ratchet. According to Section D.1, contract demand is the highest of either the demand specified in the customer's Electric Service Agreement or the customer's maximum demand. Section D.2 provides: Contract demand may not be reduced and shall remain in effect during the initial term

specified in customer's Electric Service Agreement and thereafter until said Agreement is terminated. This billing determinant is much harsher than that contained in Service Classification 4(M), which provides in Section 5.A. that: The monthly Billing Demand shall be the maximum demand established during the peak hours or 50 percent of maximum demand, established during off-peak hours, whichever is greater, but in no event less than 110 kW. The small primary service rate contains no demand ratchet.

Q. Has FERC required State commissions to prevent discrimination between QF's and those groups to whom QF's would belong if not for self generation?

A. In Industrial Cogenerators FERC required the Florida Commission to demonstrate why the ratchets were imposed on QFs when they were not contained in the rate design of nongenerating customers: [W]hether discrimination has occurred can be determined by comparing the treatment of QFs with the treatment accorded to that group to which the Qf would belong were it not for self generation. p.62,353. By failing to comply with the standby service provisions of PURPA, Union Electric has shown its willingness to use its control over providing partial requirements service to eliminate competition. The Commission must take this into account in establishing conditions on the exercise of this power before the merger may be approved.

Q. What relief does Trigen request?

A. Because of UE's past conduct, the Commission should require that UE take steps to show it is willing to rectify its past abuse of market power before considering the merger.³ The 1994 CIPS Annual Report points out the key strategic position of that company. The merged company would have a stranglehold on transmission into a large area of the Midwest. No company should be permitted to enjoy such an advantage unless it is willing to assume the responsibilities which attach to a lineowner in a competitive environment.

Because UE has by its written words, tariffs, and action shown a basic hostility toward the goal of robust competition, Trigen believes the Commission should determine the appropriate conditions necessary to assure that any merger benefit the public interest. This determination is necessary because: 1. Both UE has abused its market power over transmission in the past and continues to abuse that market power today, and 2. UE has sought to perpetuate its market power over generation by seeking to stifle competition. Until a full record has been developed during the course of this proceeding, Trigen cannot recommend the precise nature of the conditions necessary to ensure the combined entity fully complies with the public interest standard. However, it would appear the Commission should explore whether the public interest demands that the combined entity turn over control and operation of its transmission assets to a so-called independent system operator. The Commission also should examine appropriate conditions which would ensure the combined entity does not abuse its market power over generation by refusing to provide such ancillary services as are required by PURPA or otherwise required by law.

³Trigen notes that the open access filing made by the combined parties is contingent on the acceptance of the merger.

Q. Does this conclude your testimony?

A. Yes it does.