

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

Joint Application of)	
)	
Trigen-Kansas City Energy Corp.)	
)	
and)	Case No. HM-2004-0618
)	
Thermal North America, Inc.)	
)	
For Grant of the Authority Necessary)	
for the Transfer of Control, Sale of)	
All Stock Currently Owned by)	
Trigen Energy Corporation, Inc. to)	
Thermal North America, Inc.)	

PREHEARING BRIEF

I. INTRODUCTION.

A. Factual background.

Trigen Kansas City Energy Corp. (Trigen KC) is a corporation organized and existing under the laws of the State of Delaware with principal offices located at 1990 Post Oak Boulevard, Suite 1900, Houston, Texas 77056. Trigen KC is a wholly-owned subsidiary of Trigen Energy Corp. (Trigen Corp.). Trigen Corp., through its 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. Trigen KC is authorized to provide steam heating service pursuant to certification granted by the Commission in Case No. HA-90-5, issued on December 29, 1989.

Thermal North America, Inc. ("Thermal NA") is a Delaware holding company with principal offices located at 500 Boylston Street, Boston, Massachusetts 02216. Thermal NA will be a substantial thermal system holding company financially and technically capable of owning Trigen KC, as described further below.

Trigen Corp. and Thermal NA have entered into a Purchase and Sales Agreement whereby Thermal NA will acquire all of the stock of Trigen KC as well as specified other Trigen Corp. operating companies. The transaction has been approved by the Boards of Directors of Trigen Corp. and Thermal NA. The proposed stock sale will not directly affect the rates, terms and conditions under which Trigen KC customers receive service. Thus, the transfer of control will appear seamless to Trigen KC's customers in terms of the services they receive.

Thermal NA is well qualified to control Trigen KC and the other Trigen Corp. operating companies that are being acquired in the transaction. Thermal NA will rely heavily on the experience of existing plant personnel and management, as well as the expertise that will be made available to Trigen KC through contracts with Johnson Controls, Inc. ("JCI"), a Fortune 100 Company, and ThermalSource, LLC ("ThermalSource"), a third party service provider.

ThermalSource is a service company whose employees are experienced in the development and operation of complex energy systems. ThermalSource will provide legal, accounting, engineering, human resources and similar services to Trigen KC on a contract basis. In addition to the expertise already possessed by ThermalSource, members of Trigen KC's current management will be hired by ThermalSource and will continue to perform (albeit pursuant to a Corporate Services Agreement to be entered into by ThermalSource with Trigen KC, rather than as payroll employees of Tractebel North America Services, Inc.) the functions that they have been and will continue to perform prior to the transaction, subject to the overall direction and control of Trigen KC. The Corporate Services Agreement, and the records that will be maintained by Trigen KC in connection with that agreement, will be

consistent with the requirements of 4 CSR 240-80.015. Certain of ThermalSource's officers and employees will be named by the Trigen KC Board of Directors as officers and managers of Trigen KC (on a loaned employee basis), with the powers delegated to them by the Trigen KC Board of Directors and subject to Trigen KC's corporate charter.

Under and subject to the terms of the Operations and Maintenance Agreement to be entered into by and between JCI and Trigen KC upon consummation of the transaction, JCI will provide facility services (predominantly with current plant personnel who will be hired by JCI) to Trigen KC. As employees of JCI, the current Trigen KC personnel will benefit from the experience, training, technical expertise and career opportunities offered by JCI. JCI, which has been named to *Industry Week's* list of 100 Best Managed Companies for five consecutive years, is a Twenty-Two Billion Dollar (\$22,000,000,000), multinational Fortune 100 Company that specializes in facility services and has substantial experience providing steam and other power system services at various locations around the world. JCI is also the most experienced developer of energy conservation programs in the United States, as the company's corporate experience includes managing over 1.2 billion square feet of industrial and commercial space and providing power plant operation services for some of the world's largest industrial corporations.

Following completion of the transaction, Thermal NA will be a financially well-qualified owner of Trigen KC. Staff also has reached this conclusion. *See* Supplemental Rebuttal Testimony of John M. Kiebel, at page 5 (concluding that "from a financial perspective, the proposed transaction would not be detrimental to the public"). Thermal NA

itself will be a substantial thermal system holding company.¹ As such, Thermal NA will have ready access to the investment capital necessary to assure Trigen KC customers adequate and reliable steam service at reasonable costs. The companies that are being acquired in the transaction are a perfect match for the long-term objectives of Thermal NA and its need and desire to develop reliable investment returns. Upon consummation of the transaction, Thermal NA will own the largest portfolio of district heating systems in the United States. Thermal NA's business plan is centered on the thermal heating district business. Trigen KC therefore is and will be of great importance to the holding company, ensuring that it will receive substantial management attention and necessary capital investment.

