

**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, ) Case No. HA-2006-0294  
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. )

**STAFF PREHEARING BRIEF**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and respectfully submits Staff's Prehearing Brief:

**Procedural History**

On January 10, 2006, Trigen-Kansas City Energy Corporation (Trigen) filed its Application seeking to expand its certificated service area for the provision of regulated steam heating service in downtown Kansas City, Jackson County, Missouri. On February 28, 2006, the Commission granted intervention to Truman Medical Center, Inc. (TMC), Missouri Gas Energy (MGE), and Kansas City Power & Light Company (KCPL). On March 16, 2006 David A. Wagner filed Direct Testimony for TMC and Brian Kirk filed Direct Testimony for Trigen. On April 13, 2006 Alan J. Bax and V. William Harris filed Rebuttal Testimony for Staff. David L. Wagner filed Rebuttal Testimony for KCPL. On April 28, 2006, Murray Sim and Brian P. Kirk filed Surrebuttal Testimony for Trigen. Michael R. Noack filed Surrebuttal Testimony for MGE.

On April 26, 2006, KCPL filed its Notice of Withdrawal and Intervention. Counsel for KCPL has advised the Parties that KCPL no longer wants any correspondence in this case and will not participate in the case.

On May 4, 2006, Staff, on behalf of all of the Parties, filed a Proposed List of Issues, Order of Witnesses and Order of Cross-Examination. Staff will address each of the issues in this case.

### **Trigen and TMC**

Trigen is a provider of regulated steam services to 67 customers in downtown Kansas City, Missouri and to one industrial steam customer located in North Kansas City (Rebuttal Testimony of V. William Harris, p. 4, lines 5-6). The industrial customer takes industrial steam under a special contract and takes the steam load through the customer's pipeline that is connected to the Grand Avenue generating facility (Harris Rebuttal, p. 4, lines 9-11). Trigen was authorized to provide steam heating service pursuant to Commission authority granted in Case No. HA-90-5 issued on December 29, 1989 (*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 revocation of its certificate of public convenience and necessity to provide steam heat service, and 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, 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, Case Nos. HM-90-4 and HA-90-5, 30 Mo.P.S.C (N.S.) 69 (1989)*).

Trigen's steam distribution system runs from Grand Avenue generating facility to individual customer locations within the area known as the "Downtown Loop" bounded on the north by Interstate 70 (Harris Rebuttal, p. 4, lines 7-9). Trigen distributes steam through

approximately 6.5 miles of pipe buried in the streets of Kansas City, Mo. (Kirk Direct NP, p. 2, lines 11-12).

The primary use of the steam by Trigen's customers is to heat occupied spaces in buildings (Kirk Direct NP, p. 2, lines 13-14). Other customer uses of the steam include to humidify spaces, heat domestic water, provide heat for laundry, and/or prepare food and in some instances, various industrial processes (Kirk Direct NP, p. 2, lines 14-16).

KCPL originally owned and operated the Grand Avenue power plant from the early part of the twentieth century until the early 1990s until it was sold (Harris Rebuttal, p. 4, lines 14-16). A map of Trigen's current service territory and the proposed expanded service territory is attached to the Direct Testimony of Brian P. Kirk as NP Schedule BPK-5 (Kirk Direct, Schedule NP BPK-5).

TMC, an intervenor in this case, is a Missouri non-profit corporation that serves as a safety net healthcare to its catchment area, a healthcare business term akin to a service area for other businesses (Wagner Direct, p. 3, lines 6-8, 11). TMC's catchment area is Kansas City and Jackson County, Missouri (Wagner Direct, p. 3, line 16).

### **Other Intervenors**

MGE, a division of Southern Union Company, is a regulated natural gas local distribution company serving Kansas City, Missouri. KCPL is an electric utility serving Kansas City, Missouri.

