

**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

**PREHEARING BRIEF OF
TRIGEN-KANSAS CITY ENERGY CORPORATION**

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COMES NOW Trigen-Kansas City Energy Corporation (“Trigen”), by counsel, and submits this Prehearing Brief in support of its pending certificate application, Case No. HA-2006-0294, pursuant to the Commission’s Order Adopting Procedural Schedule.

I. INTRODUCTION

On January 10, 2006, Trigen filed a verified Application requesting an order from the Commission granting it a certificate of public 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 an area particularly described in Appendix B attached to said Application (for convenience, a copy of Appendix B to the Application is also attached hereto, and is also contained in NP Schedule BPK-6 attached to the Direct Testimony of Mr. Kirk). Various parties were granted intervention, and the Commission issued an Order Adopting Procedural Schedule herein on March 13, 2006. Trigen now submits this Prehearing Brief in support of its position pursuant to said Order.

II. ISSUES

On May 4, 2006, Staff filed a **Proposed** List of Issues, Order of Witnesses and Order of Cross-Examination (“Issues List”) in this case. The Issues List set forth the following Contested Issues:

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?

Trigen submits that the short answers to the foregoing questions are (A) Yes, and (B) No. Each of the foregoing issues will be addressed in detail below.

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)?

The Commission has the authority to grant certificates of convenience and necessity when “necessary or convenient for the public service”, according to Section 393.170 RSMo (2000)¹; however, “[t]he term ‘necessity’ does not mean ‘essential’ or ‘absolutely indispensable’, but that an additional service would be an improvement justifying its cost.” *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993). The Commission has set forth the following criteria to be used in evaluating certificate applications:

(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.

¹ Section 393.290 RSMo (2000) makes this section applicable to “heating companies.”

In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, 3 Mo. P.S.C. 3d 173, 177 (1994)(citing *Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991)). Applying the foregoing definitions and criteria, Trigen's certificate should be granted.

There is clearly a need for the service, since central district steam heating is currently not available in Trigen's proposed expansion area. (Kirk Direct, page 3) To the best of Trigen's knowledge, no party claims that central district steam heating service is currently available in this area. Importantly, Truman Medical Center ("TMC"), which is located in the proposed expansion area, has requested such service from Trigen. (Kirk Direct, page 6-7; *see also* the Direct Testimony of David A. Wagner of Truman Medical Center) Although Mr. David L. Wagner of KCPL² seemed to take issue with the question of "need", his testimony failed to respond directly to the question he posed (whether KCPL can provide economic electric service to generate steam heat to TMC); in any event, the Highly Confidential Surrebuttal Testimony of Mr. Kirk (HC Kirk Surrebuttal, pages 3-4 and HC Schedule BPK-1-S) demonstrates that district steam heat from Trigen would be **significantly** less costly to TMC than TMC self-generating steam using either electricity or natural gas³, and that KCPL could not provide economic electric service to generate steam heat to TMC. Given that district steam service is not currently offered in the proposed expansion area and that a request for such service has been received, the need should be obvious.

² Witnesses who prefiled testimony in this case include David L. Wagner of KCPL and David A. Wagner of Truman Medical Center: care should be taken not to confuse the two.

³ Although KCPL prefiled the testimony of David L. Wagner, they have since indicated they do not intend to offer it as evidence or participate in the hearing of this matter. This makes the preparation of a prehearing brief somewhat challenging, since the undersigned counsel feels compelled to address the prefiled testimony even though it may not be offered. Furthermore, the Commission has not yet issued an order addressing KCPL's notice of withdrawal from this proceeding filed April 26, 2006.

Trigen is also clearly qualified to provide the service; in fact, this appears undisputed. Trigen has provided district steam heating service in its current territory for many years; the nature of the service to be offered in the expansion area will be identical; and Trigen has a proven track record of providing such service in downtown Kansas City. (Kirk Direct, page 4) On the basis of Staff's prefiled testimony, Staff appears to agree that Trigen is qualified to provide the service in the expansion area (*See, e.g.,* Bax Rebuttal, page 5).

