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July 30, 1999

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

RE: Case No. HX-99-443
In the Matter of Proposed Rule 4 CSR 240-80.015 Affiliate Transactions

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case are an original and fourteen (14) copies of the REPLY COMMENTS OF TRIGEN-KANSAS CITY ENERGY CORPORATION IN OPPOSITION TO PROPOSED RULE on behalf of Trigen-Kansas City Energy Corporation.

Copies of this filing have on this date been mailed or hand-delivered to counsel of record. Thank you for your attention to this matter.

Sincerely,

Jeffrey A. Keevil

JAK/er
Enclosures
cc: counsel of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Proposed Rule 4 CSR 240-80.015 Affiliate Transactions.	))	Case No. HX-99-443

REPLY COMMENTS OF TRIGEN-KANSAS CITY ENERGY CORPORATION IN OPPOSITION TO PROPOSED RULE

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen") and respectfully submits the following comments in opposition to proposed rule 4 CSR 240-80.015 regarding affiliate transactions.

As stated in Trigen's Initial Comments, "The "purpose" clause of the proposed rule states that it "is intended to prevent regulated utilities from subsidizing their nonregulated operations." However, there is no indication anywhere in the purpose clause, or elsewhere in the proposed rule, that this has been a problem which would necessitate a rulemaking, nor any indication that the issue of subsidization has been a problem with steam heating companies." After reviewing the only timely-filed comments of which Trigen is aware which supported the proposed rule as written, (*i.e.*, Staff's comments), there is **still** no evidence of a problem, nor any indication in the record of this proceeding that the issue of subsidization has been a problem with steam heating companies. Staff's comments clearly show that Staff has no basis for proposing, or for the Commission adopting, such an onerous and expensive rule concerning steam heating companies. Staff states in the abstract that "Subsidization of nonregulated operations by the regulated heating company results in higher rates for the ratepayers of the regulated heating company without a corresponding benefit," however Staff presents

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absolutely no evidence that this has been an actual problem with regard to steam heating companies or that the procedures currently employed in the context of a rate case are somehow incapable of properly addressing the issue; the proposed rule appears to be Staff's solution to a problem which has not been shown to exist. If Staff were truly concerned about "higher rates for the ratepayers of the regulated heating company without a corresponding benefit," Staff would oppose the proposed rule, because "higher rates for the ratepayers without a corresponding benefit" is precisely the likely result of the proposed rule. The exorbitant and unnecessary costs which would result from adoption of the proposed rule were addressed in Trigen's Initial Comments, as well as the initial comments of other utilities (*see, e.g.,* comments filed in Case No. GX-99-444), and will not be repeated herein.

The majority of the first seven pages of Staff's comments implicitly concede that the "legal authority" cited in support of the proposed rule is inadequate, since Staff refers to numerous statutory sections in support of Staff's belief that the Commission has what Staff refers to as "jurisdiction" to adopt the proposed rule which are not cited as legal authority for the proposed rule in the Authority section of the proposed rule which was published in the Missouri Register. The effect of insufficient legal authority cited in the published version of the proposed rule was discussed in Trigen's Initial Comments, and will not be repeated here. Insufficient legal authority set forth in the notice of proposed rulemaking is not something the Commission may "cure" in its final order of rulemaking; therefore, the Commission cannot adopt the proposed rule. Furthermore, no amount of verbiage on the part of Staff can change the fact that the proposed rule conflicts with Section 393.140(12), which prohibits the Commission from exercising jurisdiction over

unregulated business activity engaged in by a utility as sections (5) and (6) of the proposed rule attempt to do.

For the most part, Staff's discussion of prior cases dealing with the issue of affiliate transactions is irrelevant, since none deal with steam heating companies, and several actually deal with telecommunications companies subject to Chapter 392 RSMo. rather than any type of utility subject to Chapter 393 RSMo. However, to the extent that Staff's discussion of prior cases shows anything relevant, it is that affiliate transactions matters can and have been adequately addressed in rate cases, and that there is no need for a costly and burdensome rule such as that proposed herein.