Additionally, through an Operations and Maintenance Agreement (as previously referenced) that will be entered into by Trigen KC with JCI, and through a Corporate Services Agreement that will be entered into by Trigen KC with ThermalSource, Thermal NA expects Trigen KC, after consummation of the transaction, will be able to introduce advanced facility management methods at the operating facilities (including a state-of-the-art maintenance management system), implement energy conservation programs to increase

¹ The testimony of Riaz Siddiqi described Thermal NA (TNAI) as follows: "TNAI is a private holding company wholly-owned by Thermal North America Holdings, LLC ("Thermal Holdings"). The members of Thermal Holdings are Sowood Commodity Partners Fund II LP, Lance Ahearn and Herb Zien. The fund owns 99.99986% of the ownership interests of Thermal Holdings while, as discussed further below, Lance Ahearn and Herb Zien each own 0.00007% of the ownership interests of Thermal Holdings. I note that this ownership structure of TNAI became effective on July 1, 2004, which is after the date on which the application in this proceeding was filed. An attachment to the application noted that TNAI was wholly owned, indirectly, by Harvard. (Harvard's formal corporate name is the President and Fellows of Harvard College, and I will refer to it as "Harvard.") Harvard has contributed its interest in TNAI to Sowood Commodity Partners Fund II LP as of July 1, 2004 in exchange for limited partnership interests in Sowood Commodity Partners Fund II LP. Virtually all of the ownership interests in Sowood Commodity Partners Fund II LP are in these limited partnership interests, all of which are held by affiliates of Harvard. Sowood Commodity Partners Fund II LP is managed by Sowood Capital Management LP, defined above as "Sowood." Sowood Commodity Partners Fund II LP has capital commitments of approximately \$460 million." (Direct Testimony of Riaz Q. Siddiqi at pp. 4-5).

reliability and reduce fuel cost and benchmark facility operations against other steam providers.

In sum, while the outward appearance of Trigen KC will remain the same post-merger, the inner workings will improve and the company will become more stable.

B. Procedural background.

On June 29, 2004, Trigen-Kansas City Energy Corp. (“Trigen KC”) and Thermal North America, Inc. (“Thermal NA”) (together, “Applicants”), filed their Joint Application with the Missouri Public Service Commission (“Commission”) for authority to transfer control and stock of Trigen KC currently owned by Trigen Energy Corporation, Inc. to Thermal NA. On June 30, 2004, Applicants filed with the Commission their Motion for Protective Order.

On July 1, 2004, the Commission issued its Order Directing Notice and Setting Dates for Submission of Intervention Requests. On July 22, 2004, the Commission issued its Order directing the Commission Staff (“Staff”) to indicate when it could file a recommendation regarding the Joint Application and on August 2, 2004, Staff filed its response thereto in which the Staff also requested the scheduling of an early prehearing conference.

Thereafter, on August 3, 2004, the Commission issued its Order setting a prehearing conference for August 16th. After the prehearing conference, the Commission issued its Order regarding the filing of a progress report. On August 24, 2004, the Applicants, Staff and the Office of Public Counsel (“OPC”) filed a joint motion to establish a procedural schedule.

On August 30, 2004, the Commission issued its Order Adopting Procedural Schedule in which the following procedural schedule was established:

Direct Testimony by Trigen KC and Thermal NA	September 1, 2004
Response time for data requests reduced from 20 to 10 days	September 1, 2004
Staff Recommendation filed (only if Staff does not file testimony)	October 1, 2004
Technical Conference	October 6, 2004
Rebuttal Testimony filed by Staff and OPC	October 14, 2004
Surrebuttal Testimony	November 4, 2004
Issues List, Order of Witnesses, and Order of Cross	November 11, 2004
Prehearing Briefs	November 16, 2004
Hearing	November 22, 23 and 24, 2004

The Applicants filed their verified direct testimony in support of the Joint Application on September 1, 2004. A Technical Conference was held on October 6, 2004. The Staff filed rebuttal testimony on October 14, 2004 and Applicants filed surrebuttal testimony on November 8, 2004. The parties have engaged in various discovery and discussions.

C. Hearing Issues.

The following is the issues list set for hearing. We have inserted, in *[bold bracketed italics]*, the findings we believe are supported by the record today and will continue to be supported upon the close of the hearing.