While safety and adequacy of facilities have, in some past cases, been looked at in regard to an applicant's qualifications, this should not be an issue in this case. Although MGE attempted to raise the issue of "safety" in its Application for Intervention, MGE's purported concerns were refuted by Mr. Kirk (Kirk Direct, pages 13-20) and also by Mr. Bax of Staff (Bax Rebuttal, pages 3-5). As Mr. Bax stated, "it is my belief that an extension of the existing [Trigen] facilities, as described in Appendix C attached to the Application, can be installed in a safe and reliable manner." (Bax Rebuttal, page 3) It is also noteworthy that MGE appears to have abandoned its purported safety concerns, because it filed no testimony addressing the issue. In regard to the adequacy of Trigen's facilities, Mr. Kirk's Direct Testimony shows that Trigen has sufficient boiler capacity *and* distribution system capacity to meet its existing requirements *and* to support the delivery of additional steam to the proposed expansion area to satisfy the requirements of new customers such as TMC. (Kirk Direct, page 9) Mr. Kirk also testifies as to how the **extension** will actually benefit Trigen's existing customers in terms of system operations **and** **system** reliability. (Kirk Direct pages 10-11) Trigen's qualifications should not be an issue.

Trigen also has the financial ability to provide the service, and, to the best of Trigen's knowledge, no party has presented evidence to the contrary. As shown in Highly Confidential Schedule BPK-1 attached to the Direct Testimony of Mr. Kirk, Trigen has access to the capital needed to efficiently and effectively finance the investment associated with the expansion. Further, Staff has recommended that TMC should fund the entire construction cost for the expansion project to serve TMC⁴, and while Trigen cannot commit TMC's resources to finance the entire construction cost of the project, if TMC is agreeable to such condition or if the Commission otherwise orders it, Trigen's finances become a complete non-issue.

Trigen's proposed expansion of its utility service territory is economically feasible. Without disclosing highly confidential information, the Highly Confidential Schedule BPK-2 (the feasibility study) attached to Mr. Kirk's Direct Testimony shows that the proposed expansion is expected to be immediately accretive to earnings, solely from the margin on tariff revenue generated by serving TMC, and to provide a measurable contribution to fixed costs. If TMC is willing to accept Staff's recommendation that TMC provide a construction advance for the entire cost of the project, the expected accretion to earnings will be enhanced even further. (Kirk Direct, pages 5 and 8, and HC Schedule BPK-2; Kirk Surrebuttal page 4 and HC Schedule BPK-2-S; Sim Surrebuttal pages 4-5 and 7) Since TMC has requested service from Trigen, and HC Schedule BPK-2 and NP Schedules BPK-3 and BPK-4 attached to the Direct Testimony of Mr. Kirk show that the expansion is expected to be accretive to Trigen's earnings even if TMC is the only new customer added, the proposal is clearly

⁴ Direct testimony of Staff witness V. William Harris, pp. 3 and 7. Staff made this recommendation without providing any analysis to show that Trigen does not have the requisite financial ability and without even directly raising the issue of financial ability.

economically feasible. If other customers in the area eventually take steam service from Trigen, the economics of the expansion improve further (Kirk Direct, pages 5 and 8), but the economics of the expansion do not require any customers beyond TMC (Sim Surrebuttal, page 7).

The service will promote the public interest. As the Commission has stated, “The requirement that an applicant’s proposal promote the public interest is in essence a conclusory finding Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest.” *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, 3 Mo. P.S.C. 3d 173, 189 (1994). Given that the prefiled testimony in this case supports a positive finding with respect to the other four standards as set out above, the Commission should conclude that the proposal promotes the public interest. However, the Commission need not merely rely on this conclusory finding, as the prefiled testimony contains numerous examples of how the instant proposal promotes the public interest⁵.

As set forth in Mr. Kirk’s Direct Testimony, additional customer choice and the opportunity to switch to a less expensive energy alternative such as district steam is a means to promote economic development in the expansion area; approval of the Application will provide choice to potential customers in the area, rather than them being limited to self-generation of steam by use of natural gas or electricity. (Kirk Direct, pages 5-6) By spreading Trigen’s fixed costs over a larger customer and sales base, the addition of a high load-factor customer such as TMC **will help ameliorate** the fixed cost

⁵ Additional evidence that the proposal supports the public interest can also be found in the letters of support from the Mayor of Kansas City, the Jackson County Executive, a Kansas City Councilman, and University Physicians Associates, attached to Trigen’s verified application as Appendix E.

burden that would otherwise be placed on existing Trigen customers. (*Id.* at 8) The extension will also benefit existing customers in terms of system operations and system reliability in the following ways:

- TMC's load is quite large relative to Trigen's other customers, and system operation will improve because of TMC's favorable load characteristics;
- Addition of TMC will allow Trigen's boiler capacity to operate in a more favorable and efficient load range during the shoulder and summer months;
- Most, if not all, of the additional steam production will be coal-fired, thereby driving down the percentage of natural gas combusted in the boilers and the average cost of steam production;
- Increased steam throughput will increase the production of back-pressure turbine-generated electricity, which is expected to modestly reduce Trigen's annual electricity purchase requirements and should result in increased sales of low-cost incidental electricity;
- As a significant user of steam in non-heating season months, TMC will help drive down the proportion of distribution steam losses; increased summer month sales will allow Trigen to more efficiently use its distribution system and reduce the relative line loss percentage;

- Since TMC itself currently has a substantial central heating plant, it will still have the ability to produce a substantial amount of steam if necessary; therefore, the possibility exists that the TMC plant could serve as backup generation, and in the event of a Trigen service interruption, it is possible that TMC's facility could be used to serve TMC's own needs and potentially backfeed the east radial of Trigen's distribution system.

(Kirk Direct, pages 10-11)

Beyond these public interest benefits are additional ways in which the proposal promotes the public interest. As David A. Wagner of TMC stated in his Direct Testimony, TMC is a non-profit corporation which serves as a safety net healthcare provider in Kansas City and Jackson County, Missouri. TMC contracts with Kansas City and Jackson County to provide indigent care to patients; it provides both inpatient and outpatient healthcare for its area regardless of the patient's ability to pay. (David A. Wagner Direct, page 3) Obtaining steam from Trigen will save TMC significant operating expense, saving dollars which will then be available to provide healthcare for the indigent, allowing TMC to be a good steward of taxpayer money. Obtaining steam from Trigen will also relieve TMC of running its self-generation boilers on a 24 hour basis, freeing up approximately six employees who could then be deployed to different areas of TMC's operation, resulting in personnel cost savings for TMC. Mr. Wagner's testimony even indicates that TMC's savings from taking service from Trigen could provide capital improvement funds – funds which are not currently available due to shrinking Medicare and Medicaid revenues available to TMC. (David A. Wagner Direct,

pages 3-4) Beyond the cost savings to TMC, Trigen's steam will provide a redundant energy source to assure uninterrupted operations at TMC, which is obviously vital to a Level I Trauma Center such as TMC. (*Id.* at 4)

It should also be noted that Mr. Wagner's testimony indicates that TMC is a *transportation customer* of MGE, but does not buy its natural gas from MGE. (*Id.* at 5) According to Mr. Wagner, in 2005 TMC paid MGE \$157,146.81. (*Id.* at 6) Therefore, TMC's real savings from taking service from Trigen are coming from the money it will save on avoiding the purchase of natural gas commodity – gas it does not even buy from MGE, and money which MGE will therefore not be losing since it is already not receiving this money. Mr. Wagner's testimony goes on to state that TMC **conservatively** estimates the savings it will achieve by taking service from Trigen to be almost five times any revenue lost by MGE (*Id.*); these savings may in fact be much greater. The significance of the savings to TMC can be seen in the Highly Confidential figures shown in the Rebuttal Testimony of Staff witness Harris. (HC Harris Rebuttal, page 8)

MGE witness Noack takes issue with Staff's definition of "public" and "public interest", arguing that granting Trigen's certificate request will not promote the public interest because MGE would suffer a revenue shortfall, MGE has "infrastructure" in the area, and MGE's remaining customers' rates and bills will be higher if MGE loses customers to Trigen. Unfortunately for MGE, just such an argument has been previously rejected.

First, it should be remembered that MGE does not provide steam heating service, therefore, any infrastructure MGE may have in the area is not steam heating infrastructure and there can therefore be no duplication of facilities. Second, MGE's

arguments about its revenue shortfall and remaining customers' bills being higher were rejected over thirty-five years ago. In *State ex rel. Webb Tri-State Gas Co., et al. v. Public Service Commission*, 452 S.W.2d 586 (Mo. App. 1970), the Gas Service Company was seeking a certificate of convenience and necessity to provide natural gas service in an area of the state which was already being served by liquified petroleum gas (LPG) companies. The court noted that the "tenor of the evidence" presented by the officers and employees of the various LPG companies in opposition to the grant of the certificate was that the LPG dealers "had built their businesses at considerable expense and that they will lose their investments" and because of that, the LPG companies "urged that conditions be imposed on the certificate so as to relieve from this financial loss;" the court held that the Commission "properly rejected this contention." *Id.* at 588. The court went on to quote with approval from the Commission's order that "It must be noted that in this case the apparent adverse result is the possibility of an increased price for the remaining LPG customers. For this Commission to deny the prospective customers of the Applicant the advantages of a lower priced fuel would not be in the interest of the general public. We conclude that the grant of the authority will be in the public interest." *Id.* at 589. See also, *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, 3 Mo. P.S.C. 3d 173, 190-91 (1994). Likewise, for the Commission to deny the prospective customers of Trigen the opportunity to switch to a less costly energy alternative would not be in the public interest. MGE's arguments must be rejected.

