

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of Kansas City)
Power & Light Company for authority to sell its)
downtown Kansas City, Missouri, central station)
steam heat distribution system, and for the) CASE NO. HM-90-4
revocation of its certificate of public convenience and necessity to provide steam heat service.)

In the matter of the application of Trigen-Kansas)
City District Energy Corporation for permission,)
approval, and a certificate of public convenience)
and necessity authorizing it to acquire, own,) CASE NO. HA-90-5
operate, control, manage, and maintain a steam)
heat distribution system to provide steam heat)
service, and for approval of its rates and rules)
and regulations to steam heat service.)

APPEARANCES: Mark G. English, Deputy General Counsel and Jeannie Sell Latz,
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64105, for Kansas City Power & Light Company.

George E. Rider, Attorney at Law, Morrison, Hecker, Curtis,
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and

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for Trigen - Kansas City District Energy Corporation.

Gary W. Duffy, Attorney at Law, Hawkins, Brydon, Swearengen &
England, P.C., P. O. Box 456, Jefferson City, Missouri 65102,
and

Michael C. Pendergast, Regulatory Affairs Attorney, P. O. Box 889,
Topeka, Kansas 66601, for The Kansas Power and Light Company.

William Clark Kelly, Assistant Attorney General, P. O. Box 1661,
Jefferson City, Missouri 65102, for the State of Missouri.

Lewis R. Mills, Jr., Assistant Public Counsel, P. O. Box 7800,
Jefferson City, Missouri 65102, for the Office of the Public Counsel
and the State of Missouri.

Mary Ann Young, General Counsel, P. O. Box 360, Jefferson City,
Missouri 65102, for the Staff of the Missouri Public Service
Commission.

Hearing
Examiner: C. Gene Fee

REPORT AND ORDER

By an application filed July 6, 1989, Kansas City Power & Light Company (KCPL) seeks authority to sell its downtown Kansas City, Missouri, central station steam heat distribution system to Trigen-Kansas City District Energy Corporation (Trigen-KC) and for cancellation of KCPL's certificate of public convenience and necessity to provide steam heat service in Kansas City. Simultaneously Trigen-KC filed its application for a certificate of public convenience and necessity authorizing it to acquire, own, operate, control, manage, and maintain subject steam heat system subject to the regulation of this Commission and to render the steam heating service formerly performed by KCPL.

By its Report and Order issued in Case No. HO-86-139, the Commission had authorized KCPL to terminate the utility steam service on December 31, 1990. The Report and Order also directed KCPL to make a good faith effort to sell its central station steam distribution system to a potential operator. The instant applications are the cumulation of the efforts pursuant to the Commission's Report and Order in Case No. HO-86-139.

A hearing was held in the Commission's offices in Jefferson City, Missouri, on December 19, 1989. Oral argument was heard by the Commission on December 21, 1989. All parties have waived reading of the transcript pursuant to Section 536.080, RSMo.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

At the outset of the hearing the parties offered a partial stipulation of facts and reserved three issues for submission to the Commission. The Commission is

of the opinion that the stipulation of facts should be adopted for disposition of this matter.

Pursuant to the stipulation the Commission finds that no party opposes the proposed sale to Trigen-KC for purposes of continuing the steam heating service rendered for many years by seller, KCPL. It is conceded, and the Commission so finds, that Trigen-KC has the financial and technical capability to acquire and operate the system. Continued operation of the steam heating system is in the public interest to the citizens of Kansas City and should be approved.

By documents and testimony offered at the hearing, it is established that Trigen-KC is a Delaware corporation and a wholly-owned subsidiary of Trigen Energy Corporation (Trigen Corp.) Trigen-KC is the holder of a Certificate of Corporate Good Standing issued by the Secretary of State of the State of Missouri. Trigen Corp., through a number of operating subsidiaries similar to Trigen-KC, is the operator of a number of steam heating systems throughout the United States similar to the one herein involved.

