

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

In the Matter of Trigen - Kansas City Energy	)	
Corp.'s Application for a Finding of No	)	
Jurisdiction or, in the Alternative, for a Grant of	)	
Authority for the Transfer or Sale of a Contract	)	Case No. HO-2007-0419
Currently Owned by Trigen - Kansas City	)	
Energy Corp. to Affiliate or Third Party	)	

**STAFF RESPONSE TO COMMISSION ORDER  
AND REQUEST FOR LEAVE TO LATE-FILE RESPONSE**

On May 4, 2007 the Commission issued an Order Directing Filing Of Staff Recommendation Or Report (Order). Therein the Commission directed the Staff to file no later than May 24, 2007 its recommendation or a status report indicating the earliest date it believes it can file a recommendation. Due to the press of other Commission business and the somewhat different nature of Trigen's Application undersigned counsel is requesting leave to late-file this pleading and the attached Staff Memorandum Recommendation. The Staff is not certain that it has completely captured the alternative facets of Trigen's Application so it will endeavor to set out below what it believes Trigen and the Commission are looking for based on Trigen's Application and the Commission's Order.

It is the Staff's understanding that the Commission wants a recommendation from the Staff: (1) whether the Commission has jurisdiction over Trigen – Kansas City Energy Corp.'s (Trigen) proposed transaction and (2) if the Commission asserts jurisdiction, whether the Commission should approve Trigen's proposed transaction. The Trigen Application is not only unusual in that it requests that the Commission decline jurisdiction respecting the intended transactions, but in addition it is highly unusual in that it alternatively requests preapproval if the

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Commission does not decline jurisdiction. The Staff recommends that the Commission assert jurisdiction and deny preapproval. The Staff is not necessarily opposed to the transactions that Trigen is proposing so long as there is no detriment to the public interest and the Commission is not being asked to accept whatever Trigen's parent ultimately decides to do with the Coal Contract regardless of the effect on Trigen's Missouri jurisdictional operations customers. Having made the preceding statements, the Staff also believes that Trigen should be commended for filing its Application because the Staff suspects that there are other utilities that would not have done so regarding a similar subject matter.

In response to the Commission's Order the Staff further states as follows:

1. Trigen asserts throughout paragraphs 9 - 13, pages 4 - 6, of its Application that the Coal Contract in question is not "necessary or useful" in the provision of utility service by Trigen under Section 393.190(1) RSMo 2000. The Staff believes that the cases that Trigen has cited in its Application filed on April 27, 2007 are distinguishable from the instant situation.

2. The importance of all of this discussion, in large part, is that unobtrusively in paragraph 23 at page 10 of the Application appears the following statement: "In the event that a third-party sale results in a loss for Trigen KC, the impact of such a loss on the Applicant's ratepayers, if any, would necessarily be addressed separately in a formal rate proceeding." Thus, Trigen is indicating a distinct likelihood that it will seek ratemaking recovery from Trigen's Missouri regulated operations customers of a loss respecting the Coal Contract that Trigen is asserting is "not necessary or useful" in the provision of utility service. If Trigen is intending to seek ratemaking treatment for its disposition of the Coal Contract, which Trigen has clearly indicated to the Staff presently may well be worth less to Trigen than what it has invested, then

the Commission clearly should not decline jurisdiction respecting the disposition of the Coal Contract.

3. If it is "necessary and useful" for Trigen to charge the customers of its Missouri regulated operations for the disposition of the Coal Contract in question, then it is necessary for the Commission to oversee the disposition of that Coal Contract. Seemingly, Trigen also wants the Commission to find that it has no jurisdiction to compel access to documents relating to Trigen's disposition of the Coal Contract. Trigen has made no real offer to provide the Commission any subsequent access to documentation by which the Commission can determine that Trigen has disposed of the Coal Contract in a prudent and otherwise appropriate manner. Trigen has only offered access to any documents relating to its disposition of the Coal Contract if the Commission finds that it, i.e., the Commission, has jurisdiction. In fact, even if the Commission finds that it has jurisdiction over the disposition of the Coal Contract, it faces the prospect in any subsequent ratemaking action by Trigen relating to the Coal Contract of encountering efforts by Trigen to limit discovery relating to this matter.

