BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of Trigen-Kansas City Energy Corporation for a Certificate of Public Convenience and Necessity authorizing it to construct, install, own, operate, control, manage and maintain a steam heat distribution system to provide steam heat service in Kansas City, Missouri, as an expansion of its existing certified area.	)	Case No. HA-2006-0294

STAFF RESPONSE TO COMMISSION QUESTIONS

COME NOW the Staff of the Missouri Public Service Commission (Staff) and respectfully submits as follows:

1. The Evidentiary Hearing in this case was held on May 15, 2006.

2. During the Evidentiary Hearing, the Parties were directed to respond to two Commissioner questions.

The first question is whether the Commission has ever applied Staff's condition number two to a utility seeking to expand its service territory to serve one new customer. Staff's condition number two is that the Commission order approving the application should clearly state that Trigen will bear the risk of any adverse affects of this expansion (Harris Direct NP, p. 12, lines 4-12). The short answer to this question is no in the specific limited context of a utility seeking to expand its service territory to serve one new customer. However, there are related matters.

Staff cited in its Prehearing Brief and there was testimony about gas companies establishing new service territories and Staff's condition number two being applied. Staff would also note Case No. EO-2004-0108 the Application of AmerenUE to sell, transfer and assign certain assets, etc. to AmerenCIPS, Report and Order on Rehearing, February 10, 2005. Staff

recommended among other things that AmerenUE hold harmless its Missouri retail customers from any determineal impact. *Id.* at 65. Staff further recommended that UE forego recovery of any increased transmission costs solely due to the transfer.

The Commission stated:

> The Commission does not need UE to agree to hold Missouri ratepayers harmless or to agree to forego recovery of increased transmission costs. In order to protect Missouri ratepayers from the risk of increased transmission costs resulting solely from the Metro East transfer, the Commission will exclude any such costs from UE's rates in the future as a condition of its approval of the transfer. The Commission agrees with UE that these possible costs are unlikely. Dr. Proctor, who testified as to these possible costs, rated them as only 20-percent to 25-percent likely. Nonetheless, the level of these costs is such that additional protection for Missouri ratepayers is necessary.

Id. at 66.

The second question was whether one company has sought to provide the same or similar service of an existing certificated utility and expand into the service territory or area of business of that already certificated utility. The Court stated in *Osage Water Co. v. Miller County Water Authority, Inc.,* 950 S.W.2d 569, 575-576 (Mo. App. 1997):

> We note that the Public Service Commission has the authority to issue a certificate of convenience and necessity to a public utility even though such certificate will overlap with another public utility's area of service. See, e.g., *State ex rel. Missouri Pacific Freight Transp. Co. v. Public Serv. Comm'n*, 295 S.W.2d 128, 132 (Mo.1956); *State ex rel. Electric Co. of Missouri v. Atkinson,* 275 Mo. 325, 204 S.W. 897, 899-900 (Mo. banc 1918). The public interest and convenience is the Commission's chief concern when determining whether to grant more than one certificate within one certificated area. See *Missouri Pacific Freight,* 295 S.W.2d at 132; *State ex rel. Orscheln Bros. Truck Lines, Inc. v. Public Serv. Comm'n,* 433 S.W.2d 596, 605 (Mo.App.1968).
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> Plaintiff's argument that the Public Service Commission has never granted overlapping certificated areas, as a basis for reversal, is also without merit. The policy favoring regulated monopoly over destructive competition rests upon the public interest. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Serv. Comm'n,* 600 S.W.2d 147, 154 (Mo.App.1980). It is not an absolute rule, but is applied relative to the particular facts and circumstances of each case. Id. Our State's policy against competition is a flexible one created to

> protect the public first and concerning itself with the existing utility only in an incidental manner. Id. at 155.

The Court in *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147 (Mo. App. 1980) dealt with review of a Commission Order granting a certificate of convenience and necessity to construct and operate a water utility within the area in a public water supply district. The Court of Appeals upheld the Commission. The Court stated in pertinent part at page 155-156:

> The first approach is that preference given an existing utility is merely a guideline for the Commission. The controlling factor is the public interest and such interest is a matter of policy to be determined by the Commission. It is suggested that such an approach applies a balancing process, giving weight to adequacy of service and desirability of competition. It is suggested by such an approach that adequacy or inadequacy of a facility alone is not determinative, …
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> Missouri authority tends to uphold the first approach or the application of the balancing test to the issue of allowing competition. *Ozark Electric Cooperative v. Public Service Commission*, supra, holds that adequacy of facilities is not an exclusive criterion. *State ex rel. Electric Company of Missouri v. Atkinson*, supra, points out that the policy is to protect the public and directs the concern of the public interest to the question of destructive competition. It can be further concluded that our own state's policy against competition is a flexible one created to protect the public first and concerning itself with the existing utility only in an incidental manner…
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> In conclusion therefore, the ultimate interest is that interest of the public as a whole, see 73 C.J.S. Public Utilities s 42(a) (1951) and the authority cited above, and not the potential hardship to individuals in the District herein. The P.S.C. was correct in its conclusion that such potential hardship is not a requirement for the issuance of a certificate. Any harm, and the evidence herein does not sufficiently prove any harm, to the District, as opposed to the public interest, is only of secondary importance. The question is one of public need for water, that is how that water can best be provided at the lowest rate to the user as opposed to destructive competition for the District.

The Missouri Supreme Court in *State ex rel. Electric Co. of Missouri v. Atkinson,* 275 Mo. 325, 275 S.W. 897, 898-9 (Mo. 1918), stated:

> Let it be conceded that the 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…
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> In this case these two corporations are operating in numerous other places. The per cent of appellant's business which would be affected by competition thus introduced is quite small… There is little likelihood the competition will prove "destructive."

Finally, in an effort to provide a complete response, the Staff would note a Supreme Court decision from the era when the Commission's jurisdiction included motor carriers. The Missouri Supreme Court in *State ex rel Missouri Pacific Freight Transport Company v. Public Service Commission*, 295 S.W.2d 128, 132-134 (Mo. 1956) partially overruled on unrelated grounds 411 S.W.2d 190, 195 (Mo. 1969) stated:

> … The Commission has the responsibility of determining the public's need for common-carrier service sought and of considering a new, enlarged, extended or additional, and duplication of service would adversely affect presently authorized carrier service with resultant deterioration of efficiency in adequately supplying the transportation needs of the public. In the determination of these matters, the rights of an applicant, with respect to the issuance of a certificate of convenience and necessity, are considered subservient to the public interest and convenience….
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> … It is further provided in Subparagraph 5 of § 390.051, that in determining whether a certificate should be issued the Commission 'shall give reasonable consideration to the transportation service being furnished by any common carrier by rail or motor vehicle and the effect which the proposed transportation service may have upon such carriers * * *.'
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> … See now Pond on Public Utilities, Vol. 3, 4th Ed., § 775, pp. 1552 et seq., where additionally it is said the policy of regulation upon which our present commission plan is based is at once the reason and the justification for the holding of our courts that the regulation of an existing system of transportation, which is properly serving a given field, is to be preferred to competition among several independent systems. 'The prime object and real purpose of commission control

is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates. * * * Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public and its introduction would be a handicap rather than a help ultimately in such a field.'

WHEREFORE, the Staff respectfully submits these responses to Commission questions.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 22nd day of May 2006.

/s/ Robert V. Franson