Since Trigen's certificate application satisfies each of the criteria previously set forth by the Commission, Trigen's requested certificate of convenience and necessity should be granted as being necessary or convenient for the public service.

If so [i.e., if the requested Certificate of Convenience and Necessity should be granted], should any conditions be imposed on the Certificate of Convenience and Necessity?

Staff recommends that the Commission grant Trigen's requested certificate with two conditions, summarized below:

- TMC should finance the entire cost of the project's construction, and
- Trigen should be completely "at risk" for covering any operating losses that may result from the proposed extension project.

(See, Harris Rebuttal, page 3)

With regard to the first condition, Trigen cannot commit TMC to financing the entire construction cost; TMC must answer this condition itself. However, given that Trigen's original feasibility study (HC Schedule BPK-2) shows that the expansion is ~~expected~~ to be accretive to earnings as originally proposed by Trigen, if TMC is willing to provide a construction advance for the entire cost of the project, the expected accretion to earnings will be even further enhanced. (Sim Surrebuttal, page 4)

With regard to the second condition, that Trigen be completely "at risk" for covering any operating losses that may result from the proposed extension project, Trigen ~~submits that~~ such condition should not be imposed by the Commission. Trigen believes firmly that the project will be immediately accretive to its earnings, as shown by its ~~feasibility study~~ (Sim Surrebuttal, page 5); no other party, ~~including Staff~~, has prefiled

testimony, or any other analysis or study, which shows otherwise (*Id.* at 6). Furthermore, although Staff is critical that Trigen is unwilling to maintain separate books and records for or a separate tracking of the costs and revenues related to the project, the Commission needs to recognize that Trigen has and continues to “run a lean operation.” (*Id.*) Trigen does not want to incur the additional administrative burdens and associated costs to segregate or track the operating and maintenance costs for the proposed expansion area separate from its existing area – costs which the Commission’s imposition of this condition would cause Trigen to incur, and costs which would not be required or maintained in the ordinary course of business. Otherwise, the operating results for the proposed expansion area could only be determined by conducting a special study, which would itself cause additional costs to be incurred. (*Id.*) Given that Trigen believes firmly that the project will be immediately accretive to its earnings, and that no other party, including Staff, has prefiled testimony, or any other analysis or study, which shows otherwise, requiring Trigen to incur these costs is simply unnecessary and will reduce the profitability of the proposed expansion. (*Id.*) It is also interesting that no such condition was deemed necessary when Trigen was granted a certificate to expand its service area in 1996. *In the Matter of Trigen-Kansas City Energy Corporation*, 5 Mo. P.S.C. 3d 186 (1996).

Finally, if TMC agrees to the first condition, Trigen would have no initial capital investment (*i.e.*, no net investment increasing rate base) attributable to the extension, further improving the already favorable economics of the project. (*See*, HC Schedule BPK-2-S attached to the Surrebuttal Testimony of Mr. Kirk) While Trigen’s initial net cost of construction would decline to zero, Trigen’s gross margin would remain

unchanged, and after deducting depreciation expense and recognizing any incremental income tax consequences, significant incremental net operating income available would be generated from a zero initial investment – thereby materially insulating ratepayers from any risk of loss. (Sim Surrebuttal, page 5) For all of the foregoing reasons, the second condition is simply unwarranted and should be rejected by the Commission.

In an attempt to support the imposition of his proposed conditions, Staff witness Harris cites four natural gas certificate application cases. Each of these cases is readily distinguishable from the present case. For example, at least two of the cases cited by Mr. Harris involved some sort of stipulation in which the applicant agreed to assume certain risks or obligations; one case involved allegations of inappropriate affiliate transactions; at least one of the cases involved the grant of a pipeline “line” certificate in addition to an LDC “area” certificate. However, the most important distinction is that in each of the cases cited by Mr. Harris, a significant dispute existed as to whether or not the proposed projects were feasible, *i.e.*, whether a sufficient number of customers would convert to natural gas to make the projects profitable. Each project required a substantial number of households or other customers in the area to convert to natural gas in order to be profitable, and there were significantly different projected “conversion rates” presented into evidence by Staff, the applicant company, and in some cases by intervenors.