- a. Is the transfer of ownership of Trigen Kansas City Energy Corp. to Thermal North America, Inc. not detrimental to the public? *[Yes, it is not detrimental.]*

- (1) In determining that issue, the Commission is to consider any acquisition adjustment. Is the waiver of any acquisition adjustment, past or present, without specific quantification of the amount being waived, sufficient to allow the Commission to determine that the transfer of ownership is not detrimental to the public? *[Yes.]*
 - (2) Will Thermal North America, Inc. have adequate access to the information currently available to Trigen Kansas City Energy Corp. and Tractebel North America, Inc., both through documents and individuals, for purposes of regulation by this Commission after the transaction takes place, if it takes place? *[Yes.]*
- b. Are the operations of Trigen-Missouri Energy Corporation in Kansas City, Missouri “chilled water” systems *[No]* and, if so, are they subject to this Commission’s jurisdiction? *[No.]*
 - c. Should the Commission decide the value of net original cost and current net plant value in the context of this proceeding *[Yes]* and, if so, what are those valuations? *[The valuations set forth in Staff testimony.]*

II. ARGUMENT

Applicants’ request for authority to transfer control and stock of Trigen KC to Thermal NA should be approved. Applicants’ request is not detrimental to the public interest because Thermal NA has the technical expertise and financial ability to operate Trigen KC in an appropriate manner. Moreover, Staff’s apparent position that the Commission should also review and approve transfer of the refrigerated brine operation of Trigen-Missouri Energy

Corporation (“Trigen MO”) is without merit because that system is beyond the jurisdiction of the Commission.

A. Transfer of control and stock of Trigen KC to Thermal NA would not be detrimental to the public’s interests.

The Missouri Supreme Court recently considered the standard for determining whether a merger was “detrimental to the public” in *AG Processing, Inc. v. Public Service Comm’n*, 120 S.W.3d 732, 735 (Mo. 2003). In determining whether a merger was “detrimental to the public,” the Missouri Supreme Court adopted a fact-based inquiry examining the potential impact of the merger on the public. *Id.* at 735-7. *See also City of St. Louis v. Public Service Comm’n*, 73 S.W.2d 393, 457-8 (Mo. 1934) (adopting no detrimental affect on public interest standard). The Commission has even adopted this standard in its filing requirements for utilities seeking to merge. *See e.g.* 4 CSR 240-3.115 (April 30, 2003) (“(D) The reasons the proposed merger is not detrimental to the public interest”). Applying these standards to Applicants’ requests to transfer control and stock of Trigen KC to Thermal NA, it is evident that the transfer is not detrimental to the public interest.

Transfer of control and stock of Trigen KC to Thermal NA will be transparent to the public. Thermal NA intends to keep Trigen KC intact as a wholly-owned subsidiary. *See* Direct Testimony of Riaz Q. Siddiqi at p. 5, lns. 17 – p. 6, lns. 2. Thermal NA does not plan to change the name of Trigen KC so the public will continue to interact with the same company currently providing service. *Id.* While certain administrative positions may be consolidated, the operational personnel responsible for the day-to-day management of Trigen

KC will remain in place. *Id.* at p. 9, Ins. 11-14. Put simply, the public face of Trigen KC will remain the same after the merger.

What will change, however, is that Thermal NA is committed to improving the operations of Trigen KC. Thermal NA is committed to making additional investments where they are financially prudent to improve the operations of Trigen KC. *See* Direct Testimony of Herman Schopman at p. 8, Ins. 5-11. Trigen KC's current ownership is no longer willing to make the types of investments Thermal NA will be able to make in Trigen KC. *Id.* at p. 9, Ins. 16-20. Moreover, Thermal NA is committed to keeping the accounting books and records of Trigen KC under the uniform system of accounts for electric utilities so that there is transparency and accountability in the operations of Trigen KC. *See* Direct Testimony of Riaz Q. Siddiqi at p. 8, Ins. 12-14. Accordingly, while the face of Trigen KC will remain the same after the merger, its operations will improve.

1. Applicants' waiver of any acquisition adjustment demonstrates that the merger is not detrimental to the public interest.

In *AG Processing* the Missouri Supreme Court made it clear that the Commission had a duty to consider any acquisition adjustments at the time it considered whether the proposed merger was detrimental to the public interest. 120 S.W.3d at 736. In *AG Processing*, the Court held that the Commission erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium. *Id.* The applicant in *AG Processing* had asked and the Commission agreed to defer the question of recoupment of the acquisition adjustment until a "subsequent rate making case." *Id.* The critical factor in the Court's decision was the fact that the acquisition premium of \$92,000,000 could

significantly impact the rates charged to customers and, therefore, must be considered at the time of the merger. *Id.*