4. The attached Staff Memorandum Recommendation notes that Trigen's on site Vice President and General Manager, Brian P. Kirk, has indicated to Staff auditors that Trigen will not seek recovery from its Missouri regulated operations customers of its investment in the Coal Contract, but this representation is at odds with the sentence in paragraph 23 at page 10 of the Application noted above and a response noted in the attached Staff Memorandum Recommendation. An affidavit of Mr. Kirk's is attached to Trigen's Application, in which he swears upon his oath that the things stated in the foregoing application and appendices thereto are true and correct to the best of his information, knowledge and belief. It is unclear whether

Mr. Kirk's representations to the Staff auditors or Trigen's Application and other response controls.

5. The Staff further notes that the Western District Court of Appeals has held that it is lawful for the Commission to disallow costs that are not beneficial to ratepayers, *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 600 S.W.2d 222, 228 (Mo.App. W.D. 1980), and the costs that Trigen has invested in Ricci Mine 19 respecting the Coal Contract in question have never proven to be of benefit to Trigen's Missouri regulated operations customers as related in the attached Staff Recommendation.

6. Trigen cites *In the Matter of the Application of Kansas City Power & Light Co.*, 2006 Mo.PSC LEXIS 1734 (Dec. 21, 2006), the Commission's Report And Order in the recent Kansas City Power & Light Co. (KCPL) rate increase case, ER-2006-0314, as being in support of its position. The legal principle for which Trigen cites the Commission's Report And Order in Case No. ER-2006-0314 is "used and useful" from Section 393.135, not "necessary or useful" from Section 393.190. Thus, this citation is not on point.

7. Trigen next cites *In the Matter of the Application of Arkansas Power & Light Co. regarding the selling of certain pollution control facilities and other facilities and the repurchasing of these facilities*, 1981 Mo. PSC LEXIS 60, the Commission's January 23, 1981 Order in Case No. EO-81-216, and *In the Matter of the Application of Aquila, Inc.*, 2005 Mo. PSC LEXIS 1705 (Dec. 19, 2005), the Commission's Report And Order in Case No. EO-2005-0156 (*In the Matter of the Application of Aquila, Inc. for Authority to Acquire, Sell and Lease Back Three Natural Gas-Fired Combustion Turbine Power Generation Units and Related Improvements to be Installed and Operated in the City of Peculiar, Missouri*). Trigen fails to note item "5." under the "Conclusions of Law" section at page 8 of the Commission's Report

And Order in Case No. EO-2005-0156, which clearly distinguishes both of these cases from the instant case. The instant case, among other things, is not a financing transaction:

Aquila's December 30, 2004 sale and lease-back of the facilities was not the type of transaction that Section 393.190 was meant to govern because Aquila maintained complete control over the assets.<sup>24</sup> A separate issue, which the Commission will address in Aquila's pending rate cases, is who will pay for the cost of South Harper. An asset must be used and useful before an electrical corporation can charge for operating or financing it.<sup>25</sup>

<sup>24</sup> See *In re Arkansas Power and Light*, Commission Case No. EO-81-216 (January 23, 1981)(in which the Commission held that a similar transaction was a financing transaction, and did not come within the purview of Section 393.190.

<sup>25</sup> Section 393.135 RSMo 2000.

The Staff notes that there was a Dissenting Opinion in Case No. EO-2005-0156.

8. The Staff believes that Trigen is only proposing to provide documents relating to the proposed transaction to the Commission if it asserts jurisdiction, and even then Trigen is proposing to provide only limited documents. The Commission has the statutory authority necessary to acquire access to the documents relating to the sale or transfer of the Coal Contract to an unrelated third party or an affiliate of Trigen, especially if Trigen is seeking ratemaking treatment for the transaction. *State ex rel. Utility Consumers Council of Missouri v. Public Serv. Comm'n*, 562 S.W.2d 688, 694 (Mo.App. StL.D. 1978); *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 645 S.W.2d 44, 55 (Mo.App. W.D. 1982).