### **The Application**

Trigen's Application to expand its existing service territory was filed on January 10, 2006. Pertinent parts of the Application provide a good description of the proposed expansion of Trigen's service territory. The Application, in pertinent part, provides as follows:

9. A prospective customer within the proposed new service area (“Truman Medical Centers, or “TMC”) has requested that Trigen provide its property with steam heating service, as further discussed in **Highly Confidential Appendix C**. This prospective customer is located in an area where Trigen does not presently hold a certificate from the Commission. However, Trigen does currently hold a franchise from the City of Kansas City, a copy of which was submitted in CASE NO. HA-96-370 and is incorporated herein by this reference, which includes the proposed new service area. Trigen will not require any additional franchises or permits from municipalities, counties or other authorities in connection with the proposed construction other than the usual and customary railroad and state, city and/or county highway and road crossing and construction permits which will be obtained prior to construction.

10. Applicant’s existing rates and regulations for steam heating service, as contained in its tariff and as may change from time to time pursuant to law, will apply to service in the proposed area.

11. The new area for which Trigen seeks a certificate from the Commission contains other potential steam heating customers which are expected to express an interest in acquiring Trigen’s service, in addition to the prospective customer mentioned above, as further discussed in **Highly Confidential Appendix C**. Service from a steam heating utility is not available in this area at the present time. Since Trigen has a city franchise and the ability to provide service economically in this area by extension of its existing facilities, Trigen believes that potential new customers should be afforded the opportunity to take service from Trigen if they so desire...

### **The Issues in this Case**

The issues for this case, as stated by the Parties in the May 4, 2006 filing entitled “Proposed List of Issues, Order of Witnesses, and Order of Cross-Examination,” were as follows:

A. Should the Commission grant Trigen’s requested Certificate of Convenience and Necessity to construct, install, own, operate, control, manage and maintain a system for the provision of steam heating service to the public pursuant to its approved rates, rules and regulations in Kansas City, Jackson County, Missouri (in the area more particularly described in Appendix B to Trigen’s Application) as an expansion of its current service territory as being “necessary or convenient for the public service” pursuant to Sections 393.170 and 393.290 RSMo (2000)?

B. If so, should any conditions be imposed on the Certificate of Convenience and Necessity?

Staff answers these matters in the affirmative. The Commission should grant Trigen's requested Certificate of Convenience and Necessity but only with the conditions set forth in the testimony of Staff Witness V. William Harris. Staff's two conditions are: 1) TMC provide Trigen with all of the funding to construct this project (Harris Direct NP, p. 7, lines 12-24); and 2) 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).

### **Legal Standard for CCN**

Section 393.170 RSMo 2000 provides as follows:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Section 393.290 RSMo makes Section 393.170 applicable to steam heating companies such as Trigen.

Types of Certificates

The Court in the *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177 (Mo. App 1960) case distinguished between the two types of certificates of convenience and necessity, identifying Section 393.170.1 with line certificates of convenience and necessity and Section 393.170.2 with area certificates of convenience and necessity. The Court stated:

Certificate “authority” is of two kinds and emanates from two classified sources. Sub-section 1 requires “authority” to construct an electric plant. Sub-section 2 requires “authority” for an established company to serve a territory by means of an existing plant. *Peoples Telephone Exchange v. Public Service Comm.*, 239 Mo.App. 166, 186 S.W.2d 531.

343 S.W.2d at 185.

This distinction more clearly appears in the Western District Court of Appeals’ decision in *State ex rel. Union Electric Co. v. Public Serv. Comm’n*, 770 S.W.2d 283, 285 (Mo.App. 1989):

. . . Two types of certificate authority are contemplated in Missouri statutes. Section 393.170.1, RSMo 1986 sets out the requirement for authority to construct electrical plants. This is commonly referred to as a line certificate and is what Union Electric held in the instant case. Subsection 2 sets out the requirement for authority to serve a territory which is known as an area certificate. § 393.170.2, RSMo 1986. . . .

On its face, line certificate authority described under subsection 1 of section 393.170 carries no obligation to serve the public generally along the path of the line. The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority. That difference is reflected in the distinct rules for each promulgated by the Commission at 4 CSR 240-2.060(2) [*See* 4 CSR 240-3.105(1)(A) and (B)].