Near the bottom of page seven of Staff's comments, Staff refers to "[t]he regulation in 4 CSR 240-80.018." Since the proposed rule under consideration in this case is 4 CSR 240-80.015, this reference is unclear. Does Staff have another proposed rule in waiting? If so, perhaps the two proposals should be considered together.

The majority of Staff's discussion of the subparts of the proposed rule merely sets forth Staff's interpretation of those parts; none of Staff's discussion should be confused as a reason or justification for adoption of the proposed rule.

In paragraph numbered 5 of Staff's comments, on page 8, Staff states that "[o]nly if a regulated heating company has control over another entity can the other entity be an affiliated entity." While this is a crucial point in the interpretation and implementation of the proposed rule, and also impacts on the extremely high and unnecessary costs which would be imposed on steam heating companies (and eventually their ratepayers) by adoption of the proposed rule, Staff's statement set forth above **is not what the proposed rule says.** Subsection (1)(A) clearly provides that "affiliated entity" means any

corporation "which, directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated heating company." This is partially why, when read together, subsections (1)(A), (B) and (C) place such an onerous and costly burden on the regulated heating company. If Staff's statement in its comments, as set forth above, was correct, the proposed rule would not be as onerous or costly as it is. Perhaps Staff does not understand the proposed rule as written, and intended it to mean that "[o]nly if a regulated heating company has control over another entity can the other entity be an affiliated entity." Perhaps this is why the estimated private entity cost fiscal note is so grossly understated, as discussed in Trigen's Initial Comments. In any event, such a misperception on the part of Staff regarding such a critical provision of the proposed rule demonstrates that the Commission cannot adopt the proposed rule as written – the definitions of "affiliated entity", "affiliate transaction" and "control" in subsections (1)(A), (B) and (C) are too broadly written, and the full impact of such definitions are apparently misunderstood by Staff.

In paragraph numbered 7 of Staff's comments, on page 9, Staff states that "[t]he fully distributed costing methodology is an accepted regulatory method;" however, this cannot be construed to mean that other costing methodologies are not also accepted. In fact, other costing methodologies are accepted, and under the circumstances purported to be addressed by the proposed rule, are more appropriate. The use throughout the proposed rule of "fully distributed cost" as defined in subsection (1)(E) of the proposed rule will unreasonably load excessive costs on nonregulated operations. The result of this unreasonable and excessive cost loading will be the stifling of regulated utility participation in nonregulated activities to the detriment of both customers and company

earnings. The Commission should therefore remove "fully distributed cost" from the proposed rule.

Similar to the definition of "fully distributed cost", the transfer pricing standards in the proposed rule (*e.g.*, a steam heating company must compensate an affiliate at the lesser of fair market price or cost and a steam heating company must charge an affiliate at the greater of fair market price or cost) will also impose an artificial disincentive against otherwise beneficial affiliate dealings. The net effect of "codifying" such a bias will be increased rates to consumers and reduced earnings to companies. Instead of adopting the asymmetrical transfer pricing standards set out in the proposed rule, the Commission should use common sense pricing standards, based on sound business concepts and overall benefits to customers taking regulated service. The Commission should therefore remove subsection (2)(A) of the proposed rule in its entirety.

Staff also failed to provide adequate justification of the onerous and costly record keeping and reporting requirements set forth in section (4) of the proposed rule. In fact, Staff provided no reason whatsoever for the annual reporting requirement; if the Commission, Staff or Public Counsel do not intend to make use of such information each year, the annual reporting should obviously not be required.

Staff's lengthy discussion of the Union Electric merger case, beginning on page 16 of Staff's comments, is entirely irrelevant to this proceeding, and cannot be used to bootstrap Commission jurisdiction over entities and activities which the Commission is statutorily prohibited from regulating.

Trigen addressed additional infirmities of the proposed rule in its Initial Comments, which will not be discussed herein. However, Trigen would refer the Commission to those Initial Comments for such discussion.

For all of the reasons set forth above, and in the Initial Comments of Trigen, the proposed rule is unlawful, unreasonable and simply unnecessary, and the Commission should reject the proposed rule in its entirety.

Respectfully submitted,

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ATTORNEY FOR TRIGEN-KANSAS CITY ENERGY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by first-class mail, or hand-delivery, to counsel on the attached list on this 30th day of July, 1999.

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