9. Undersigned counsel apologizes for his delay in filing the attached Staff recommendation due to the additional time that he required due to other Commission cases and the amount of work required to respond to Trigen's jurisdictional argument.

Wherefore the Staff contends that the Commission has jurisdiction over the proposed transaction of Trigen, submits the attached Staff Memorandum Recommendation suggesting that the Commission should assert jurisdiction and not grant preapproval of the proposed transaction

and undersigned counsel requests leave to late-file the Staff's response to Trigen's April 27, 2007 Application and the Commission's May 4, 2007 Order Directing Filing Of Staff Recommendation Or Report.

Respectfully submitted,

/s/Steven Dottheim

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Missouri Bar No. 29149

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 1st day of June 2007.

/s/ Steven Dottheim


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

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Corp. to Affiliate or Third Party )

# AFFIDAVIT OF CARY G. FEATHERSTONE

STATE OF MISSOURI )  
 )  
 ) ss.  
COUNTY OF COLE )

Cary G. Featherstone, of lawful age, on his oath states: that he has participated in the preparation of the foregoing Staff Recommendation; that the information is given by him; that he has knowledge of the matters set forth; and that such matters are true and correct to the best of his knowledge and belief.

  
Cary G. Featherstone

Subscribed and sworn to before me this 1<sup>st</sup> day of June, 2007

B. M. Webb  
Notary Public

BEVERLY M. WEBB  
Notary Public - Notary Seal  
STATE OF MISSOURI  
Clay County  
My Commission Expires March 17, 2008

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Corp. to Affiliate or Third Party )


**AFFIDAVIT OF PHILLIP K. WILLIAMS**

STATE OF MISSOURI     )  
                              )  
COUNTY OF COLE     )     ss.

Phillip K. Williams, of lawful age, on his oath states: that he has participated in the preparation of the foregoing Staff Recommendation; that the information is given by him; that he has knowledge of the matters set forth; and that such matters are true and correct to the best of his knowledge and belief.

  
Phillip K. Williams

Subscribed and sworn to before me this 1<sup>st</sup> day of June, 2007.

  
Notary Public

BEVERLY M. WEBB  
Notary Public - Notary Seal  
STATE OF MISSOURI  
Clay County

My Commission Expires March 17, 2008



## MEMORANDUM

TO: Missouri Public Service Commission Official Case File  
Case No. HO-2007-0419, Trigen-Kansas City Energy Corporation

FROM: Cary G. Featherstone, Regulatory Auditor V – Auditing Department  
Phillip K. Williams, Regulatory Auditor III – Auditing Department

/s/ Cary G. Featherstone                      /s/ Steven Dottheim  
Project Coordinator                      Office of General Counsel

SUBJECT: Staff's Recommendation Regarding Trigen-Kansas City Energy Corporation's Request in Case No. HO-2007-0419

DATE: May 31, 2007

On April 27, 2007, Trigen-Kansas City Energy Corporation (Trigen, Company or Applicant), a Delaware corporation, filed a request asking that the Missouri Public Service Commission (Commission) "find that it has no jurisdiction over the sale or transfer of Applicant's interest in a coal purchase contract and related agreements (collectively the 'Coal Contract') and permit the transaction to proceed without approval from the Commission. In the alternative, Trigen KC requests that the Commission grant authority to permit Applicant to transfer its interest in the Coal Contract to an affiliated entity or a third-party purchaser." [Application, page 1].

Trigen states in its Application that if the Commission finds it has authority over this Coal Contract, it is requesting pre-approval of the proposed sale to either an unrelated third party or an affiliate of the Company since "[p]rospective transferees or purchasers have not yet been identified" [Application, page 1].

Phil Williams and Cary Featherstone of the Commission's Auditing Staff have conducted a review of the Application of Trigen. Trigen, a wholly-owned subsidiary of Thermal North America, Inc. (Thermal), was authorized to provide steam heating service pursuant to authority granted by the Commission in Case No. HA-90-5 issued on December 29, 1989.