...The basic rule remains that the Commission must deal with the utility and the affected public within the framework of authority sought by the utility and granted by the Commission after applying the scrutiny of proper administrative processes.

Trigen's Application states that Trigen seeks a certificate of convenience and necessity pursuant to Section 393.170 and Section 393.290 and 4 CSR 240-2.060 and 4 CSR 240-3.400. Clearly, Trigen is seeking an area certificate of convenience and necessity not a line certificate of convenience and necessity.

Commission Rules and Caselaw

Commission Rule 4 CSR 240-3.400(1)(E) specifies that the facts in that application must show that the granting of the application is required by the public convenience and necessity. The Western District Court of Appeals in *State ex rel. Intercon Gas Co. v. PSC*, 848 S.W.2d 593, 597-98 (Mo.App. W.D. 1993) stated that "[t]he term 'necessity' does not mean 'essential' or 'absolutely indispensable,'" "[t]he safety and adequacy of facilities are proper criteria in evaluating necessity and convenience" and "it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate." (Citations omitted).

The Western District Court of Appeals in *State ex rel. Public Water Supply Dist. No. 8 v. PSC*, 600 S.W.2d 147, 155 (Mo.App. W.D. 1980) stated that "[t]he controlling factor is the public interest and such interest is a matter of policy to be determined by the Commission." The Court further related that "the ultimate interest is that interest of the public as a whole . . . and not the potential hardship to individuals. . ." *Id.* at 156. Section 386.610 requires the Commission to consider "the public welfare, efficient facilities and substantial justice between patrons and public utilities."

In *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 562 S.W.2d 688 (Mo.App.), *cert. denied*, 439 U.S. 866, 99 S.Ct. 192, 38 L.Ed.2d 177 (1978), UCCM sought judicial review of the Commission granting a CCN, pursuant to Section 393.170(3), to

construct and operate in Callaway County a nuclear-powered steam electric generating plant. The Court held that in order for the Commission “[t]o arrive at its determination, [i.e., whether to grant a CCN,] the Commission must find that the nuclear facility is adequate to meet the needs of the public and is economical...” 562 S.W.2d at 698 n.1. The Court further stated that “[t]he Commission’s considerations pertain to economic feasibility, need for increased power and financing.” *Id.* at 698.

To determine how the statute is to be applied, it is necessary to examine what the phrase “necessary or convenient for the public interest” means. Citing *State ex rel. Crown Coach Co. v. Public Serv. Comm’n*, 179 S.W.2d 123, 126 (1944), the Western District Court of Appeals stated in *State ex rel. Capital City Water Co. v. Public Serv. Comm’n*, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993) that “[t]he Commission’s principal interest is to serve and protect ratepayers.” While the language “substantial justice between patrons and public utilities” is part of Section 386.610, the Courts have been clear that the public interest is the foremost concern in certificate of convenience and necessity cases. “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.” *State ex rel. Missouri Pac. Freight Transport Co. v. Public Service Comm’n*, 295 S.W.2d 128, 132 (Mo. 1956). Although it has been held that the general purpose of utility regulation is to substitute regulated monopoly for destructive competition, the protection given the utility is merely incidental to the protection of the public. *DePaul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo.App. 1976).

In Case No. EO-2002-351, respecting a request for a CCN for a transmission line, the Commission stated:

The Court of Appeals has said that, “[f]or some reason, either intentional or otherwise, the General Assembly has not seen fit to statutorily spell out any specific criteria to aid in the determination of what is ‘necessary or convenient for the public service’ within the meaning of such language as employed in Section 393.170 . . .” That same Court found that the safety and adequacy of facilities are criteria that may be considered, but that they are not the only criteria. The Court of Appeals has also stated that “the term ‘necessity’ does not mean ‘essential’ or ‘absolutely indispensable’, but that an additional service would be an improvement justifying its costs.”

The dominant purpose in creation of the Commission is public welfare. The administration of its authority should be directed to that purpose. In every case where it is called upon to grant a permit, or to authorize an additional service to be rendered by an authorized certificate holder, the Commission should be guided, primarily, by considerations of public interest.

