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Missouri Public Service Commission

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

RE: In the Matter of the Assessment Against the Public Utilities in the State of Missouri – Case No. OO-99-44

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case are an original and fourteen (14) copies of a **BRIEF** on behalf of Trigen-Kansas City Energy Corporation.

Copies of this filing have on this date been mailed or hand-delivered to counsel for parties of record. Thank you for your attention to this matter.

Sincerely,

Jeffrey A. Keevil

JAK/er
Enclosures
cc: counsel of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 1998.	))))	Case No. OO-99-44

BRIEF OF TRIGEN-KANSAS CITY ENERGY CORPORATION

November 2, 1998

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BRIEF OF TRIGEN-KANSAS CITY ENERGY CORPORATION

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), and respectfully submits this Brief pursuant to the directive of the Presiding Regulatory Law Judge at the hearing in this matter held at the offices of the Commission on October 14, 1998. For additional discussion of the issues addressed herein, Trigen would refer the Commission to Trigen's Memorandum of Law which was filed herein on October 6, 1998, which it incorporates fully herein by this reference.

Trigen does not believe that utility assessments paid to the Commission should be considered within the definition of "total state revenues" as that term is used in Mo. Const. Article X, due in part to the fact that such utility assessments are not **for public use**, but rather "shall be devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities subject to the jurisdiction of the commission." Section 386.370(4) RSMo. The two-part test set forth in *Kelly v. Hanson,* 959 S.W.2d 107 (Mo. banc 1997), did not change this, but simply sought to determine whether certain funds were "for public use" by looking to whether such funds were subject to appropriation. That the PSC fund may be subject to

appropriation for one specific use does not change the fact that such fund is not for public use.

Issue I – Whether the Article X transfers from the Public Service Commission Fund to the General Revenues Fund for fiscal years 1995, 1996 and 1997 are authorized by law

Section 386.370 RSMo. Supp. 1997 states that the Public Service Commission Fund "shall be devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities subject to the jurisdiction of the commission" and that "any amount remaining in such special fund or its successor fund at the end of any fiscal year shall not revert to the general revenue fund, but shall be applicable by appropriation of the general assembly **to the payment of such expenditures** [i.e., those expenditures attributable to the regulation of public utilities] of the commission in the succeeding fiscal year and shall be applied by the commission to the reduction of the amount to be assessed to such public utilities in such succeeding fiscal year." (emphasis added) Therefore, the transfers are not authorized by law.

Staff makes the argument that the appropriations bills which addressed monetary transfers for Hancock Amendment refunds amended Section 386.370 by implication; however, as Chair Lumpe correctly noted at the hearing, in an appropriations bill the legislature cannot repeal existing law and cannot establish new law – it can only appropriate. (Tr. pp. 86-87). The Missouri Supreme Court has held that the constitutional limitation found in Article III, Section 23 of the Missouri Constitution, which provides that no bill shall contain more than one subject, limits appropriations bills to appropriations only. *See, e.g., Rolla 31 School District v. State,* 837 S.W.2d 1 (Mo.

banc 1992); *State ex rel. Davis v. Smith,* 335 Mo. 1069, 75 S.W.2d 828 (Mo. banc 1934). Therefore, Staff's argument regarding repeal by implication must fail.[1]

Issue II – Whether the Article X transfers for fiscal years 1995, 1996 and 1997 (which are included in the Commission's calculation of assessments against public utilities for the fiscal year commencing July 1, 1998) represent expenses to be incurred by the Commission that are reasonably attributable to the regulation of public utilities

In its Memorandum of Law filed in this proceeding on October 6, 1998, even Staff admitted that the Article X transfers are not reasonably attributable to the regulation of public utilities. (Staff's Memorandum of Law, p. 8). Instead, Staff argued that the appropriations bills previously discussed provided an exception to Section 386.370(4) RSMo. However, as discussed above and as correctly noted by Chair Lumpe, appropriations bills cannot amend or repeal existing statutes, and therefore Staff's argument must fail. The Article X transfers for fiscal years 1995, 1996 and 1997 (which are included in the Commission's calculation of assessments against public utilities for the fiscal year commencing July 1, 1998, per the Stipulation of Facts filed herein [see Exhibit 1, p. 9, and the cover letters sent to each utility along with its assessment notice, Exhibit G to Exhibit 1]) do not represent expenses to be incurred by the Commission that are reasonably attributable to the regulation of public utilities, but were instead to fund the refunds under Mo. Const. art. X, Section 18.[2]

Issue III – Whether the Commission may recover Article X transfers from the Public Service Commission Fund to the General Revenues Fund in the calculation of public utility assessments

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[1] Furthermore, the cases are legion which hold that the concept of repeal by implication is disfavored. *See, e.g., St. Charles County v. Director of Revenue,* 961 S.W.2d 44 (Mo. banc 1998).

[2] The Missouri Supreme Court has held that the refund "commanded by Section 18(b) is a penalty imposed on the government for collecting too much revenue." *Missourians for Tax Justice Education Project v. Holden,* 959 S.W.2d 100 (Mo. banc 1997). As a penalty imposed on government for collecting too much revenue, the transfers to fund the refunds obviously do not represent expenses to be incurred by the Commission reasonably attributable to the regulation of public utilities.