Trigen states in its Application at page 3 in section "I.C. Disclosures" that it "does not have any pending actions or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or rates, which action, judgment or decision has occurred within three (3) years of the date of this application."

Further Trigen states: "[It] does not have any overdue annual report or assessment fee(s). Applicant received notice that its request (filed April 16, 2007) for a 30-day extension as to filing its 2006 Annual Report has been approved." [Application, page 3.]

Trigen supplies district heating steam service to customers located in Downtown Kansas City and steam service used in industrial processes to customers taking this service from its Grand

Avenue Station. This production facility is located on the northern edge of Downtown Kansas City along the southern border of the Missouri River.

**Overview of Trigen's Application:**

Trigen's Application states that the Coal Contract is with Ricci Mining, L.L.C. ("Ricci"), a Kansas company, "the owner and operator of a waste coal processing facility in southeast Kansas." Under the Coal Contract, Trigen "agreed to make prepayments for a 10-year supply of coal with the intention of providing Ricci with necessary startup capital for the development of the Ricci mining operation through prepayments on coal purchases." [Application, page 3]. However, the coal obtained from the Ricci mine through this Coal Contract has not been sufficient to meet Trigen's minimum production needs nor is the coal of a quality to meet the requirements of pending environmental regulations as they pertain to the operation of the Trigen steam facility.

The Staff has determined that the Company has been using coal from different suppliers than contemplated under the Coal Contract to provide the necessary inventory of coal to properly run its Grand Avenue steam boiler plant within the environmental requirements under which Trigen must operate for the following reasons:

1. Ricci Mining, L.L.C., has been unable to provide a supply of coal sufficient to operate the Trigen steam facility.
2. The coal supplied by Ricci Mining, L.L.C. under the terms of the Coal Contract does not meet the environmental requirements under the Industrial Boiler Maximum Available Control Technology ("Boiler MACT"). Trigen has indicated that environmental regulations that were scheduled to go into effect in September 2007 for industrial boilers similar to the boilers used by Trigen to provide steam service by its steam system in Downtown Kansas City have been requested by the federal Environmental Protection Administration (EPA) to not go into effect until later than September of this year. [May 16, 2007 meeting with Trigen (Brian Kirk, Trigen's Vice President and General Manager).]

The Trigen Application is not only unusual in that it requests that the Commission decline jurisdiction respecting the intended transactions, but in addition it is highly unusual in that it alternatively requests preapproval if the Commission does not decline jurisdiction. The Staff recommends that the Commission assert jurisdiction and deny preapproval.

**Background:**

Trigen and Ricci entered into the Coal Contract on May 3, 2006. This agreement involving a coal reclamation project provides for Trigen to receive from the Ricci mine up to 100,000 tons of coal per year for a period of ten (10) years starting in the fall of 2006 and expiring May 31, 2016. [Application Section II. Description of Proposed Transaction, page 3]. There are no minimum amounts that Trigen has to take or that Ricci must be able to deliver.

Construction on the coal reclamation facility started in September 2006. The coal was trucked from the Ricci mine in southeast Kansas to the Grand Avenue facility. [May 16, 2007 meeting with Trigen (Brian Kirk)].

Trigen supplied funding for this reclaimed coal supply project, which is described below, by making a prepayment for the coal. Funding by Trigen amounts to over \*\* \_\_\_\_\_ \*\* to date. Trigen is still incurring an outlay of cash, primarily for consultants, for determining if the coal washing process can be improved for efficiency and to increase production from this reclaimed coal supply. Mr. Kirk of Trigen stated to Messrs. Williams and Featherstone that Trigen was not going to seek recovery from the customers of its Missouri regulated operations for this investment, although Trigen's Application at page 10 indicates that Trigen might seek to recover from Trigen's ratepayers any loss that results from a third party sale. Trigen wants to sell this Coal Contract to an unrelated third party or to set up an affiliated company (possibly called a Fuels Company) by Thermal, Trigen's owner. Trigen believes this coal can be marketed to other companies for other processes than in boilers to produce steam [May 16, 2007 meeting with Trigen (Brian Kirk)].