Thus, in determining whether the proposed transmission line is “necessary or convenient for the public service,” the Commission must determine if granting a certificate to build the proposed transmission line is in the public interest.

Who are “the public”? Concerned Citizens argues that the Commission should not consider the benefits it admits exist for AmerenUE, Associated, or Associated’s customers. Concerned Citizens would have the Commission consider only the interests of the affected landowners. However, this argument is contrary to the case law.

In the *Missouri Pacific Freight Transport Company* case, the Court stated that the “rights of an individual with respect to issuance of a certificate are subservient to the rights of the public . . .” And, in a case affirming the Commission’s grant of a certificate of convenience and necessity to a water utility, the Court in *Public Water Supply District No. 8* stated, “the ultimate interest is that interest of the public as a whole . . . and not the potential hardship to individuals . . .”

The Commission is also aided by zoning and eminent domain cases where the issue of public interest is often addressed. An examination of those cases in Missouri finds that the determination of public interest is a balancing test between public and private interests. And further, “[n]o one factor is dispositive in balancing public versus private interests. Each case stands on its own facts and circumstances.”

Section 386.610, RSMo, which applies to the Commission’s general regulatory power over electric corporations, supports this balancing test approach. The relevant part of 386.610 states that “[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.”

The Commission must, therefore, balance all the relevant factors, both the benefits and detriments, and determine whether the public benefits of the project outweigh the individual detriments. It is not within the authority of this Commission to determine the monetary value or just compensation for such detriments other than to determine if the costs of the project outweigh the benefits provided by it. [Footnotes omitted].

*In the Matter of The Application of Union Electric Company for Permission and Authority to Construct, Operate, Own, and Maintain a 345 Kilovolt Transmission Line in Maries, Osage and Pulaski Counties, Missouri (“Callaway-Franks”) Line, 12 Mo.P.S.C. 3d 174, 189-190 (August 21, 2003).*

### **Trigen’s Application**

This particular application involves Trigen’s request to serve TMC and other potential customers in a service territory expansion. This raises the issue of whether the Commission may give particular consideration to a single ratepayer over other patrons.

In discussing Staff’s view of the public in this case, Staff Witness Harris stated that the “public” that is of concern to the Staff in this proceeding is:

. . . at least those consumers taking and receiving utility service from Trigen’s steam operations in downtown Kansas City.

In this case, Staff would define “public interest” as referring to the nature and level of the impact or effect that this proposed expansion of the existing steam operations will have on Trigen’s existing customers. This includes all existing customers and the industrial steam customer who has operations north of the Missouri River. There is a fundamental concern in the regulation of public utilities that the public being served must not be impacted adversely or harmed by those responsible for providing monopoly services. Public utilities in Missouri are charged with providing safe and adequate service at nondiscriminatory, just, fair and reasonable rates. If this proposed expansion results in adverse or negative impacts to Trigen’s existing steam customers, then the Commission should not approve the application or, in the alternative, should impose conditions sufficient to overcome the detriments of the proposed expansion.

(Harris Rebuttal, p. 5, line 12 through p. 6, line 4).

Staff recommends that that Commission carefully consider the full spectrum of the term “public” in this case. As part of this consideration, Staff’s testimony has directly focused on Trigen’s existing steam customers (Harris Rebuttal, p. 5, line 12 through p. 6, line 4), which is the most directly at risk segment of the public in this case. The conditions that Staff proposes protects the most at risk segment of the public. However, contrary to the assertions of MGE Witness Michael R. Noack (Surrebuttal Testimony of Michael R. Noack, p. 3, lines 16-22), Staff did not limit its consideration of the “public” simply to the existing customers of Trigen. Staff stated that the term “public” should include “...at least those consumers taking and receiving utility service from Trigen’s steam operations in downtown Kansas City.” (Harris, Direct, p. 5, lines 13-15).

