BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

TRIGEN RESPONSE TO COMMISSIONER QUESTIONS

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), through the undersigned counsel, and respectfully submits the following in response to the questions posed by Commissioner Gaw and Commissioner Murray at the conclusion of the hearing in this matter on May 15, 2006:

Commissioner Gaw question – Have there been any cases involving two established regulated utility companies providing exactly the same service where one sought a certificate to move into the other's service territory, and if so, how was the issue of "need" for the service analyzed?

In *State ex rel. Electric Company of Missouri v. Atkinson*, 275 Mo. 325, 204 S.W. 897 (1918), the court upheld the Commission's issuance of a certificate to the Western Power & Light Company to serve the city of Maplewood. The Electric Company of Missouri opposed such certificate, since it was already serving Maplewood.[1] Both were electric companies, providing electricity service. The court (and presumably the Commission below) looked at whether the "incumbent" utility was adequately rendering

[1] Although it is not clear from the opinion of the court, it is assumed that both companies were regulated.

the service proposed, and the rates each company proposed to charge in the overlapping area. The court also noted that the two corporations were operating in numerous other places, that the percent of the "incumbent" utility's business which would be affected was quite small, and that there was "little likelihood the competition will prove 'destructive'." 204 S.W.2d at 899. The court also stated that "the rule [against competition] is not a fine-spun theory, applicable without discrimination in every case where competition seeks to enter. It is held to be a practical system designed, as stated, to promote the public good and the particular facts in each case are to be regarded in applying it." *Id.* In the case currently before the Commission, MGE has admitted that it does not render the service proposed. (Tr. 199-200)

People's Telephone Exchange v. Public Service Commission, 239 Mo. App. 166, 186 S.W.2d 531 (1945), did not involve two regulated companies, but involved a previously unregulated phone company seeking a certificate (and to thereby become regulated) in an area served by a regulated phone company. In that case, the court upheld the Commission's denial of the requested certificate; however, it must be noted that in that case it was found that granting the certificate "would not make available any service that is not now afforded" in the affected area. 186 S.W.2d at 535. The court also appears to have approved the Commission's statement that it "realizes that the law does not vouchsafe a monopoly to the system which is already in the field, and it would not hesitate to favor the granting of identical authority to another to enter the same area" if the incumbent utility had been remiss in providing adequate service (remember that in that case, both companies were providing the same service, *i.e.*, phone service). *Id.* (*See also, In the matter of The Central West Utility Company*, 5 Mo. P.S.C. (N.S.) 332, 340

(1954)(citing both *Atkinson* and *People's*)). Again, in the case currently before the Commission, it is undisputed that granting the requested certificate **would** make available a service that is not now afforded in the affected area.

State ex rel. Public Water Supply District No. 8 v. Public Service Commission, 600 S.W.2d 147 (Mo. App. 1980) did not involve two regulated utilities providing the exact same service, but rather involved the granting of a certificate to a water company in an area overlapping a water district. The court looked at whether the incumbent district was equipped to provide the new service, noted that the issuance of the certificate would have minimal impact on the district, and upheld the Commission's grant of a certificate to the applicant company. The court stated that "Missouri authority tends to uphold . . . the balancing test to the issue of allowing competition . . . adequacy of facilities is not an exclusive criterion . . . the policy is to protect the public and directs the concern of the public interest to the question of destructive competition. It can be further concluded that our own state's policy against competition is a flexible one created to protect the public first and **concerning itself with the existing utility only in an incidental manner**. (emphasis added)" *Id.* at 155. "The question is one of public need for water, that is how that water can best be provided at the lowest rate to the user." *Id.* at 156. Likewise, in the present case, the question is one of public need for district steam heating service and how steam heating service can best be provided at the lowest rate to the user.

Although not involving two regulated utility companies, and not involving a certificate application but, rather, the power of eminent domain by water utilities, the court of appeals stated in a 1997 case that "We note that the Public Service Commission has the authority to issue a certificate of convenience and necessity to a public utility

even though such certificate will overlap with another utility's area of service . . . The public interest and convenience is the Commission's chief concern when determining whether to grant more than one certificate within one certificated area." [citations omitted[2]] *Osage Water Company v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 575 (Mo. App. 1997).