The Staff also submitted to Trigen in writing the following question: "If there are any costs (actual or expected) relating to terminating / selling the "Ricci Mine 19 Coal Contract," does Trigen-Kansas City Energy Corporation intend to seek ratemaking recovery of any costs or losses associated with the termination / sale of the Ricci Mine 19 Coal Contract"? Trigen responded in writing as follows:

To the extent that the Mine 19 Gob coal project would have resulted substantial fuel savings (e.g. a source of \*\* \_\_\_\_\_ \*\* /mmbtu coal versus alternatives ranging from \*\* \_\_\_\_\_ \*\* /mmbtu) that would, in turn, have inured to the benefit of Trigen's customer base in the form of lower steam costs, Trigen would have considered requesting recovery of its investment through rates. While Trigen considers that it would be fair and equitable to share the risk with ratepayers, as Trigen would have shared the rewards, Trigen does not now anticipate that the Company will seek recovery through rates. The project will not result in a coal supply that conforms with Trigen's volume or quality requirements, and no savings will be realized by tariff customers.

The contract price for the Ricci coal was a delivered amount of under \*\* \_\_\_\_\_ \*\* per mmbtu. Trigen had been paying prior to the Ricci Coal Contract between \*\* \_\_\_\_\_ \*\* per mmbtu. Presently, Trigen is getting local Missouri/ Kansas coal for around \*\* \_\_\_\_\_ \*\* per mmbtu on the spot market. The Company has received quotes for Missouri and Kansas coal to be supplied under contract at \*\* \_\_\_\_\_ \*\* per mmbtu, but Trigen will not be able to use this type of coal in the future because of new emission regulations on mercury, chlorine and particulate matter. [May 16, 2007 meeting with Trigen (Brian Kirk)].

As previously noted, the new environmental regulations are called the Industrial Boiler Maximum Available Control Technology ("Boiler MACT"). They limit plant emissions of mercury (Hg), chlorine (Cl) and particulate matter (PM). These limits affect Trigen's ability to burn certain coals, including Ricci mine coal, while still maintaining environmental compliance. Trigen believes to retro-fit its Grand Avenue plant to burn local Missouri/Kansas coal (including the coal Ricci is delivering under the Coal Contract) and comply with Boiler MACT regulations, the Company would have to invest between \*\* \_\_\_\_\_  
\_\_\_\_\_. \*\*. [May 16, 2007 meeting with Trigen (Brian Kirk)].

In its Application Trigen states that it entered into a long-term coal supply agreement with Ricci to have a "reliable source of fuel, at attractive prices, for use in its Grand Avenue Station coal-fired district energy plant." [Application Section II. Description of Proposed Transaction, page 3]. Trigen had sought this coal reclamation project involving an abandoned strip mine that had been closed for many years because it believed it was economic to do so. Pittsburg Midway had operated the mine located near Joplin across the Kansas state line--close to Empire's Riverton Generating Station. The process Pittsburg Midway had used to strip the mine left contaminated coal that was piled up at the mine site and abandoned. Mr. Kirk indicated that a contractor who worked at Grand Avenue knew of this coal and told him that he estimated that there was over one million tons of coal left at this site. Trigen investigated the merits of reclaiming this coal and determined the project was worth pursuing. [May 16, 2007 meeting with Trigen (Brian Kirk)].

**Trigen's Coal Contract Performance:**

Trigen's Application states: "Based on experience in the first year of project operations, Trigen KC has now reached the conclusion that it is no longer prudent to remain in the Coal Contract. Despite the efforts and expectations of Trigen KC and Ricci, Mine 19 has not yet attained a level of economic yield necessary to satisfy Trigen KC's coal source requirements, nor has it succeeded in producing coal at a consistent quality or quantity." [Application Section II. Description of Proposed Transaction, page 4]. Trigen confirmed that the coal supplied from the Ricci mine was not sufficient to meet the Company's energy needs to produce steam for the customers of its Missouri regulated operations in an interview with Brian Kirk held on May 16, 2007.