The Commission in *In the Matter of the Application of The Empire District Electric Company for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain an Electric Transmission and Distribution System to Provide Electric Service in an Area in Greene County, Missouri*, Case No. EA-99-172, 8 Mo.P.S.C.3d 426, 430 (1999) stated:

In making a determination as to whether or not the statute has been satisfied and a certificate of convenience and necessity should be granted, the Commission has in prior cases consider the following standards:

1. There must be a need for the service;
2. The applicant must be qualified to provide the proposed service;
3. The applicant must have the financial ability to provide the service;
4. The applicant’s proposal must be economically feasible; and
5. The service must promote the public interest.

Trigen Witness Brian Kirk, in his Direct Testimony, discusses the need for the expansion and sets out the proposal in substantial detail (Kirk Direct, p. 1-21). The fact that TMC is willing to provide substantial capital for the expansion is indicative of a need for the service as an economical alternative for energy.

Trigen is able to provide distributed steam service in the proposed expansion area (Bax Rebuttal, p. 3, line 14 through p. 4, line 5). Mr. Bax explains that the proposed extension of the existing facilities can be done in a safe and reliable manner (Bax Rebuttal, p. 3, line 14 through p. 4, line 5). TMC currently produces its own steam and the plan is for Trigen to connect its new facilities directly to TMC's existing infrastructure (Bax Rebuttal, p. 3, line 14 through p. 4, line 5). If Trigen should extend its system into the proposed expansion area, then this could potentially provide Trigen with a backup production source as well as possibly increase the reliability of Trigen's customers on the east radial (Bax Rebuttal, p. 4, lines 1-5).

The financial capability of Trigen to provide this service is not a particular issue especially since TMC will pay for most of the expansion and Staff recommends as a condition for approval that TMC pay it all. The economic feasibility of the matter is established by Mr. Kirk's testimony. Staff believes that the expansion, given due consideration, is in the public interest.

### **Staff's Conditions**

#### *1. Other Customers Held Harmless*

Staff recommends that the Commission approve this CCN but only with two specific conditions. Staff is recommending that the entire amount of the project be advanced by the customer being directly served by the new steam line expansion, which currently is only TMC (Harris Rebuttal, p. 7, lines 9-11). Staff believes that TMC should pay for the entire funding for

this project because Trigen's existing customers should not be adversely impacted by the expansion of steam service in downtown Kansas City (Harris Rebuttal, p. 7, lines 14-18). Staff further notes that while the project is expected to provide positive benefits to both TMC and Trigen, there is no guarantee that this will occur (Harris Rebuttal, p. 7, lines 18-19). TMC's complete initial provision of the financing will hold Trigen's other customers harmless (Harris Rebuttal p. 7, lines 12-23). Mr. Harris also points out that at such time that Trigen's expanded steam operations prove to be successful, then a portion of TMC's funds used to construct the distribution lines in the expansion could be refunded to TMC (Harris Rebuttal, p. 6, lines 22-24). Furthermore, even if TMC advances the entire amount of the construction, the project would still result in significant savings to TMC (Harris Rebuttal, p. 7 line 24 through p. 8 line 7).

It is common in the utility industry for potential customers to provide funds for construction advancement (Harris Rebuttal, p. 8, lines 8-10). The utility only has an obligation to serve customers in its service territory (Harris Rebuttal, p. 8, lines 8-19). When potential customers ask the utility for service, the customers generally are required to pay for the expansion with the understanding that a portion of the monies provided may qualify for refunds to those customers if sufficient revenues are generated (Harris Rebuttal, p. 8, lines 13-17). In the present case, TMC has requested service that Trigen is not obligated to provide (Harris Rebuttal, p. 8, lines 15-17). However, Trigen certainly has a business interest to expand its existing customer base and one way is the proposed expansion (Harris Rebuttal, p. 8, lines 17-19).

Trigen, in surrebuttal testimony, states that TMC is best able to speak to the condition of TMC financing the entire construction cost of the extension project (Sim Surrebuttal, p. 4, lines 5-8). TMC did not file surrebuttal testimony to address this condition proposed by the Staff. Trigen did not express any opposition to this condition in surrebuttal testimony but did not

endorse it either (Sim Surrebuttal, p. 4, lines 5-22). MGE's surrebuttal testimony did not address this condition.

