

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Tariff Filing of)	
Trigen-Kansas City Energy Corporation)	
To Implement a General Rate Increase for)	Case No. HR-2008-0300
Regulated Steam Heating Service Provided)	Tariff Nos. YH-2008-0553 and
To Customers in the Company's Missouri)	YH-2008-0554
Service Area)	

**MOTION FOR ORDER RESTRICTING ACCESS
TO HIGHLY CONFIDENTIAL INFORMATION**

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), through the undersigned counsel, and for its Motion for Order Restricting Access to Highly Confidential Information pursuant to 4 CSR 240-2.135(5) and 4 CSR 240-2.080 respectfully states as follows:

1. The Commission's rule on Confidential Information, 4 CSR 240-2.135, provides as follows:

(4) Highly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for purposes of the case [and who have executed a non-disclosure agreement pursuant to section (6)].

(A) Employees, officers, or directors of any of the parties in a proceeding, or any affiliate of any party, may not be outside experts for purposes of this rule. . . .

(5) If any party believes that information must be protected from disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

As the Commission is aware, “highly confidential” is the highest level of protection for information explicitly recognized by the Commission’s rule. According to the rule, only attorneys of record and outside experts have access to highly confidential information.

2. Pursuant to the rule quoted above, although employees, officers, or directors of any of the parties (or any affiliate of any party) may *not* be outside experts for purposes of this rule, no similar provision is explicitly made for attorneys of record who *are* employees, officers, or directors of a party (or any affiliate of a party); although the rule creates two categories – employees and attorneys – it fails to address the situation when the categories cross-over in the case of an attorney of record who is an employee. In other words, it is not clear that in-house attorneys of record (in reality, direct employees who happen to be attorneys) are precluded from having access to highly confidential information pursuant to the language of the rule. For the reasons set forth below, Trigen requests that the Commission issue an order which, for purposes of access to highly confidential information, would clearly treat KCPL’s (and its affiliates’) in-house employee attorneys of record the same as other employees of KCPL are treated under the rule. Trigen would note that it has already received an informal request from KCPL’s in-house attorney of record for the workpapers supporting Trigen’s rate case filing, and that substantial portions of said workpapers are deemed highly confidential by Trigen.

3. In the instant case, Case No. HR-2008-0300, at least one in-house attorney/employee of KCPL has entered an appearance as an attorney of record for KCPL, in addition to at least two outside attorneys who have entered appearances as

attorneys of record for KCPL¹. As the Commission is aware, KCPL is a competitor of Trigen's, and KCPL's service territory completely engulfs Trigen's territory.

4. As stated in Trigen's direct testimony filed herein on or about March 11, 2008, Trigen has only approximately 56 retail customers. Given the relatively small number of customers of Trigen as compared to the thousands of customers of KCPL, each of Trigen's customers is extremely important to Trigen's profitability and viability. Even though Trigen is regulated by the Commission, each and every one of Trigen's customers has competitive options for space heating (as well as building humidification, domestic water heating and food service applications). A primary competitive option to Trigen's steam service is KCPL's electric service. KCPL does not itself contend with any competition for the light and power portion of its customers' requirements. KCPL is also, by definition, an incumbent electric provider in each and every building in the overlapping territory of Trigen. This advantage, coupled with access by a KCPL employee (whether attorney or not) to Trigen's most sensitive (*i.e.*, highly confidential) information could result in irreparable harm to Trigen's business interests. Given that KCPL's territory completely overlaps Trigen's territory, and that KCPL is considerably larger than Trigen, allowing *any* employees (whether attorneys or non-attorneys) of KCPL (or its affiliates) access to Trigen's highly confidential information² in this case would place Trigen at an extreme competitive disadvantage, as KCPL could use this information to compete with Trigen and take customers from Trigen. KCPL's past

¹ KCPL's outside counsel entered their appearances at the prehearing conference held on April 17, 2008. Furthermore, the Commission should be aware that Trigen's participation in KCPL's recent rate cases, ER-2006-0314 and ER-2007-0291, was only through outside counsel as attorneys of record.