Respecting sulfur, the Ricci mine coal can be currently burned at Grand Avenue, meeting Trigen's air quality permit of less than 4% sulfur content, but, as previously indicated, the reclamation process does not produce sufficient quantities of coal to meet Trigen's steam generation needs. Trigen received \*\* \_\_\_\_\_ \*\* tons out of \*\* \_\_\_\_\_ \*\* total tons burned in September 2006; \*\* \_\_\_\_\_ \*\* tons out of \*\* \_\_\_\_\_ \*\* total tons burned in October 2006 and \*\* \_\_\_\_\_ \*\* tons out of \*\* \_\_\_\_\_ \*\* total tons burned in November 2006. Trigen only received \*\* \_\_\_\_\_ \*\* tons out of \*\* \_\_\_\_\_ \*\* total tons in December 2006, far from the quantity necessary to supply the steam loads in Downtown Kansas City. For the four-month period from September to December 2006, Trigen received 1,613 tons of Ricci coal and burned \*\* \_\_\_\_\_ \*\* total tons of coal at its Grand Avenue plant. The Ricci mine provided approximately 5% of Trigen's needed coal supply during those four months. [May 16, 2007,

meeting with Trigen (Brian Kirk) and information supplied by Trigen (Brian Kirk) on May 22, 2007]. The Company has indicated that Ricci Mine 19 could produce increased quantities of coal, but doing so and burning such quantities would result in higher sulfur content than Trigen's existing air permit allows – less than 4% sulfur content. [Information supplied by Trigen (Brian Kirk) on May 22, 2007].

Trigen has not taken any coal from Ricci since December 2006, except a small quantity purchased from a third party which acquired coal from the Ricci mine to allow Trigen to test burn the coal at Grand avenue for compliance with the new emission standards. The coal was determined to not be in compliance with the new Boiler MACT emission standards, and, therefore, cannot be used in the future if and when those new standards are implemented.

**Trigen's Principal Proposal Of Commission Disclaiming Jurisdiction Over Coal Contract and Trigen's Alternative Proposal Of Commission Granting Preapproval:**

Trigen requests "a disclaimer of jurisdiction by the Commission such that Applicant's Proposed Transaction will not require approval by the Commission under Section 393.190 RSMo, 4 CSR Sections 240-2.060(1) and/or 240-3.405." The Application indicates that these sections "require Commission approval for the sale of an asset that is 'necessary or useful' in the provision of utility service." Trigen states that "the Coal Contract is not 'necessary or useful' in the performance of Applicant's duty to the public under Mo. Rev. Stat. Section 393.190(1)." [Application Section III. Disclaimer of Commission Jurisdiction, page 4].

Trigen states in its Application that it "seeks authorization, in the alternative, from the Commission to transfer or sell its entire interest in the Coal Contract to either an affiliated entity or an unrelated third party. Applicant seeks waivers of any regulations that may be needed to allow the Commission to approve the Proposed Transaction before its terms are negotiated." [Application, pages 6-7]. Thus, if the Commission determines that it has authority over the sale of the Coal Contract as recommended by Staff, then Trigen requests that it should be permitted to dispose of the Coal Contract to an unrelated third party or transfer the investment to an affiliate and, among other things, waiver should be granted from the Commission's affiliate transaction rule.

No documents to sell or transfer the Coal Contract have been provided to the Staff for examination. The Application indicates that no documents for this proposed transaction are available at this time. The Staff does not believe the existence of the actual sale or transfer documents would change its view of Trigen's proposed treatment of the Coal Contract, but cannot be certain of that. What Trigen is asking that the Commission do with its Application is permit the Company to sell or transfer the Coal Contract by either not asserting authority over said transaction or granting pre-approval of the sale or transfer without providing any documentation such as sale or transfer contracts and other agreements supporting the proposed transaction.

The Staff believes that in general the Commission has jurisdiction over coal contracts related to steam and electric utilities' provision of service and recovery of costs from ratepayers. The

Staff does not concur with Trigen's view that the Ricci Mine 19 coal is not "necessary or useful" to the Missouri regulated operations of the Company if Trigen seeks to recover the costs of its investment in the Coal Contract from its Missouri ratepayers, even though the Staff believes the Coal Contract otherwise provides no benefit to Trigen's Missouri regulated operations and cost recovery should not be sought by Trigen from the customers of Trigen's Missouri regulated operations. The Staff addresses in its cover pleading the legal arguments respecting whether the Commission has jurisdiction over the Coal Contract.