While the Commission must consider the issue of any acquisition adjustments at this time, Applicants' decision to waive any past or present acquisition adjustments nullifies the issue. Unlike UtiliCorp in the *AG Processing* case, Applicants have waived any past or present acquisition adjustments. Riaz Q. Siddiqi testified that "Applicants agree and do not expect to recover any acquisition premium from this transaction or from any historical transactions in future rate proceedings." See Surrebuttal Testimony of Riaz Q. Siddiqi at 3, lns. 13-14. The reason why the Missouri Supreme Court held that the Commission erred in *AG Processing* was because an acquisition premium of \$92,000,000 was known to exist and was expressly deferred to a future rate making case. 120 S.W.3d at 736. It was known at the time of the merger that rates for customers may go up because of the acquisition premium and the Court believed that, in determining whether the merger was detrimental to the public interest, the potential rate increase must be considered at the time of the merger. *Id.* In the present case, Applicants are not seeking to alter their rate base, and as a consequence rates to customers, because of any past or present acquisitions. Accordingly, Applicants' willingness to waive any acquisition adjustments means there can be no related impact on rates; this satisfies the test for determining whether the merger is detrimental to the public interest.

2. Thermal NA will have access to the institutional knowledge of Trigen KC and Tractebel after the merger.

The merger is not detrimental to the public's interest because Thermal NA will continue to have access to the wealth of institutional knowledge held by Trigen KC and its current employees. Mark P. Barry, a representative of the current management agent,

Tractebel, testified in his direct testimony that in evaluating the offer to purchase from Thermal NA what stood out was the following: “the financial resources and top-rated credit behind their offer; their commitment to the district energy business as the foundation of a highly focused customer-centered business plan; the vision, leadership and enthusiasm for the district energy business . . . ***and their willingness to maintain continuity with the employee group.***” *Id.* at p. 11, lns. 2-7 (emphasis added).

Thermal NA is committed to retaining the institutional knowledge, including in books and records, that already exists within the operations of Trigen KC while improving the overall performance of the system. Thermal NA representative Riaz Q. Siddiqi testified on direct that bookkeeping for Trigen KC will improve because its “books will be brought back from Houston to Kansas City” and will be “maintain[ed] in a manner consistent with Commission requirements.” *Id.* at p. 8, lns. 12-14. Specifically, in order to ensure a smooth transition, prior to the closing of the merger “Trigen Energy Corporation will perform an exhaustive search of its paper and electronic records [and] . . . will transfer [the] entire inventory of those records to Trigen Kansas City.” *See* Surrebuttal Testimony of Herman Schopman at p. 2, lns. 18-20. If any documents are discovered post-closing, Trigen Energy Corporation “will promptly provide those to Trigen Kansas City.” *Id.* at p. 3, lns. 1-2.

In general, current management will be retained and become ThermalSource employees and the current operations employees will be retained and hired by JCI. *Id.* at p. 9, lns. 11-14. A key component of Thermal NA’s transition plan for Trigen KC after the merger is the continuation of the “deep pool of institutional knowledge” that will ensure that “the transition process [is] one that will not have any negative impact on customers and services.” *Id.* at p. 10, lns. 4-6. Reliance on the existing institutional knowledge of Trigen

KC, nearly all of which resides in the personnel located at the facility in Kansas City, is also critical to Thermal NA's business plan for Trigen KC over the long-term. *Id.* at p. 10, lns. 11-13. In sum, post-merger, Trigen KC will retain all of its years of experience in operating the system in Kansas City while adding the additional resources and expertise of Thermal NA, its management agent, ThermalSource, and its O&M contractor, JCI.

B. The Commission does not have jurisdiction over Trigen-Missouri Energy Corporation.

The Commission does not have jurisdiction over Trigen-Missouri Energy Corporation's refrigerated brine operations because Trigen-Missouri Energy Corporation ("Trigen-Missouri"), does not deal in any "cold water" or "chilled water" operation that would qualify it as a "heating company" under section 386.020(20) RSMo 2000. The Commission also does not have jurisdiction over Trigen-Missouri Energy Corporation because it is not a public utility and does not offer its services to the general public. To the parties' knowledge, no public service commission in the country regulates such services today, and there is no public policy reason which could support the extension of Commission jurisdiction in this case.

1. The operations of Trigen-Missouri Energy Corporation are not "chilled water" systems.

Staff argues that Trigen-Missouri is subject to the Commission's jurisdiction as a "heating company" under section 386.020(20) RSMo 2000, although it does not explain how. (Staff's witness David Elliot's response to subpart (B) of Trigen Kansas City Energy Corporation's data request no. 0018) (attached as Appendix A).

Section 386.020(20) RSMo 2000 does not apply to Trigen-Missouri, which provides air conditioning services not listed in or contemplated by the statute. Trigen-Missouri does

not provide or distribute hot or cold water to its customers for any purposes. The solution Trigen-Missouri uses in the majority of its operations is refrigerated brine, not water. The statute on its face does not apply to refrigerated brine. And there is no historical or public policy reason to extend the reach of the statute to cover Trigen-Missouri.

a. Trigen-Missouri does not provide “chilled water” or “cold water.”