Section 386.370 RSMo. Supp. 1997 clearly provides that only expenses to be incurred by the Commission "reasonably attributable to the regulation of public utilities" are to be included in the calculation of public utility assessments; as discussed above, the Article X transfers do not represent expenses to be incurred by the Commission reasonably attributable to the regulation of public utilities. Therefore, the answer to issue number three is "no".

Issue IV – Whether the assessment process followed by the IAD and Commission, as described on Exhibit A to the Stipulation of Facts and Statement of Issues Presented (Ex. 1), is in compliance with Section 386.370 RSMo.

In its Memorandum of Law filed herein on October 6, 1998, Trigen argued that this issue is distinct from the issues involving Article X, and respectfully submits that the answer is that the process followed is not in compliance with Section 386.370. No argument presented by Staff (or any other party to this case) in its Memorandum of Law or at the October 14 hearing has changed Trigen's position on this issue. This is because Section 386.370(2) RSMo. Supp. 1997, broken into its components, provides as follows:

> (a) The commission shall allocate to each such group of public utilities the estimated expenses directly attributable to the regulation of such group **and**
> (b) an amount equal to such proportion of the estimated expenses not directly attributable to any group as the gross intrastate operating revenues of such group during the preceding calendar year bears to the total gross intrastate operating revenues of all public utilities subject to the jurisdiction of the commission, as aforesaid, during such calendar year.
> (c) **The commission shall *then*** assess the amount so allocated to each group of public utilities, subject to reduction as herein provided, to the public utilities in such group in proportion to their respective gross intrastate operating revenues during the preceding calendar year . . . .

Section 386.370(2) RSMo. Supp. 1997 (emphasis added). As used in the context above, the word "then" is defined by The American Heritage Dictionary (Second College

Edition, Houghton Mifflin Company) as "next in time, space, or order; immediately afterward." As seen from the foregoing, after completing steps (a) and (b), the Commission is to proceed to immediately make assessments as provided in step (c). No additional steps, such as the use of a five year average, are permitted by the statute between steps (b) and (c).

A review of Exhibit A to Exhibit 1 reveals that this statutorily-required process was not followed. Page 6 of Exhibit A to Exhibit 1 reveals that steps (a) and (b) were carried out by the IAD and Commission, and should have resulted in an allocation to the heating group of utility companies in the amount of $20,917. However, before proceeding to step (c) as required by statute, a five-year average was calculated as shown on Page 11 of Exhibit A, which resulted in an allocation to the heating group of $29,554, rather than $20,917. Only after the allocation to the utility groups were subjected to this five year averaging procedure were the assessments made as provided in step (c). This caused the process to not be in compliance with Section 386.370(2) RSMo.[3]

Staff argues that since the statute does not specify the method for estimating the amount of expenses attributable to each of the utility groups, that the five year average does not violate Section 386.370 RSMo. However, Staff's argument misses the point. Page 6 of Exhibit A shows that the IAD and the Commission had already calculated the amount of expenses attributable to each of the utility groups before calculation and application of the five year average. In other words, the five year average is not simply

[3] Although Trigen was the only utility to address the issue of the five year average in its Memorandum of Law, at the hearing on October 14, counsel for Laclede Gas Company and Missouri Gas Energy also requested the Commission look at this issue. (Tr. pp. 126-128).

an alternative method for estimating expenses attributable to each of the groups as Staff would have the Commission believe; rather, it is an entirely separate step which is only applied after the estimate of expenses directly attributable to the regulation of each group and allocation of common costs on the basis of intrastate revenues have been made. As evidenced by Page 11 of Exhibit A to Exhibit 1, the use of the five year average caused the heating, gas, water and sewer groups to effectively subsidize the electric and telephone groups.

With regard to this issue, Trigen submits that in its Order in this case the Commission should include Findings of Fact that, in arriving at the assessments contained in its Supplemental Order No. 52, the Commission (1) allocated to each group of public utilities the estimated expenses directly attributable to the regulation of such group, (2) allocated "common" costs to each group of public utilities on the basis of intrastate revenues, and then (3) applied a five year averaging procedure to each group's total cost allocation to arrive at a cost allocation for each group rather than assessing the amount allocated pursuant to (1) and (2) to each group of public utilities to the public utilities in each group. In its Order the Commission should also include as a Conclusion of Law that this procedure caused the assessment process followed in arriving at the assessments contained in its Supplemental Order No. 52 to not be in compliance with Section 386.370.

WHEREFORE, for all of the foregoing reasons, Trigen respectfully requests that the Commission issue a new supplemental order consistent with the evidence presented and the applicable law, i.e., excluding Article X transfers from the calculation of the public utility assessments and properly allocating amounts to each group of public

utilities pursuant to Section 386.370(2) RSMo. Supp. 1997 (as shown on page 6 of Exhibit A to Exhibit 1[4]) as discussed herein and in Trigen's Memorandum of Law filed herein on October 6, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first-class mail, or hand-delivery, to counsel for parties of record on this 2nd day of November, 1998.

[4] The Article X transfer amounts will first need to be backed out of the allocations shown on page 6 of Exhibit A to Exhibit 1.