

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

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

**APPLICATION FOR DISCLAIMER OF JURISDICTION  
OR, IN THE ALTERNATIVE, FOR GRANT OF AUTHORITY  
TO TRANSFER OR SELL ASSET**

Trigen-Kansas City Energy Corporation ("Trigen KC" or "Applicant"), through its undersigned counsel and pursuant to Mo. Rev. Stat. §§ 393.190 and 393.290 and 4 CSR §§ 240-2.060 and 240-3.405, hereby requests 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<sup>1</sup> (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.

If the Commission does not disclaim jurisdiction, Trigen KC seeks pre-approval of the Proposed Transaction. Prospective transferees or purchasers have not yet been identified. This Application provides an overview of the reasons for the Proposed Transaction. Applicant will provide evidence to Staff of the final sale documents to demonstrate compliance with the Commission's order approving the transaction.

---

<sup>1</sup> The related agreements, all dated May 3, 2006, are as follows: Royalty Agreement; Transfer Agreement; Security Agreement; and Coal Purchase Agreement.

In support of this Application, Applicant states as follows.

**I. Description of Applicant**

**A. Legal Name and Organization**

1. Trigen KC, a wholly-owned subsidiary of Thermal North America, Inc., is a corporation organized and existing under the laws of the State of Delaware. Trigen KC's principal offices are located at 115 Grand Avenue, Kansas City, Missouri 64106.

2. Trigen KC 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 KC has been duly authorized by the Secretary of State of Missouri to transact business as a foreign entity; a copy of Trigen's Certificate of Good Standing from the Missouri Secretary of State was submitted in Case No. HM-2004-0618 and is incorporated herein by reference.

**B. Contact Information**

3. Correspondence, communications and orders and decisions of the Commission are to be sent to:

Jeffrey A. Keevil  
Stewart & Keevil, L.L.C.  
4603 John Garry Drive  
Suite 11  
Columbia, MO 65203

Lawrence W. Plitch  
Vice President & General Counsel  
The Trigen Companies  
99 Summer Street, Suite 900  
Boston, MA 02110

(With a courtesy copy to:)

Thomas McCann Mullooly  
Foley & Lardner LLP  
777 East Wisconsin Avenue  
Milwaukee, WI 53202-5306

### **C. Disclosures**

4. Applicant 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.

5. Applicant 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.

### **II. Description of Proposed Transaction**

6. Trigen KC's counterparty in the Coal Contract is Ricci Mining, L.L.C. ("Ricci"), the owner and operator of a waste coal processing facility in southeast Kansas ("Mine 19"). Under the Coal Contract, Trigen KC 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. The prepayments provide operating capital to Ricci to aid in the development of facilities and the production of usable coal product. The Coal Contract provides Trigen KC with an option to purchase the first 100,000 tons per year of Mine 19 coal. Ricci has the rights to sell up to 30,000 tons per year of its mined coal to third parties.

7. As background, Trigen KC negotiated and entered into the Coal Contract as a means to supply itself with a reliable source of fuel, at attractive prices, for use in its Grand Avenue Station coal-fired district energy plant. Coal costs are the largest single line expense item for Trigen KC, and, even at high prices, the availability and deliverability of coal supply was not always assured. The Mine 19 project, based on initial tests and budget projections, appeared to provide a long-term solution.

8. 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. Mine 19 has yet to yield the anticipated volume of coal, and much of the coal produced by Mine 19 unfortunately exceeds the fuel sulfur content requirements set forth in Trigen KC's Title V air permit. The costs and risks associated with Mine 19 appear greater than originally anticipated, and the amount of capital required to meet Trigen KC's original expectations has grown. To retain its focus on providing economical district heating service, Trigen KC now seeks to end its contractual relationship with Ricci and cease its support for development activity and funding of Mine 19. Trigen KC is planning on transferring its entire interest in the Coal Contract to an affiliated entity or to an unrelated third party (the "Proposed Transaction").

### **III. Disclaimer of Commission Jurisdiction**

9. Applicant 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 §§ 240-2.060(1) and/or 240-3.405. Those sections require Commission approval for the sale of an asset that is "necessary or useful" in the provision of utility service.<sup>2</sup> The Coal Contract is not "necessary or useful" in the performance of Applicant's duty to the public under Mo. Rev. Stat. § 393.190(1).

---

<sup>2</sup> The Commission may prefer to consider this as a request, pursuant to 4 CSR § 240-2.060(4), for a waiver of the approval requirements of 4 CSR §§ 240-2.060(1) and 240-3.405. Reasons for granting a waiver and justification of the good cause for granting a waiver are identical to the explanations and arguments asserted in support of Applicant's request for the Commission's disclaimer of jurisdiction (*see* Section III). In addition, the Applicant is not aware of any public utility, other than Applicant itself, that is affected by this request for a waiver. *See* 4 CSR § 240 2.060(4)(C).

