ORIGINAL

STEWART & KEEVIL, L.L.C.

ATTORNEYS AT LAW

CHARLES BRENT STEWART
JEFFREY A. KEEVIL

WILLIAM M. SHANSEY
OF COUNSEL

1001 CHERRY STREET
SUITE 302
COLUMBIA, MISSOURI 65201-7931

AREA CODE 573
TELEPHONE 499-0635
FACSIMILE 499-0638

June 29, 1999

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

FILED

JUN 29 1999

Missouri Public
Service Commission

RE: Case No. HX-99-443

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case are an original and fourteen (14) copies of the INITIAL COMMENTS OF TRIGEN-KANSAS CITY ENERGY CORPORATION IN OPPOSITION TO PROPOSED RULE.

Copies of this filing have on this date been mailed or hand-delivered to counsel for Staff and the Office of the Public Counsel. Thank you for your attention to this matter.

Sincerely,

Jeffrey A. Keevil

JAK/er
Enclosures
cc: counsel for Staff and Office of the Public Counsel
Jim Henslee

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Proposed Rule 4 CSR 240-80.015 Affiliate Transactions.	))	Case No. HX-99-443

INITIAL COMMENTS OF TRIGEN-KANSAS CITY ENERGY CORPORATION IN OPPOSITION TO PROPOSED RULE

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen") and respectfully submits the following comments in opposition to proposed rule 4 CSR 240-80.015 regarding affiliate transactions.

The "purpose" clause of the proposed rule states that it "is intended to prevent regulated utilities from subsidizing their nonregulated operations." However, there is no indication anywhere in the purpose clause, or elsewhere in the proposed rule, that this has been a problem which would necessitate a rulemaking, nor any indication that the issue of subsidization has been a problem with steam heating companies. It should be remembered that Trigen, as a steam heating company, does not have a "typical" utility customer base, in that it serves no individual residential customers, and the customers it has have other options for their heating purposes. Trigen has not had a general rate increase case since it became subject to the jurisdiction of the Commission; therefore, it is difficult to imagine how any nonregulated activities in which it may be engaged could be harming its ratepayers or how the Staff or Office of the Public Counsel could have encountered any difficulties in conducting an audit due to nonregulated activities, since no audits have been conducted. Section 536.021.2(1) RSMo (1998 Supp) requires that a notice of proposed rulemaking contain "an explanation of any proposed rule or any

4

change in an existing rule, **and the reasons therefor**" (emphasis added); as discussed above, the "purpose" clause of the proposed rule fails to contain any reason whatsoever for the proposed rule, and the proposed rule is therefore "null, void and unenforceable" pursuant to section 536.021.7 RSMo. (1998 Supp.).

It is also nonsensical that a proposed rule, the ostensible purpose of which is to assure the public "that their rates are not adversely impacted" by nonregulated activities, will in all likelihood have the opposite effect by leading to rate increases by driving up the cost of providing service in Missouri. This can be seen by simply looking at the fiscal notes accompanying the proposed rule. Bear in mind that under the Commission's utility assessment procedure, both the private entity fiscal cost and the public entity fiscal cost will ultimately be borne by the utilities, which will then have little choice but to seek to increase their rates and pass those costs on to customers. Given that there has been no indication that affiliate transactions have been subject to any abuses, especially in the area of steam heating companies, this increase in cost is unjustified and ultimately harmful to the customers which the rule purports to protect.

In regard to the private entity cost fiscal note, Trigen submits that the estimated cost is grossly understated. Section III(3) states that only one of the three Missouri-regulated steam heating companies responded to the Commission's request for fiscal impact information; Trigen responded to the request for such information in November 1998. In its response, Trigen estimated that the first year cost would be $243,009 and that succeeding years' cost would be $183,457 annually. Nothing has changed to cause Trigen to lower its estimate of these costs. If these costs are used for the calculations shown on the private entity cost fiscal note, rather than the unsubstantiated $100,000 and

$75,000 "assumptions" stated in Section IV(5) and (6), the total estimated private entity cost would have been $729,027 in the first year and $550,371 in all succeeding years. As stated above, under the Commission's utility assessment procedure, both the private entity fiscal cost and the public entity fiscal cost will ultimately be borne by the utilities, which will then have little choice but to seek to increase their rates and pass those costs on to customers. Given that there has been no indication that affiliate transactions have been subject to any abuses, especially in the area of steam heating companies, this increase in cost is unjustified and ultimately harmful to the customers which the rule purports to protect.

While the foregoing additional costs may not seem significant in relation to larger utility companies with whom the Commission deals more frequently, these costs are very significant to Trigen. In addition to the significant increase in cost discussed above, Trigen believes the proposed rule would greatly increase its record keeping requirements. Such increased record keeping would consume a great deal of time on the part of Trigen personnel. Trigen believes the Commission should recognize that for a small company like Trigen, the burden imposed by the proposed rule, both in terms of cost and time, would be significantly greater than on larger utility companies with whom the Commission deals more frequently. Trigen does not have the personnel or financial resources as the larger gas and electric utilities in Missouri.

The legal "authority" cited for the proposed rule as required by section 536.021.2(2) RSMo (1998 Supp.) – sections 386.250 RSMo Supp. 1998 and 393.140 RSMo 1994 – does not authorize adoption of the proposed rule and the proposed rule is therefore "null, void and unenforceable" pursuant to section 536.021.7 RSMo. (1998

Supp.). First, it should be noted that neither section 386.250 nor 393.140 refer to steam heating companies; neither can therefore give the Commission jurisdiction to adopt a rule governing steam heating companies. The Commission's entire jurisdiction over heating companies is by virtue of section 393.290 RSMo; however, this section was not set forth as legal authority for the proposed rule. Without the authority of section 393.290 RSMo, there is simply no authority whatsoever for the proposed rule. Second, neither statutory section gives the Commission authority to adopt, for any type of utility, such a broad, wide-ranging rule as that currently proposed. The proposed rule is therefore "null, void and unenforceable" pursuant to section 536.021.7 RSMo. (1998 Supp.).