Since the Ricci mine cannot meet expectations and performance under terms of the Coal Contract from the perspective of quantity and compliance with environmental requirements, the Staff is not opposed to Trigen transferring or selling this coal contract to an affiliate company or an unrelated third-party, if most immediately Trigen confirms that contrary to the indication at page 10 in its Application it will not seek recovery of its \*\* investment in the Coal Contract from its Missouri regulated operations customers. Even if Trigen is willing to provide such a commitment, the Commission should require that Trigen file all documentation relating to the sale or transfer of the Coal Contract in question to an unrelated third party or its transfer to a Trigen affiliate for determination by the Commission that there is no detriment to Trigen's Missouri regulated operations customers.

At this time the Staff would concur with Trigen's assessment that the proposed transaction would not be not detrimental to the public interest, if Trigen would follow through on Mr. Kirk's representation to the Staff auditors that Trigen will not seek recovery of its \*\* investment in the Coal Contract from the customers of its Missouri regulated operations and there is nothing in the sale or transfer documents to an unrelated third party or an affiliate that would be detrimental to the public interest.

Trigen has been and continues to supply steam load to its existing customers without this coal supply. The coal contracted for from the Ricci mine never met expectations from the perspective of either quantity or quality, and as such, the terms of the Coal Contract have not been met. This source of coal never provided sufficient production of steam, and, therefore, Trigen never relied on this source of supply to meet its steam load requirements. Trigen states the "discontinuation of the coal supply under the Coal Contract will not adversely affect Trigen KC's operations." [Application, page 9]. There is no apparent adverse effect on Trigen's Missouri regulated operations and its ability to serve its customers if Trigen does not sell or transfer the Coal Contract to an unrelated third party or an affiliate and seek recovery of the \*\* investment in the Coal Contract from the customers of its Missouri regulated operations. Staff is unable to determine at this time whether the ultimate sale or transfer of the Coal Contract to an unrelated third party or affiliate will be detrimental to the public interest without knowing the terms of the sale or transfer.

Sale of the Coal Contract to an unrelated third party or transfer to an affiliated entity gives Trigen opportunity to recoup some or all of its prepayments for the Ricci coal. The Staff believes Trigen should be permitted to attempt to sell or transfer its investment in the Ricci coal to an unrelated third party or an affiliate, but the customers of Trigen's Missouri regulated operations should not be expected to pay for any costs Trigen incurs to dispose of the Coal Contract to either an unrelated third party or an affiliate.

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The Staff concurs with Trigen respecting the waiver of the Commission requirement of providing a purchaser's balance sheet and income statement. Since the Coal Contract is not needed by Trigen to provide safe and adequate service to the customers of its regulated Missouri operations, the Staff does not see any benefit to requiring Trigen to conform with this requirement.

If the Commission asserts jurisdiction, Trigen will seek a wavier from 4 CSR 240-3.405(1)(B) relating to providing a copy of the contract of sale because no sale has been made at this time. [Application, page 7]. If Trigen is not able to enter into a viable sale of the Coal Contract, then Trigen has indicated it will "transfer the Coal Contract to an affiliate in full compliance with the Commission's affiliate rules for steam heating utilities." [Application, pages 7-8]. Until documentation exists relating to either a sale to an unrelated third party or transfer to an affiliate needed to determine if such a transaction will be detrimental to the customers of Trigen's Missouri regulated operations, the Application should not be approved.

Documentation that would be necessary to review the sale of the Coal Contract to an unrelated third party would be the actual sale contract or agreement and documents that show the effect the transaction would have on the books and records of Trigen. Documentation necessary to review if the Coal Contract is transferred to an affiliate would be any documentation necessary to effect the transfer from Trigen and documentation regarding the affiliate relating to transferring the Coal Contract to the affiliate.