At the evidentiary hearing, TMC will have an opportunity to state its position on this condition. Staff requests that the Commission grant the CCN subject to this condition and one other condition.

2. Trigen bears risk of failure

Staff's second condition is that Trigen bear the risk of any adverse affects of this expansion (Harris Rebuttal, p. 12, lines 1-10). Mr. Harris's testimony explains the similarities between this case and similar cases involving natural gas utilities (Harris Rebuttal, p. 9, line 6 through p. 11, line 31). The natural gas cases involved service territory expansions into areas having electricity and propane gas energy choices (Harris Rebuttal, p. 9, lines 10-11). This case involves service territory expansion into any area having electricity and natural gas energy choices (Harris Rebuttal, p. 9, lines 11-12). Each of the cases cited by Mr. Harris involved a service territory expansion into an area by a new energy provider, thus, creating competition from an alternative energy within that area (Harris Rebuttal, p. 9, lines 12-14).

In Case No. GA-94-127, Tartan Energy Company, LC d/b/a SMGC (Tartan) agreed to bear the risk for any misstatement or overstatement in estimates of the construction and operational costs that were identified in the Stipulation and Agreement in that case (Harris Direct, p. 9, lines 15-23). In its Report and Order in that case, the Commission stated: "Tartan bears most of the risk if it has underestimated the economic feasibility of its project, and the public benefit outweighs the potential for underestimating these costs." (Harris Rebuttal, p. 9, lines 15-23). Mr. Harris provides other examples including Case Nos. GA-94-325, GA-95-216, GA-97-132 and GA-97-133 (Harris Rebuttal, p. 10, line 1 through p. 12, line 12).

Another common component of these cases was the requirement that the company seeking a CCN keep separate accounting records for the expansion project which could be examined at the next general rate case to determine whether any detriment had occurred (Harris Rebuttal, p. 10, lines 32-36; p. 11, lines 9-20; p. 11, lines 25-31). In other words, the Commission has seen the need for a mechanism to determine if any detriment has occurred and to assess it appropriately in a rate case.

In responses to Staff Data Request Nos. 8 and 9, Trigen indicated that it is not willing to separately account for the TMC expansion because “the project is expected to be accretive to the earnings of Trigen KC.” (Harris Rebuttal, p. 9, lines 1-5 and Schedules BPK-3 and BPK-4 attached to Trigen witness Kirk’s Direct Testimony). There is great similarity of the instant case to the cases cited by Mr. Harris and the condition proposed by the Staff should apply to Trigen as it has applied to utilities in other cases.

Trigen’s first reason for rejection of Staff’s hold harmless condition for Trigen’s existing customers is that “...Trigen firmly believes that the extension will be immediately accretive to its earnings.” (Sim Surrebuttal, p. 5, lines 1-7). Staff has no doubt that Trigen believes this. However, mere belief is no substitute for the necessary protection for existing ratepayers. The applicants in each of the filings referenced in Mr. Harris’ Rebuttal Testimony thought the expansion for which each was seeking authority from the Commission was going to be profitable. Yet, in instances of projecting loads, forecasting operation and maintenance costs, and estimating construction costs, there is a possibility of adverse events occurring that would cause the expansion to result in a decrease in earning, and, thus, be detrimental to Trigen’s other customers, unless those customers are properly protected. While Staff shares Trigen’s optimism respecting the earnings potential of the TMC load, Staff wants to ensure that a “no harm”

standard is effectuated as has been adopted by the Commission in the previously cited cases involving other utilities.

Trigen's second reason for rejection of Staff's hold harmless condition is that Trigen would have no initial capital investment if TMC were to agree to finance the entire cost of the construction and this would "materially" insulate ratepayers from any risk of loss (Sim Surrebuttal, p. 5, lines 9-21). While it is true that if TMC were to agree to finance the entire cost of the construction, it would be a positive development in providing some assurance that existing customers would be protected, it does not change the fact that existing customers remain at risk for any failure of the project, especially if projected revenues do not materialize. Thus, TMC agreeing to finance the entire cost of the construction does not change the need for the hold harmless condition.