As a part of its total effort, Trigen-KC proposes to pay to KCPL \$6 million in cash for the steam properties, and to spend approximately \$2.5 million in system improvements and modifications to permit the use of coal as the most economic fuel for its steam generation.

In addition to a contract for the purchase, KCPL and Trigen-KC have negotiated a Steam Service Agreement under which KCPL proposes to purchase steam from Trigen-KC for the purpose of generating electricity, when necessary, at KCPL's Grand Avenue Station.

Certain features of the Steam Service Agreement are the subject of one of the objections to Trigen-KC's proposed method of operation raised by intervenor, Kansas Power & Light Company (KPL Gas Service). KPL Gas Service is engaged in the rendering natural gas service to the public in the Kansas City area subject to the

jurisdiction of this Commission. Its service area includes the proposed service area of Trigen-KC.

KPL Gas Service objects to the features in the Steam Service Agreement which contain automatic price adjustments, including a fuel adjustment clause, contended to be in violation of State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission of Missouri, et al., 585 S.W.2d 41 (Mo. 1979). That case is commonly referred to by the parties, and is hereinafter referred to, as UCCM.

In UCCM the only issue decided by the Missouri Supreme Court was that application of a fuel adjustment clause to residential and small commercial customers was beyond the statutory authority of the Public Service Commission. At page 41, the Court specifically stated "the question of use of an FAC in regard to other customers is not an issue in this case." In UCCM, the Court set forth at great length the history and the purpose of regulation by the Public Service Commission. It was acknowledged that the purpose of regulation was to protect the consumer against the natural monopoly of a public utility as providers of public necessities. It was recounted that prior to regulation the only protection to consumers as to rates and service was their right to make the best contract they could with utilities in competition with each other for their business. In the Commission's opinion the facts in the instant cases are sufficiently distinguishable from UCCM that they do not fall within the prohibition of automatic adjustment clauses and the offending portions of the Steam Service Agreements are not prohibited by Missouri law.

Unlike unsophisticated members of the public, KCPL is a very knowledgeable customer with substantial resources and has used these resources to voluntarily undertake service subject to automatic adjustments reflected in the Steam Service Agreement negotiated at arm's length over a long period of time.

The proposed steam service to KCPL is not within the service area sought by Trigen-KC in which it holds itself out to provide public utility heat service to all of those who may ask for it. As such, Trigen-KC would be allowed to refuse to extend the subject service to KCPL. KCPL has voluntarily negotiated the availability of the steam service, for the purpose of generating electricity, because it is advantageous to KCPL to have the service available.

In addition, the proposed steam sale is not a monopoly service for which KCPL has no substitute. KCPL has other sources of electrical generation to it, but prefers to avail itself of the steam service of Trigen-KC under conditions freely accepted. Not only is the contract of benefit to KCPL but it is also greatly beneficial to Trigen-KC. Trigen-KC's potential for delivering off-peak steam load to KCPL is one of the considerations in determining that it may be feasible to invest an additional \$2.5 million in the system to make it possible to use coal, the lowest cost form of energy.

The Commission finds that the transfer of KCPL's steam system in Kansas City as proposed is in the public interest and should be approved. The Steam Service Agreement should also be approved as an integral feature of the complete proposal.

The Commission Staff and KPL object to some of the proposed provisions in a Steam Service Agreement with National Starch Company for many of the same reasons raised in the objections to the agreement with KCPL. Like the facilities of KCPL, the plant of National Starch is outside of the proposed service territory of Trigen-KC. Several years ago National Starch, at its own expense, constructed a steam main to connect to the downtown steam loop to permit receipt of steam for industrial processing at its plant north of the Missouri River.

Since the National Starch facilities are outside the area proposed to be served by Trigen-KC, applicant would be justified in refusing to render the proposed

steam service to National Starch. For that reason the Commission has serious doubts that the rendition outside Trigen-KC's proposed service area, over facilities provided by the customer, is a public utility offering.