² Such highly confidential information could include, but is not limited to, customer-specific information, employee information, marketing analyses, strategies employed or to be employed or under consideration in negotiations, and other highly confidential business information.

actions have demonstrated a willingness on the part of KCPL to “cherry-pick” customers of Trigen (see discussion of the GSA – Bolling Building contained in Trigen’s Motion to Dismiss, Strike and Sanction filed in Case No. EE-2008-0238 on April 18, 2008).

Furthermore, it would not be sufficient to simply keep the names of Trigen’s customers hidden from KCPL’s (or its affiliates’) employees (whether attorneys or non-attorneys) while allowing those employees access to all other information, since KCPL could easily figure out the identities of such customers given the relatively small number of Trigen customers and that KCPL already has a certain amount of knowledge due to the fact that its territory overlaps Trigen’s. In addition, highly confidential information is not limited to customer specific information, but also includes employee information, marketing analyses, strategies under consideration, and additional competitive information (such as, but not limited to, fuel costs and other costs).

5. Even if KCPL’s employees (whether attorneys or non-attorneys) did not intentionally use highly confidential information outside of this case, the mere fact of their employment by KCPL would expose them to situations where use of such information, once it is known by them, would be impossible to avoid – such as in negotiations with customers, formal or informal discussions with other employees, or in strategic business planning activities (it is certainly reasonable to assume that an in-house attorney would be involved in negotiations and preparation of business plans). In such a situation, if the attorney already possesses knowledge of information concerning one of KCPL’s competitors (such as Trigen) through the review of highly confidential information obtained solely as a result of the competitor’s rate case, how could the employee attorney simply put that information out of his mind and not allow such

protected information to be considered in the conduct of KCPL's normal business activities? In addition to being harmful to the competitive business interests of Trigen, such situation also highlights another reason KCPL's employees (whether attorney or not) should not be allowed access to Trigen's highly confidential information, and that is simply that having knowledge of such information would put the employee in a difficult position – he could not fulfill his duties under the rule to not use such information outside this case and protect Trigen's highly confidential information and, at the same time, fulfill his duties to his employer.

6. As mentioned above, KCPL also has outside counsel who have entered appearances in this case. Therefore, preventing KCPL's (and its affiliates') in-house attorneys from having access to the highly confidential information produced in this case (whether through discovery, testimony, at hearing, or otherwise) would not impose any significant burden on KCPL. Furthermore, under the rule KCPL is already required to obtain outside consultants in order to use such information in testimony – KCPL's expert witness employees do not qualify as outside experts under the rule and are therefore precluded from having access to the highly confidential information. Trigen is simply requesting herein that the Commission issue an order which would treat KCPL's (and its affiliates') in-house employee attorneys of record the same as other employees of KCPL are treated under the rule.

7. Finally, Trigen would note that this motion is not meant to discredit or accuse the specific KCPL in-house attorney who has entered an appearance as an attorney of record in this case of any wrongdoing or malicious intent on his part. However, given the past nature of the highly competitive situation between KCPL and

Trigen, and the reasons set forth above, Trigen feels it necessary to request that the Commission issue an order preventing *any* employees (whether or not they are attorneys) of KCPL (or its affiliates) from having access to the highly confidential information of Trigen produced in this case.

WHEREFORE, Trigen respectfully moves for an order of the Commission preventing *any* employees, officers or directors of a party (or an affiliate of a party) from having access to the highly confidential information of Trigen and ordering that Trigen's highly confidential information may be disclosed only to the outside (not an employee, officer or director of a party or an affiliate of a party) attorneys of record, or to outside experts that have been retained for purposes of the case and who have executed an acceptable non-disclosure agreement pursuant to 4 CSR 240-2.135, and otherwise further providing that such highly confidential information or proprietary information may only be used in the manner and for the purposes as provided in 4 CSR 240-2.135.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was sent to counsel of record by depositing same in the U.S. Mail first class postage paid, by hand-delivery, or by electronic transmission, this 1st day of May, 2008.

/s/ Jeffrey A. Keevil