The foregoing is not an issue in the present case. Trigen is seeking to expand its territory to serve a customer (TMC) which has requested service from Trigen, which customer has a great public need, and, most importantly in distinguishing this case from the gas cases cited by Mr. Harris, **the economics of the expansion do not require any customers beyond TMC.** (Sim Surrebuttal, page 7) Therefore, requiring Trigen to incur

the costs associated with Staff's second condition is not warranted, and is also not supported by the cases relied upon by Staff.

The Commission should also recognize that Trigen has excess steam production capacity to serve new customers. Margins attributable to revenues from these new customers would serve to reduce future per unit rates from what they would otherwise be. A regulatory policy which endorses a one-sided proposal such as that recommended by Staff, and which imposes extraordinary risk on such customer expansion opportunities could result in utilities not pursuing otherwise favorable expansion opportunities, thereby increasing future rate levels to existing customers beyond what they would have been had such expansion occurred. (Sim Surrebuttal, page 8)

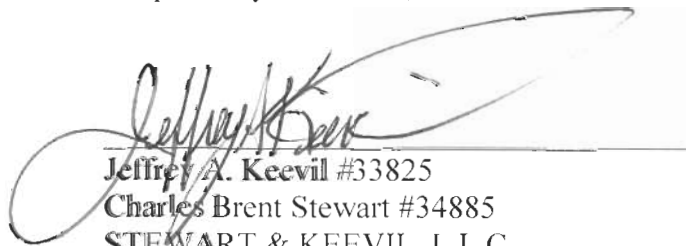
Finally, if all of the downside risk is placed on Trigen as Staff proposes, it is only reasonable that some of the upside gain should be as well. If Staff's second recommended condition is adopted by the Commission – that Trigen in effect indemnify other customers from any losses that might result from the territory expansion – Trigen should be allowed to keep 50% of any gain. In other words, on a cost of service basis, one-half of the **margin earned above the Commission-authorized** rate of return would not be recognized for ratemaking purposes to reduce the overall revenue requirement. Such a sharing seems only reasonable if Staff's proposed condition is adopted.⁶ (Sim Surrebuttal, page 7)

⁶ Trigen firmly believes that the territory expansion will be immediately accretive to earnings and did not envision the presentation of a recommendation that it be allowed to retain any upside gain. However, such a sharing request seems reasonable because of Staff's indemnification condition – a condition without any evidentiary basis or economic support. (Sim Surrebuttal, page 7)

III. CONCLUSION

For all of the reasons discussed above, the Commission should grant Trigen's requested Certificate of Convenience and Necessity authorizing Trigen 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, a copy of which is also attached hereto) as an expansion of its current service territory, without imposing any conditions⁷ (unless TMC is agreeable to Staff's first proposed condition). However, in the event that the Commission imposes Staff's second condition discussed above, that Trigen in effect indemnify other customers from any losses that might result from the territory expansion, Trigen should also be allowed to keep 50% of any gain. In other words, on a cost of service basis, one-half of the margin earned above the Commission-authorized rate of return would not be recognized for ratemaking purposes to reduce the overall revenue requirement.

Respectfully submitted,



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⁷ If the requested certificate is granted, Trigen is aware that it will need to file a tariff sheet reflecting the additional territory and certainly does not oppose a "condition" that it file such tariff.

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 11th day of May, 2006.

A handwritten signature in black ink, appearing to read "Jeffrey K. Kline", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

APPENDIX B

TERRITORIAL DESCRIPTION OF PROPOSED NEW SERVICE AREA

Beginning at a point on the southern boundary of Trigen's existing certificated area on the west line of Locust Street and the north line of Interstate 670;
thence southerly along the west line of Locust Street to the south line of 25th Street;
thence easterly along the south line of 25th Street to the east line of Campbell Street;
thence northerly along the east line of Campbell Street to the intersection of the northerly projection of the east line of Campbell Street and the south line of 11th Street;
thence westerly along the south line of 11th Street to a point on the eastern boundary of Trigen's existing certificated area on the west line of Interstate 70;

All streets and freeways referred to above are as now established and are located within the City of Kansas City, Jackson County, Missouri.