10. The Commission should grant Applicant's request for disclaimer of jurisdiction because the Coal Contract is not presently "necessary or useful" in fulfilling the utility's public duties. Mo. Rev. Stat. § 393.190(1). An asset is "necessary or useful" if "the asset is actually being used to provide service and . . . is actually needed to provide utility service." *See In the Matter of the Application of Kansas City Power & Light Co.*, 2006 Mo. PSC LEXIS 1734 (Dec. 21, 2006) (discussing when an asset is considered used and useful for purposes of inclusion in a utility's rate base). Given the inability of the coal from Ricci to consistently satisfy the environmental permitting requirements at Trigen KC's Grand Avenue Station, the Coal Contract cannot be considered either "necessary" or "useful" to utility service.

11. The Commission has previously found that Section 393.190(1) does not apply in similar circumstances. *See, e.g., In the Matter of the Application of Arkansas Power & Light Company regarding the selling of certain pollution control facilities and other facilities and the repurchasing of these facilities* 1981 Mo. PSC LEXIS 60, at \*4 January 23, 1981 (no jurisdiction where the facilities were not yet constructed and were not part of the system used to provide service). Similarly, the Commission has declined to assert, and acknowledged that it did not possess, jurisdiction over the sale/lease-back of a utility's combustion turbines, as the turbines were not necessary or useful in the performance of the utility's duties to the public at the time Commission approval was required. *In the Matter of the Application of Aquila, Inc.*, 2005 Mo. PSC LEXIS 1705 (Dec. 19, 2005). In that case, the turbines were not being used to generate electricity, and the Commission's Conclusion of Law was the Section 393.190(1) thus did not apply. *Id.* at \*11. Consistent with all these cases, the Coal Contract is not providing useable coal to Trigen KC today. Thus the Commission should conclude that it need not consider or approve the sale of the Coal Contract and find that it does not have jurisdiction.

12. Further, the relevant time frame for evaluating the necessity or usefulness of an asset is the time of the transaction. *See id.* at \*11 (“[b]ecause the turbines and associated equipment were not providing electricity to Missourians on December 30, 2004 [the date of the transaction], those assets were not necessary or useful *at that time*. Therefore, Section 393.190 does not apply to this transaction”) (emphasis added). Thus, the Commission need not consider whether the Coal Contract ever reached the “necessary or useful” threshold in the past or whether it is likely to in the future as a determinative factor regarding Commission jurisdiction.<sup>3</sup>

13. In short, Trigen KC’s interest in the Coal Contract is not “necessary or useful” to provide the public with Trigen KC’s steam heating services in the State of Missouri. Mine 19 has failed to produce the volume or quality of coal necessary to serve as a significant fuel supply for Trigen KC. Applicant seeks to sell or transfer its interest in the Coal Contract for the exact reason that the coal received under the terms of the contract is neither necessary nor useful in supplying the coal needs for Trigen KC’s steam heating facilities. Accordingly, Section 393.190(1) is inapplicable, and the Commission should disclaim jurisdiction over the Proposed Transaction.

#### **IV. In the Alternative, Application for Transfer or Sale of Assets**

##### **A. Overview**

14. Applicant 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 third party. Applicant seeks waivers of any regulations that may be needed to allow the Commission to

---

<sup>3</sup> Nonetheless, Applicant notes that its original intentions were that the Coal Contract would provide a safe, reliable and useful supply of coal at reasonable prices. While some Mine 19 coal has been burned in the facility, the coal is not consistently satisfactory, and while some deliveries continue, there is no reasonable expectation that satisfactory coal can be reliably delivered in quantities necessary to justify the ongoing expected economic investment required. Without investment significantly beyond the original budget, Mine 19 is unable to supply Trigen KC given that the quality of the coal is insufficient to burn within the limits of Trigen KC’s air permit.

approve the Proposed Transaction before its terms are negotiated. Applicant 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.

15. According to Commission rules regarding the transfer or sale of assets of a steam heating utility, in order to receive approval, the Applicant must provide the Commission with (i) a brief description of the property involved in the transaction, (ii) a copy of the contract of sale, (iii) verification that Applicant has the proper authority to carry out the Proposed Transaction, (iv) indication that the Proposed Transaction is “not detrimental to the public interest” and (v) the Purchaser’s balance sheet/income statement showing the results of the Proposed Transaction, if the Purchaser is subject to the Commission’s jurisdiction. *See* 4 CSR § 240-3.405(1)(A)-(E).

**B. Application for Authority to Transfer/Sell Asset**

**(1) Brief Description**

16. The description of the Coal Contract and Proposed Transaction described in Section II is incorporated herein. *See* 4 CSR § 240-3.405(1)(A).

**(2) Copy of the Contract**

17. The contract for the Proposed Transaction is not yet available, and the Applicant requests waiver of this requirement. Applicant is in the process of evaluating whether its interest in the Coal Contract will be sold to an affiliated entity or a third-party purchaser. Applicant is in the process of offering the Coal Contract to potential third-party buyers. Should a buyer be identified to purchase the Coal Contract on satisfactory terms, the Proposed Transaction will be consummated with that third party. Should such a third-party sale not be viable, the

Applicant would transfer the Coal Contract to an affiliate in full compliance with the Commission's affiliate rules for steam heating utilities.