Missouri statutes define a “public utility” to include a “heating company.” §386.020(42) RSMo 2000. Section 386.20(20) RSMo 2000 defines “heating company” as a utility “manufacturing and distributing and selling, for distribution, or distributing hot or cold water, steam or currents of hot or cold air for motive power, heating, cooking, or any public use or service... .”

Trigen-Missouri does not fit within this definition. It does not sell, distribute or supply hot or cold water to its customers for any purpose. The service Trigen-Missouri provides its customers is air conditioning.² The technology used to provide air conditioning services is a closed loop piping system through which fluid is circulated: the fluid leaves the plant at a low temperature, circulates via the pipe system through customer premises, and then is returned to the plant at a higher temperature before being refrigerated again to repeat the cycle. (Surrebuttal Testimony of Herbert P. Zien, p. 2) Customers do not consume this fluid, they simply utilize its thermal characteristics for air conditioning purposes. (*Id.*)

The fluid Trigen-Missouri uses in this closed loop system is not water but refrigerated brine. (*Id.*) As described in Herbert Zien’s surrebuttal testimony, water would not allow Trigen-Missouri to provide their current services, because it lacks the thermal and antifreeze qualities of refrigerated brine – the solution used by Trigen-Missouri. (Surrebuttal

² The Commission does not regulate any air conditioning equipment or providers today.

Testimony of Herbert P. Zien, p. 2) The brine solution was introduced into the pipes upon the establishment of the system in the 1990s. *Id.* at 1. Brine is a term used for a liquid solution made up of some parts water and some parts salty chemicals. *Id.* The brine solution was created by mixing approximately 89% water with a patented chemical product that was delivered to Trigen-Missouri Energy Corporation in railroad tanker cars. *Id.* Since being mixed and introduced into the pipe loop, this brine solution has not left the pipes, other than in small amounts for testing purposes. (*Id.*)

The Commission should not treat refrigerated brine as “cold water” or “chilled water” under section 386.20(20) RSMo 2000. If the words “water” in the statute were read as “any solution involving water,” such an interpretation would lead to unreasonable results. For example, as Mr. Zien testified:

Consider if you will a soft drink like Coke. By weight, Coke is made up of about 90% water, and about 10% patented solution involving sugar. Now we all know that Coke is often served over ice. If the Commission were to assert jurisdiction over the service of circulating the refrigerated brine in the pipes of Trigen Missouri Energy Corporation because it is “chilled water,” it would be like asserting jurisdiction over a fast food restaurant serving an ice cold Coke because that too is “chilled water.”

(Surrebuttal Testimony of Herbert P. Zien, p. 2-3).

b. Statutory intent and industry history demonstrate that Trigen-Missouri’s refrigerated brine operation is not regulated.

Staff has asserts that section 386.020(20) RSMo 2000, defining a “heating company,” applies to Trigen-Missouri’s services. That statute was enacted in 1939. To the best of Applicants’ knowledge (as well as Staff’s), no companies at that time provided the same services that Trigen-Missouri provides today. (Staff’s witness Phillip Williams’ response to subpart (E) of Trigen Kansas City Energy Corporation’s data request no. 0014) (attached as

Appendix B). It is extremely improbable that distribution of refrigerated brine between large downtown office buildings in order to provide air conditioning services was contemplated by the Legislature in 1939.

In addition, neither the Applicants nor Staff are aware of any provider of services similar to Trigen-Missouri's that are currently regulated or have been regulated in the past either by the Missouri Public Service Commission or by a public service commission in any other state. (Staff's witness Phillip Williams' response to subparts (B), (C) and (D) of Trigen Kansas City Energy Corporation's data request no. 0014) (attached as Appendix B).

2. Trigen Missouri Energy Corporation is not a public utility.

Even if air conditioning service provided via a closed loop refrigerated brine system fell within the statutory definition, Trigen-Missouri would still not be considered a public utility under Missouri law because it is not providing the service "for public use." The statutes granting jurisdiction to the Public Service Commission all require the services in question to be provided "for public use." *See State ex rel. Danciger & Co. v. Public Serv. Comm'n*, 275 Mo. 483, 494, 205 S.W. 36 (Mo. 1918) ("while the definition ... express therein no words 'for public use'...it is apparent that the words 'for public use' are to be understood and to be read therein. For the operation ...must of necessity be for public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it").

Because Trigen-Missouri does not offer its services to the public and provides service only by private contract and because its customers do not require the state's protection in their dealings with Trigen-Missouri, Trigen-Missouri is not a public utility and therefore is not subject to the Commission's jurisdiction.

a. Trigen-Missouri does not provide or hold itself out to provide services to the general public.