The Commission is also of the opinion that the subject service is not prohibited by the ruling in UCCM for many of the same reasons previously discussed. The evidence establishes that National Starch is not a captive customer for a monopoly service for which it has no alternative. To the contrary, National Starch has engaged in extensive arm's-length negotiations to arrive at a contract which will guarantee it availability of the large volume of steam required for its industrial operation.

Although the contract is not finalized, the two features objected to are fixed and will not change. The proposed term of the contract is for ten years, under which National Starch will pay a monthly availability charge for the privilege of taking almost 50 percent of the annual steam production of the Kansas City steam system. National Starch would not have entered into the contract without the long term provision since it must be guaranteed a long term source of steam to make its starch production competitive. In the absence of the availability of the long term contract, National Starch would exercise a second option, that of building its own boiler facilities and using purchased gas for the generation of its steam requirements.

By the same token, Trigen-KC relies on the anticipated year-round load of National Starch for a production level which will permit the use of lower cost coal in the steam generation. In the absence of this important element of the economic feasibility of its operation, Trigen-KC would be unable to consummate the proposed transaction and thereafter operate the steam system.

National Starch is a sophisticated customer which has voluntarily entered into the contract with a number of automatic adjustments because the contract is to

the best interests of National Starch. National Starch has other alternatives available to it and will only use the service of Trigen-KC when it is the most competitive form of energy available. Since National Starch is not a captive customer, and has voluntarily undertaken the contract as being in its best interests, the Commission is of the opinion that the prohibition of automatic adjustment charges in UCCM does not apply and Trigen-KC should be authorized to finalize its proposed contract with National Starch.

KPL also objects to a proposed feature of Trigen-KC's tariff which would act as a prohibition of steam customers having connection to any other heat supply without prior notice and written approval from Trigen-KC. The prohibition is contained in both Section 3.7 and Section 4.2 of the proposed General Rules and Regulations of Trigen-KC. Testimony of the Commission Staff establishes that no other utility has a tariff containing such a prohibition.

During the course of the hearing Trigen-KC has expressed a willingness to modify its proposed tariff provision to only require notice of alternative heat connections to permit the company an opportunity to formulate, and file with the Commission, a tariff covering less-than-full-requirements service. In the Commission's opinion removal of the subject tariff provision under the conditions offered by Trigen-KC will be adequate protection for KPL. Trigen-KC should make the modifications in its proposed tariffs.

National Starch is a substantial customer for KPL's gas service at present, and it is anticipated that it will continue to be a customer. It is our opinion that, even in the absence of the modification of the tariff provision, the prohibition would not apply to National Starch as that customer is receiving service from Trigen-KC under a contract and not under the company's tariffs. The tariffs to be filed by Trigen-KC as a result of this proceeding will not be allowed to contain the complained-of prohibition against a second source of heat.

For the reasons recited herein, the proposed applications of KCPL and Trigen-KC should be approved as being in the public interest of the present customers of the steam system as well as the electric customers of KCPL.

Both the Commission Staff and KPL advocate enlargement of Trigen-KC's proposed service area to eliminate any doubts about the propriety of extra-territorial service. It is the Commission's opinion that we have no authority to force a public utility applicant to accept a service territory which exceeds the area in which the applicant professes to dedicate its facilities in public service to all those who seek the service. As such, the proposal of the Staff and KPL is not a serious consideration.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions.

The instant application of Kansas City Power & Light Company is in response to a prior Commission order to make good faith efforts to find a buyer and operator of the subject steam system. The application of Kansas City Power & Light fulfills the letter and the spirit of the Commission's prior order and should be approved.

When the Commission has found, as in the instant case, that the performance of a utility function under the terms proposed is in the public interest, the application should be granted. The record in this case makes it abundantly clear that the proposed operation by Trigen-KC is in the public interest. As illustrative of how important this continued operation is to the Kansas City area, it should be recalled that Kansas City has enacted an ordinance reducing the gross receipts tax on the steam system's operations from 10 percent to 4 percent effective January 1, 1990.