18. Accordingly, a copy of the contract of sale is not available at the time of this Application. *See* 4 CSR § 240-3.405(1)(B). Applicant is requesting approval prior to the identification of the affiliated or third-party purchaser of the Coal Contract. Applicant shall provide the Commission staff with a confidential copy of the document transferring Trigen KC's interest in the Coal Contract, whether to an affiliated entity or a third party, when such document becomes available.

**(3) Verification**

19. The Proposed Transaction (i.e., for Trigen KC to assign its interests in a fuel agreement) is within the general scope of authority previously delegated to the Applicant by the Board of Directors of Thermal North America Inc. and has been explicitly authorized by the Board of Directors of Trigen KC. A certified copy of the Unanimous Written Consent of the Board of Directors of Trigen KC authorizing the transfer or sale of Trigen KC's interest in the Coal Agreement is attached as Appendix A. *See* 4 CSR § 240-3.405(1)(C).

**(4) Not Detrimental Public Interest Demonstration**

20. The Commission must approve the Proposed Transaction if it is not detrimental to the public interest. *See* 4 CSR § 240-3.405(1)(D); *see also State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980) ("obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility [and] Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest") (citing *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934); *see also In the Matter of the Application of Arkansas Power & Light Company*, 1981 Mo. PSC



LEXIS 60, at \*4 January 23, 1981 (“purpose of the statute is to protect Missouri consumers from the disposition of useful and necessary parts of a utility's system by which Missouri residents receive their electricity”).

21. The Proposed Transaction will cause no detriment to the public interest. Trigen KC has a duty to provide steam heating utility services to its Missouri-based customers. Trigen KC acted prudently in entering into the Coal Contract to establish an economic and sustainable source of fuel to operate its utility services. But based upon the inability of Mine 19 to reliably produce a sufficient source of usable fuel for Trigen KC, it is in the best interest of the public for the Applicant to cease continued funding of Mine 19 and rely on alternate fuel sources. Furthermore, it is in the best interest of the public for the Applicant to identify an entity that may be better able to utilize the coal produced from Mine 19 and would therefore be more willing to provide the additional capital necessary for Mine 19’s continued operation. It is possible that other customers will be able to use Mine 19 as a beneficial fuel source but it is no longer beneficial for Trigen KC to carry the burden of that business activity.

22. Since initiating discussions with Ricci two years ago, Trigen KC has developed other coal contracts and market opportunities sufficient to supply the fuel needed to operate Applicant’s steam utility operation in Kansas City, Missouri. Thus, discontinuation of the coal supply under the Coal Contract will not adversely affect Trigen KC’s operations.

23. Further, Trigen KC is intent on receiving a fair market price for the sale of its interests in the Coal Contract.<sup>4</sup> If a satisfactory third party buyer is not found, Trigen KC will

---

<sup>4</sup> To the extent that the Commission determines its approval is necessary, receiving it in advance will assist Trigen KC in receiving the highest price available in the market as regulatory uncertainty will be decreased. Trigen KC wants to move forward as quickly as possible now that it has made the decision that maintaining its role in the project is no longer in its best interests.

sell the Coal Contract to an unregulated affiliate. Such an affiliate sale would conform to the Commission's affiliate interest rules governing transactions involving the sale or transfer of assets of a heating utility to an affiliated entity. *See* 4 CSR § 240-80.015. 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.

**(5) Balance Sheet**

24. Applicant requests a waiver of the requirement for a purchaser balance sheet and income statement. *See* 4 CSR § 240-3.405(1)(E) and -3.405(2). If a third-party buyer is found, it is possible that it would not be subject to the jurisdiction of the Commission and would not become so subject merely as a result of the transaction. Even if it were subject to Commission jurisdiction, given that the asset that is the subject of this application is a fuel contract, it seems unlikely that the balance sheet/income statement of the purchaser would be important for Commission deliberation.

**V. Conclusion**

For the reasons stated above, Applicant respectfully submits that the Proposed Transaction does not require Commission approval. Applicant respectfully requests that the Commission disclaim jurisdiction over the Proposed Transaction or, in the alternative, approve the Proposed Transaction as not detrimental to the public interest and grant such waivers as described above and as may otherwise be required to issue an approval before the final terms of the Proposed Transaction have been determined.

Respectfully submitted,

By **/s/ Jeffrey A. Keevil**

---

Jeffrey A. Keevil      #33825  
Stewart & Keevil, L.L.C.

4603 John Garry Drive, Suite 11  
Columbia, MO 65203  
(573) 499-0635  
(573) 499-0638 (fax)  
[per594@aol.com](mailto:per594@aol.com)

*Attorney for Trigen-Kansas City Energy  
Corporation*

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing was sent to the following counsel by depositing same in the U.S. Mail First Class postage paid, by hand delivery or by electronic transmission, this 27th day of April, 2007.

Office of the General Counsel  
Missouri Public Service Commission  
200 Madison Street  
Post Office Box 360  
Jefferson City, MO 65102-0360

Office of the Public Counsel  
200 Madison Street  
Post Office Box 2230  
Jefferson City, MO 65102

**/s/ Jeffrey A. Keevil**

---