“To constitute a public utility and be subject to regulation by the Commission, a service must be devoted to public use.” *Khulusi v. Southwestern Bell Yellow Pages Inc.*, 916 S.W.2d 227, 232 (Mo. App. 1995) (citing *State ex rel. Danciger & Co. v. Public Serv. Comm’n*, 275 Mo. 483, 205 S.W. 36 40 (Mo. 1918)). The MoPSC has held that in order for a utility to be considered dedicated to public use, the utility must appear to hold itself out to all who ask for service. *Re Areaco Investment*, 25 Mo. P.S.C. (N.S.) 80, 84 (1982). The entity is not a public utility if it furnishes service “only to particular individuals in fulfillment of private contracts.” *Id.* See also *In the Matter of Public Water Supply District No. 8 v. Norman Goad Construction Company, Inc.*, 21 Mo. P.S.C. (N.S.) 614, 615 (1977) (company providing water service only to a limited group defined as “tenants” of a mobile home park is not a public utility even if the company is capable of providing service beyond those boundaries).

Trigen-Missouri’s services are not offered to the general public. (Surrebuttal Testimony of Herbert P. Zien, p. 4). It has only five customers, each of whom reached an individually negotiated contract with Trigen-Missouri. *Id.* The service was not and has not been made available to the public at large, and there is no price offering by which a customer could simply decide whether or not to receive services. *Id.*

In *Danciger*, the court noted that in analyzing whether a service provider is a public utility, “the fact of refusal” to serve particular customers for any reason “remains highly significant,” because it indicates that a service provider is not holding itself out to the general public. *State ex rel. Danciger & Co. v. Public Serv. Comm’n*, 275 Mo. 483, 498. Similarly

to the service provider in *Danciger*, Trigen-Missouri Energy Corporation has in the past declined to offer service to potentially interested parties simply because the economics of the situation did not work for Trigen-Missouri. (Surrebuttal Testimony of Herbert P. Zien, p. 4). Such events are likely to occur under the new ownership. *Id.*

b. There are no public policy reasons for the commission to exercise jurisdiction over Trigen-Missouri Energy Corporation.

As the Missouri Supreme Court held in *Danciger*, in order for the Commission to have jurisdiction over a utility, its operation must be for public use and therefore necessarily coupled with public interests. *State ex rel. Danciger & Co. v. Public Serv. Comm'n*, 275 Mo. 483, 496. The usual considerations requiring the regulation of a public service commission such as regulating a “natural monopoly” or customer protection are not present in relation to Trigen-Missouri’s operations: there are competitive alternatives to Trigen-Missouri’s services, and Trigen-Missouri’s customers are sophisticated parties who negotiated their own contracts.

The typical reason for imposing government regulation on public utilities is that:

public utilities... tend toward monopoly or, more accurately, the firms in these industries seem to operate more efficiently as monopolies. Yet, if economic power is not to be controlled by the market, it must be controlled by public authority, for a firm’s contribution to the general welfare, rather than being the result of voluntary choice, must be compelled.

See PHILLIPS, CHARLES F. JR., *THE REGULATION OF PUBLIC UTILITIES*, 5 (Public Utilities Reports, Inc., 1984). There is no such situation today in the business of Trigen-Missouri. The market in which Trigen-Missouri operates does not have a monopoly structure. A potential customer can secure air conditioning services in many different ways from a multitude of commercial suppliers. (Surrebuttal Testimony of Herbert P. Zien, p. 5)

Another basic premise of utility regulation is that customers need some protection from potential abuses by the provider and thus the additional costs related to regulation result in a net benefit. That is not the case here. Trigen-Missouri Energy Corporation's customers are all sophisticated players in the marketplace. (Surrebuttal Testimony of Herbert P. Zien, p. 6). They are aware of their choices and options and entered into contracts on the basis of value being provided to them under terms which they specifically negotiated. *Id.* Not a single one of those customers has asked this Commission to regulate this service. *Id.* The additional costs of adding regulation to this business is not something they have bargained for and it would not be welcome. *Id.* The business is run today on a slim margin which essentially was determined by the marketplace. *Id.* Thus the additional cost of adding regulation to the business simply could not be absorbed by the provider or the consumers. *Id.* In this case, neither the customers nor the provider see a need for or have a desire or ability to pay for the Commission's involvement in their privately negotiated contracts.

C. The Commission should adopt FERC Uniform System of Accounts for Applicants accounting.

The Commission should include in its order that the FERC Uniform System of Accounts must be used by the new owners, and waive any requirement that the 1915 Steam Heating System of Accounts be used for maintaining records.