Assuming solely for purposes of argument that the cited statutory sections actually constituted authority for adoption of the proposed rule, each of the cited statutes requires that the Commission conduct a hearing. Since a hearing is required by the statutes upon which the Commission has relied in issuing the proposed rule, the instant proceeding must be considered a "contested case" under Missouri law.[1] As a "contested case", the full range of procedural rights and requirements applicable to contested cases must be observed for this proceeding, including, but not limited to, the right to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses and to rebut opposing evidence; to have all oral evidence received only on oath or affirmation; the right to have a printed transcript; the right to present oral arguments or written briefs at or after the hearing; and the right to a final written decision with findings of fact and conclusions of law. (*See,* Sections 536.067, 536.070, 536.073, 536.074, 536.080 and 536.090 RSMo). The procedures currently contemplated by the Commission, as reflected

[1] Section 536.010(2) RSMo defines "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

in the NOTICE OF PUBLIC HEARING AND NOTICE TO SUBMIT COMMENTS portion of the proposed rule, do not begin to comply with these procedural requirements. The Commission should therefore, at a minimum, revise such procedures in a manner that will provide all interested parties with the level of due process required by the procedural mandates of a contested case.

Furthermore, the proposed rule actually conflicts with section 393.140(12) RSMo, which clearly precludes Commission jurisdiction over unregulated business activity engaged in by a utility. The Commission is a creature of statute, and as such has only such powers as are conferred on it by statute; the Commission cannot extend its jurisdiction through the creation of a rule. Sections (5) and (6) of the proposed rule clearly exceed the Commission's jurisdiction and violate section 393.140(12) RSMo, as they purport to impose record keeping requirements on nonregulated affiliated entities and give the Commission access to the records of nonregulated affiliates. As such they must not be adopted. In regard to Sections (5) and (6) of the proposed rule, the Commission should also ask itself how a regulated heating company can "ensure" that its affiliates keep their records in a certain way, or how a regulated heating company can "make available" the records of its affiliates, when "affiliated entity" is defined as it is in subparagraph(1)(A) and (C). Clearly, the rule seeks to impose conditions upon the regulated heating company which are impossible to fulfill.

Trigen's parent company, Trigen Energy Corporation, has 19 operating companies (including Trigen-Kansas City) in the United States, Canada, and Mexico; it operates 41 plants in 27 locations in 17 states and in 2 Canadian provinces. Presumably, each of these operating companies and the parent company (and possibly other entities as

well) would qualify as "affiliated entities" under the proposed rule. How can Trigen "ensure" that all of these entities, some outside the country, maintain their books and records as required by Section (5) of the proposed rule? How can Trigen "make available" such books and records as required by Section (6)(A)? And does Staff actually propose to audit the books and accounts of these other entities, including those in Canada and Mexico? If Staff does intend to conduct audits out of the country, the estimated fiscal impact of the proposed rule on the Commission is as understated as the estimated fiscal impact on the regulated heating companies.

Subparagraph (1)(A) of the proposed rule includes political subdivisions within the definition of "affiliated entity". As such, it violates the Hancock amendment, Article X, section 21 of the Missouri Constitution.

Subparagraphs (1)(F) and (2)(B) attempt to prevent the regulated heating company from providing any "preferential service" to an affiliated entity. However, if this does not harm the customers of the regulated heating company it is difficult to see why the Commission should care about such activity, and in any event, it would certainly not fall within the purported "purpose" of the rule. Similarly, subparagraph (2)(D) would require the regulated heating company to provide information to customers regarding the availability of nonaffiliated entities even when the customers did not request such information; once again, if providing information only about affiliated entities (when such is requested by the customer) does not harm the customers of the regulated heating company it is difficult to see why the Commission should care about such activity, and in any event, it would certainly not fall within the purported "purpose" of the rule. Also, by foreclosing action which does not even harm customers, the proposed rule limits the

ability of the regulated heating company to manage its assets in the most efficient manner possible, and therefore will result in even higher costs to the customers.

Subparagraphs (2)(D) and (3)(D) refer to an annual cost allocation manual ("CAM"), approved by the Commission. However, nowhere in the rule is there any indication as to how this CAM is to be filed for Commission approval. Subparagraph (9)(A)2.B likewise refers to an annual CAM filing, but no guidance is given as to when (other than, presumably, annually) or how this filing is to be made, or exactly what it is to contain.

Subparagraph (4)(A) would require a regulated heating company to maintain certain information "in a **mutually agreed to** electronic format (i.e., agreement between the staff, Office of the Public Counsel and the regulated heating company)" (emphasis added). However, no provision is made for the possibility that the three listed parties may not agree.

For all of the reasons set forth above, the proposed rule is unlawful, unreasonable and simply unnecessary, and should not be adopted by the Commission.

Respectfully submitted,

Jeffrey A. Keevil
Missouri Bar No. 33825
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, Missouri 65201
(573) 499-0635
(573) 499-0638 (fax)
ATTORNEY FOR TRIGEN-KANSAS CITY ENERGY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered by first-class mail, or hand-delivery, to counsel for Staff of the Missouri Public Service Commission and the Office of the Public Counsel on this 29th day of June, 1999.