Further, Trigen indicates that should the Commission assert jurisdiction, Trigen "will provide to Staff all necessary documents upon closing of the transaction, together with a statement verifying that the transaction, as executed, is consistent with the description of the Proposed Transaction provided in this application and the terms and conditions of any Commission order approving the Proposed Transaction," but there is no indication from Trigen what these documents would be. [Application, page 7].

#### **Conclusion and Recommendation:**

The Staff believes that the Commission should make a determination to exercise its jurisdictional authority over the sale of the Coal Contract to an unrelated third party or an affiliate of Trigen. Although Trigen's representative Brian Kirk, as Trigen's Vice President and General Manager, seemingly on behalf of Trigen the Applicant, has committed that it will not seek recovery of its related \*\* \_\_\_\_\_ \*\* investment in the Ricci Mine 19 Coal Contract from its Missouri regulated operations customers, Trigen's Application at page 10 appears to be in conflict with this commitment.

Also, while the Staff believes that the Coal Contract that is the subject of this Application has not been beneficial, is not currently beneficial and will not be beneficial in the future to the customers of Trigen's Missouri regulated operations, the Staff cannot determine whether the sale or transfer of the Coal Contract to an unrelated third party or an affiliate would be not be detrimental to the public interest, absent knowing the actual terms of the specific proposed transaction.

Since the Coal Contract is not needed by Trigen to provide safe and adequate service to the customers of its regulated Missouri operations, the Staff agrees the Commission should waive the Rule 4 CSR 240-3.405(1)(E) and -3.405(2) requirement of providing a purchaser's balance sheet and income statement.

While the Commission should exercise jurisdictional authority regarding this coal supply agreement, Trigen should be permitted to dispose of this agreement in a manner that recognizes the concerns of Trigen's owner, Thermal, while at the same time does not cause a detriment to Trigen's Missouri regulated operations customers. The Company never received the expected quantities of coal and does not believe the situation will improve sufficiently to meet the contract tonnages of up to 100,000 tons per year. As indicated by Trigen, the Ricci mine coal will not meet the new EPA Boiler MACT regulations and much of the coal produced by Ricci Mine 19 exceeds the fuel sulfur content requirements under Trigen's Title V air permit of less than 4% sulfur content. Therefore, the coal agreement did not meet the expectations of Trigen, and with the new emission standards cannot be a reliable source of coal supply for Trigen. The Company invested in the Ricci coal reclamation project as a venture capital project with shareholder monies. Trigen (Brian Kirk) has indicated it does not intend to seek recovery from its Missouri regulated operations customers of this investment but Trigen has not definitively resolved this matter before the Commission.

The Commission should assert jurisdiction over the sale of the Coal Contract to an unrelated third party or the transfer of the Coal Contract to an affiliated entity. Trigen should be permitted to dispose of the Coal contract to an unrelated third party or an affiliate since the Coal Contract has not, is not and will not provide benefit to Trigen's Missouri regulated operations, but the Commission must assert its oversight authority to assure that there will be no detriment to Trigen's Missouri regulated operations customers. Trigen should be required by the Commission to provide the documentation related to the sale or transfer of the Coal Contract necessary to show that the proposed transaction will not have any adverse effect to the Missouri steam customers it serves. This documentation would include all relevant sale or transfer agreements to an unrelated third party or an affiliate; documents regarding the start-up of any affiliate to which the Coal Contract is transferred and other documents relating to affiliated transactions between such affiliate and Trigen's Missouri regulated operations if any; and any relevant documents concerning the effects of the sale or transfer of the Coal Contract on the books and records of Trigen.

The Staff recommends that the Commission issue an Order directing Trigen to respond to the instant filing of the Staff, in particular Staff's understanding that Trigen will not seek recovery from its Missouri regulated operations customers of its investment in the Ricci Mine 19 coal reclamation project and whether Trigen is willing to provide to the Commission all documentation relating to the sale of the Coal Contract in question to an unrelated third party or its transfer to a Trigen affiliate necessary for determination that there is no detriment to Trigen's Missouri regulated operations customers.