4 CSR 240-80.020 requires that Steam Heating Companies must maintain accounts pursuant to the January 1, 1915 Uniform System of Accounts. The Commission has previously waived compliance with regulations where the waiver was reasonable, not detrimental to the public interest, and consistent with the purposes of the statute regulating the utility. *See e.g. In the Matter of the Joint Approval of the Transfer of Assets and*

Customers of Focal Communication Corporation of Missouri to Broadwing Communications, LLC, Case No. TA-2005-0045, (MoPSC October 28, 2004).

In this case, waving the requirements 4 CSR 240-80.020 will be reasonable, not detrimental to the public interest and consistent with the purposes of Chapter 393 RSMo 2000. The 1915 system of accounts is only available in a partially illegible copy, and appears to no longer conform to realities of public utility accounting which are more adequately embodied in the FERC Uniform System of Accounts. (Surrebuttal Testimony of Riaz Q. Siddiqi, p. 2). Further both the Staff and the Buyers are very familiar with the FERC Uniform System of Accounts which does satisfy the accounting and oversight purposes of Chapter 393. *Id.* Neither Staff nor Buyers have any experience utilizing the 1915 system of accounts. *Id.* Applicants believe that Staff agrees with and supports the waiver.

D. Ongoing compliance.

The Buyers have pledged that Trigen KC will comply with all requirements of Missouri law and Commission regulation, including reporting and affiliate interest rules, which are applicable to steam heating companies. In his surrebuttal testimony, Mr. Siddiqi stated that “Trigen KC and TNAI would agree to obey all the requirements governing steam heating utilities under the Missouri statutes and Code of State regulations including, but not limited to, the regulation governing reporting and record-keeping requirements and the affiliated transaction rules governing steam-heating utilities.” (Surrebuttal Testimony of Riaz Q. Siddiqi at p. 1). Staff’s testimony seeks to add to those requirements an additional wish list of items not currently found in the law. In addition to the requirements governing steam heating utilities under the Missouri statutes and Code of State regulations, Staff’s testimony adds a wish list of additional requirements not imposed by Missouri law. *See e.g.*

Rebuttal Testimony of Phillip K. Williams at pp. 36-38, 40. *See also* Rebuttal Testimony of David W. Elliot at Schedule 3. Buyers respectfully request that the Commission order it to comply with all existing laws and regulations.

III. CONCLUSION.

For the foregoing reasons, Applicants respectfully request that the Commission grant their Application.

Respectfully submitted,

LATHROP & GAGE, L.C.

Dated: November 16, 2004

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CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the foregoing pleading was sent via U.S. Mail or electronic transmittal on this 16th day of November, 2004, to:

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Appendix A

TRIGEN-KANSAS CITY ENERGY CORPORATION
CASE NO. HM-2004-0618
DATA REQUEST 0018

Date of request: 10/28/04

Date received: 11/02/04

Date Due: 11/12/04

Requestor: Paul S. DeFord

Requested from: David Elliott

Question: In Schedule 3 of his rebuttal testimony, David Elliott recommended the following conditions regarding reporting requirements regarding refrigerated brine operations:

To be reported on a monthly basis to the manager of Energy Department:

- 1. Hourly chiller flow/load for each chiller.*
- 2. Monthly steam usage by the chillers.*
- 3. Chiller forced outages. Report to include the cause, the date of outage, the time of outage, and the duration of the outage.*
- 4. Chiller planned outage annual schedule.*
- 5. Citations or notices of violation received from any state or federal agency.*
- 6. Date, time, and duration for any loss of piping capacity that limited plant output.*

- (A) The recommended condition appears to be roughly based on Reporting requirements for Electric Utilities and Rural Electric Cooperatives under 4 CSR 240-3.190 (1)(C), (E), (H), (J), (L), and 3(E). Please provide the basis for applying reporting requirements for electric utilities to refrigerated brine operations.
- (B) Please provide the basis in law for the assertion that refrigerated brine operations fall under the jurisdiction of the Missouri Public Service Commission.

Response:

(A) The recommended condition is based on Staff's belief that providing this information on a regular basis would allow Staff to be able to determine if problems exist in the operation of the steam heating plant that would affect the provision of safe and adequate service and, further, the information itself would be useful to both Staff and the Company during a rate case or earnings investigation. The information requested is similar to the requirements of 4 CSR 240-1.390 for the electric utilities because of the similarity of the equipment used in the chiller operation.