Trigen's third reason is that Staff has provided no analysis or study to support any contention that the extension will have any probability of producing an operating loss (Sim Surrebuttal, p. 6, lines 1-2). Such an argument ignores the fact the Trigen bears the burden of proving its case and no study or analysis can guarantee the hold harmless condition. There is no study or analysis that would prove this point since any such study or analysis would rely on projections, estimates and forecasts to measure events that have yet to occur. Any such analysis or study would be speculative because the revenues and related costs are all estimates. Accordingly, the hold harmless condition is appropriate.

Trigen's final reason is that it would take additional administrative burden to maintain separate books and records for a tracking of the costs and revenues of the TMC project (Sim, p. 6, lines 4-14). The fact is that if Trigen wants to do this project, there are certain inherent risks which it should bear and which need to be reviewed in a subsequent rate case. This review

cannot be done without appropriate books and records. If the TMC expansion proves to be accretive and beneficial to Trigen's entire Kansas City operations, the necessity for separate accounting would no longer be necessary on a going forward basis.

While Trigen attempts to distinguish this project from the cases cited by Staff Witness Harris (Sim Surrebuttal, p. 7, lines 5-10), the fact remains that any risk of failure should be on Trigen, since Trigen is the entity seeking this CCN and the existing customers need to be insulated. Trigen's existing customers should not be adversely affected in any way by TMC's desire to acquire steam service and Trigen's desire to provide steam service to TMC. Furthermore, based on Staff's past experience regarding "sharing proposals," Staff has no interest in Trigen's sharing mechanism for any gains that may occur (Sim, p. 7, lines 12-21).

Staff recommends that the Commission approve Trigen's CCN subject to Staff's two conditions.

### **MGE Objections**

The only other party, besides Trigen, to file Surrebuttal Testimony was MGE. MGE contends that Trigen should not be allowed to expand its service territory to compete with MGE because (1) the placement of Trigen's infrastructure adjacent to the MGE infrastructure may harm MGE's infrastructure and (2) MGE and its customers are part of the public and they will be harmed if Trigen is permitted to compete for certain of MGE's customers. (Noack Surrebuttal, p. 2-6). In other words, MGE does not want any competition.

Each of the cases cited by Mr. Harris in his Rebuttal Testimony involved a service territory expansion into an area by a new energy provider, thus creating competition within that area (Harris Rebuttal, p. 9, lines 12-14). Except in the cases of electric territorial agreements, the purpose of expanding a service territory has related to creating the opportunity for competition.

Trigen, KCPL and MGE are competitors in downtown Kansas City, Missouri. The fact that MGE does not want competition with Trigen, does not prevail over the public interest. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson City v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. 1980). The Commission's primary interest in determining whether to grant a CCN is to serve the public interest rather than to protect a utility from competition. *Id.* at 155. Moreover, "it is within the discretion of the P.S.C. to determine when the evidence indicates the public interest will be served in the award of a certificate to a competing utility, see *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo.App. 1973)." *Id.* at 154.

TMC is only a gas transport customer of MGE and does not directly buy gas from MGE nor has it for several years (Direct Testimony of David A. Wagner, p. 5, lines 22-23). MGE's lost revenues, if any, will be in the transportation costs paid by TMC to MGE (Direct Testimony of David A. Wagner, p. 6, line 8). TMC expects to save over 5 times the purported MGE revenue loss (Direct Testimony of David A. Wagner, p. 6, lines 13-14). TMC looks at all options that are available to it and chooses quality service for the lowest operational cost (Direct Testimony of David A. Wagner, p. 6, lines 16-17). TMC wants the steam option (Direct Testimony of David A. Wagner, p. 6, lines 18-20). Have MGE and KCPL offered or agreed not to compete for Trigen's existing customer base? No, and that would be extremely unlikely.

**WHEREFORE**, the Staff respectfully recommends that the Commission approve the Application subject to the conditions recommended by Staff.

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 11<sup>th</sup> day of May 2006.

/s/ Robert V. Franson