Both KPL and the Commission Staff point out that, although prohibition of automatic adjustment clauses in UCCM applies only to residential customers, the Commission has, in recent years, expanded that prohibition. For the reasons recited

herein we are of the opinion that it is improper to attempt to apply the prohibition contained in UCCM to the instant application.

Both KPL and the Commission Staff fear the precedential value of the authorizations sought by the applicants in these cases. In the Commission's opinion the highly unusual circumstances of the instant applications are not likely to be duplicated and our decision in this matter will have little or no precedential application. To deny KCPL and National Starch the benefit of bargains which they have sought long and hard is in no way similar to any protection that should be afforded an unsophisticated residential customer which must take a needed service at a price over which he has no control.

KPL protests the proposed contracts of Trigen-KC as an unauthorized method to render service to a utility customer outside an authorized service area. In our opinion we do not consider the instant contracts to be the wave of the future since they do not permit the invasion of another company's service territory. There is no other steam company available. The facilities of KCPL and National Starch are not in the present or proposed service territory of any steam company. This is another of the unique facts in the instant case not likely to be duplicated in the future.

The proposal to expand the service area of Trigen-KC is not a potential solution to any of the problems presented. We are of the opinion that we are without power to order a company to provide service to an area in which it has not professed or undertaken to serve all who ask for its service. State ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 416 S.W.2d 109 (Mo. App. 1967).

Trigen-KC, in a lengthy legal memorandum, has cited considerable authority for the proposition that its service to National Starch and KCPL is not a public utility function. We find it unnecessary to reach that question in order to approve the instant applications. It is our desire to continue to monitor the involved contracts for assurances that service, although possibly unregulated, is not being

extended under terms or conditions that would be detrimental to the remainder of the steam system users.

Finally, we must turn our attention to a matter beyond our jurisdiction. The parties request the granting of the instant applications be conditioned upon the receipt of certain approvals by other regulatory agencies. One form of those approvals is the legally binding transfer or a reissuance, as the case may be, of all existing permits, licenses, franchises, easements, certificates and approvals required for Trigen's ownership and operation of the steam system. Another condition on which the instant applications hinge is the legally binding transfer of KCPL's rights to 5,955 tons of sulphur dioxin emissions credits banked with the Missouri Department of Natural Resources. The Commission recognizes that, absent these approvals, the proposals herein involved cannot be consummated. We therefore specifically condition the authority granted herein on the receipt of those approvals.

Subject to the conditions herein recited, the instant applications should be granted.

It is, therefore,

ORDERED: 1. That the application of Kansas City Power & Light Company for authority to sell its downtown Kansas City, Missouri, central station steam heat distribution system to Trigen-Kansas City District Energy Corporation be, and the same is, hereby approved, and Kansas City Power & Light Company is authorized to do any and all things necessary to consummate the transaction herein authorized.

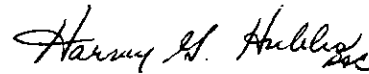
ORDERED: 2. That the application of Trigen-Kansas City District Energy Corporation for permission to acquire and operate the steam heat distribution system herein involved is hereby granted subject to the conditions herein recited, and Trigen-Kansas City District Energy Corporation is hereby authorized to do any and all things necessary to consummate the transaction herein approved.

ORDERED: 3. That within thirty (30) days from the effective date of this Report And Order, Trigen-Kansas City District Energy Corporation shall file, for Commission approval, tariffs governing the proposed operation herein involved.

ORDERED: 4. That within thirty (30) days from execution, Trigen-Kansas City District Energy Corporation shall submit for Staff review copies of the executed contracts with Kansas City Power & Light Company and National Starch Company.

ORDERED: 5. That this Report And Order shall become effective on the 8th day of January, 1990.

BY THE COMMISSION



Harvey G. Hubbs
Secretary

Steinmeier, Chm., Mueller,
Fischer, and Rauch, CC., Concur.

Dated at Jefferson City, Missouri,
on this 29th day of December, 1989.