(B) Based on the advice of counsel Staff is relying on sections 386.020(20), and 393.290, RSMo 2000. 386.020(20), RSMo 2000 states:

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“Heating company” includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers, appointed by any court whatsoever, owning, operating, managing or controlling any plant or property for manufacturing and distributing and selling, for distribution, or distributing hot or cold water, steam or currents of hot or cold air for motive power, heating, cooking, or for any public use or service, in any city, town or village in this state; provided, that no agency or authority created by or operated pursuant to an interstate compact established pursuant to section 70.370, RSMo, shall be a heating company or subject to regulation by the commission;

and section 393.290, RSMo. 2000 provides:

All provisions of chapters 386, 387, 390, 392 and 393, RSMo, in reference to railroad corporations, street railroad corporations, common carriers, gas corporations, electrical corporations, water corporations, telephone and telegraph corporations, and sewer corporations, in reference to hearings, summoning witnesses, taking of testimony, reports, approval of incorporation and certificates of franchises, the approval of issues of stocks, bonds, notes and other evidence of indebtedness, consolidation, lease, transfer of franchises, valuation of property, grants and franchises, keeping of accounts, complaints as to quality, price, facilities furnished, the fixing of just and reasonable rates and adequacy of service, forfeitures of all descriptions, forfeitures for noncompliance with the orders, summary proceedings under chapters 386, 387, 390, 392 and 393, RSMo, excessive charges for product, service or facilities, proceedings before the commission, and proceedings in any court mentioned in chapters 386, 387, 390, 392 and 393, RSMo, and in all other sections, paragraphs, provisions and parts of chapters 386, 387, 390, 392 and 393, RSMo, in reference to any other corporations subject to any of the provisions of chapters 386, 387, 390, 392 and 393, RSMo, so far as the same shall be practically, legally or necessarily applicable to heating companies in this state, are hereby made applicable to such heating companies as designated in said chapters, and shall have full application thereto.

APPENDIX B

TRIGEN-KANSAS CITY ENERGY CORPORATION
CASE NO. HM-2004-0618
DATA REQUEST 0014

Date of request: 10/28/04

Date received: 11/02/04

Date Due: 11/12/04

Requestor: Paul S. DeFord

Requested from: Phillip Williams

Question:

On page 41 of his Rebuttal Testimony, Phillip Williams made the following condition (Condition 22):

That this Commission should make a finding of fact and conclusion of law before approving this sale that the chilled water service provided by Trigen Missouri is regulated.

- (A) Please provide the basis in law that supports the assertion that the operation of refrigerated brine falls under the jurisdiction of the Missouri Public Service Commission.
- (B) Staff has referred to "chilled water service." Does Missouri currently regulate any provider of chilled water service?
- (C) Is Staff aware of any chilled water service provider which is regulated anywhere in the United States? If so, please name the entity, the jurisdiction, and provide a citation and or documentation evidencing such regulation.
- (D) Is Staff aware of any provider of chilled water service or refrigerated brine service that existed circa 1939? If so, please provide documentation evidencing the existence of such service.
- (E) Is Staff aware of any provider of hot or cold water that existed circa 1939? If so, please provide documentation evidencing the existence of such service.

Response:

(a) Please reference Staff witness David Elliot's response to subpart (B) of Trigen Kansas City Energy Corporation's data request no. 0018 in Case No. HM-2004-0618.

(b) No.

(c) Staff has not conducted the necessary research to be able to answer this question in full, but is not aware of any other provider of steam or chilled water service that is regulated.

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(d) Staff has not conducted the necessary research to be able to answer this question in full, but is not aware of any provider of chilled water service, or refrigerated brine service, that existed circa 1939.

(e) Staff has not conducted the necessary research to be able to answer this question in full but is not aware of any provider of hot or cold water that existed circa 1939.

The attached information provided to Trigen-Kansas City Energy Corporation in response to the above data information request is accurate and complete, and contains no material misrepresentations or omissions, based upon present facts of which the undersigned has knowledge, information or belief. The undersigned agrees to immediately inform Trigen-Kansas City Energy Corporation if, during the pendency of Case No. HM-2004-0618 before the Missouri Public Service Commission (the "Commission"), any matters are discovered which would materially affect the accuracy or completeness of the attached information.

If these data are voluminous, please (1) identify the relevant documents and their location (2) make arrangements with requestor to have documents available for inspection in the Commission office, or other location mutually agreeable. Where identification of a document is requested, briefly describe the document (e.g., book, letter, memorandum, report) and state the following information as applicable for the particular document: name, title number, author, date of publication and publisher, addresses, date written, and the name and address of the person(s) having possession of the document. As used in this data request the term "document(s)" includes publication of any format, workpapers, letters, memoranda, notes, reports, analyses, computer analyses, test results, studies or data, recordings, transcriptions and printed, typed or written materials of every kind in your possession, custody or control or within your knowledge. The pronoun "you" or "your" refers to the Commission and its employees, contractors, agents or others employed by or acting in its behalf.

Security Public

/s/ Phil Williams

**Response provided
electronically on
November 10, 2004.**