As can be seen from the foregoing, the Commission has, at times, granted overlapping certificates even for utilities providing the same service. It must be remembered, however, that the case currently before the Commission does not involve two companies providing exactly the same service. MGE, the only party contesting the application, provides natural gas and natural gas transportation service; Trigen provides district steam heating service in its current territory and seeks to do so in the requested new territory. MGE, KCPL and Trigen already compete, to some extent, in Trigen's current territory, and MGE and KCPL already compete with each other in Trigen's requested new territory. MGE has admitted that it does not provide steam heating service in Trigen's requested new territory. Truman Medical Center has requested such service from Trigen. The need is indisputable.

[2] It should be noted that when the Commission had jurisdiction over trucking, it occasionally granted overlapping trucking certificates, and some of the citations omitted from the *Osage Water* quotation were trucking cases; however, trucking certificates were apparently not granted pursuant to Section 393.170 RSMo, but instead were granted pursuant to their own statute which specified matters for the Commission to consider in making its determination.

Commissioner Murray question – Has Staff's proposed "Condition 2" ever been applied to a certificate extension application to serve a specific customer, and what about the Union Electric / Noranda case?

The undersigned is unaware of, and was unable to find, any cases were Staff's proposed Condition 2 was applied to a certificate extension application to serve a specific customer, or where one specific customer made the certificate extension project economic.[3] This condition was not imposed in the Union Electric / Noranda case. In that case, in addition to a certificate, Union Electric sought approval of a new tariff under which to serve Noranda. Since a stipulation was filed, the Commission order stated that "by the time of the hearing, the only contested issue was the proposed LTS Tariff." (Case No. EA-2005-0180, order dated March 10, 2005) The Commission approved the stipulation and the modified tariff. In describing the stipulation, the Commission stated

> In general, the agreement provides that, prior to UE's next general rate or complaint case, Noranda will be served on an interim basis as a Missouri retail electric customer of UE pursuant to the proposed Large Transmission Service ("LTS") tariff, . . . That tariff, and the terms under which service is provided to Noranda, are subject to review in AmerenUE's next general rate case, complaint case, or rate design case. **The parties also agree that service to Noranda shall be treated for ratemaking purposes and for determination of prudence like service to any other Missouri retail customer of UE.**

Id. (emphasis added) A review of the stipulation itself reveals that it provided that:

> 5. Service to Noranda in the area certificated pursuant to this case shall be treated for ratemaking purposes and for determination of prudence like service to any other Missouri retail customer of AmerenUE. Specifically, the Commission's grant of a certificate allowing the extension of service to Noranda and AmerenUE's decision to commence that service pursuant to such certificate shall not be subject to challenge as imprudent. Consequently, if costs, whether capital or expense, are

[3] It should be remembered that although the project is expected to be economic if Truman Medical Center is the only customer added in the new area and Truman has requested Trigen's service, the requested certificate is for the entire area and customers in addition to Truman may be added in the new area.

> necessary to provide safe, reliable and adequate service to Noranda, those costs, if otherwise prudently incurred, would be recoverable as part of the Company's Missouri retail cost of service in rates in the same manner and fashion as are all prudently incurred costs to serve any other Missouri retail customer. Signatories to this Stipulation and Agreement reserve the right to raise arguments in future proceedings regarding the prudence or reasonableness of the resource mix and the related costs incurred by AmerenUE to serve its Missouri retail load or the manner in which those decisions are implemented.

The stipulation then provided, in the following paragraph, that the parties to that stipulation were entering the stipulation "with an understanding of the unique circumstances presented by AmerenUE's Application, and a Party's agreement to the terms of this Stipulation and Agreement regarding prudence shall not create any precedent that a Party would agree to any kind of prudence finding in any future proceeding."

In any event, Condition 2 which Staff seeks to impose on Trigen was not imposed in that case.

Respectfully submitted,

Jeffrey A. Keevil #33825
Charles Brent Stewart #34885
STEWART & KEEVIL, L.L.C.
4603 John Garry Drive, Suite 11
Columbia, Missouri 65203
(573) 499-0635
(573) 499-0638 (fax)
per594@aol.com
stewart499@aol.com

ATTORNEYS FOR TRIGEN-KANSAS CITY ENERGY CORPORATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent to counsel for parties of record by depositing same in the U.S. Mail, first class postage prepaid, by hand-delivery, or by electronic mail transmission, this 22nd day of May, 2006.