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March 30, 2005

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

FILED

MAR 30 2005

Re: Case No. HC-2005-0331

**Missouri Public
Service Commission**

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter the original and five copies of an Application to Intervene and Motion to Dismiss Complaint.

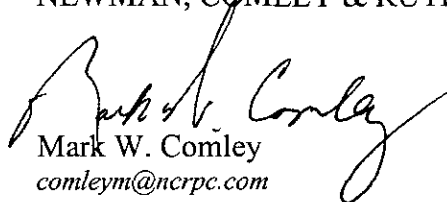
Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
comleym@ncrpc.com

MWC:ab

Enclosure

cc: Office of Public Counsel
General Counsel's Office
William Geary
Morris Woodruff
All parties of record

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

COUNTY OF JACKSON, MISSOURI,)
)
COMPLAINANT)
)
v.)
)
TRIGEN-KANSAS CITY ENERGY)
CORP.)
)
and)
)
THERMAL NORTH AMERICA, INC.)
)
RESPONDENTS)

CASE NO. HC-2005-0331

**APPLICATION TO INTERVENE AND
MOTION TO DISMISS COMPLAINT**

COMES NOW the City of Kansas City, Missouri (hereinafter sometimes "Kansas City" of the "City"), pursuant to 4 CSR 240-2.075 of the Rules of Practice and Procedure, and for its Application to Intervene respectfully states:

1. The City of Kansas City, Missouri, is a municipality of the State of Missouri.
2. Correspondence, communications and orders in this matter should be addressed

to:

William D. Geary
Assistant City Attorney
2700 City Hall
414 E. 12th St.
Kansas City, MO 64106
Telephone No.: 816/513-3118
Fax No.: 816/513-3133
Bill_Geary@kcmo.org

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3. The County of Jackson (Jackson County) originated this action by filing a complaint against the named respondents. The predecessor to Respondent Trigen-Kansas City energy Corp obtained a franchise from the city of Kansas City to, among other things, operate facilities within the boundaries of the City for the manufacture and sale of steam; and to use the City's public rights of way, subject to conditions, in that enterprise. A copy of the grant of franchise is attached hereto as Appendix 1.

4. In the body of the complaint, Jackson County has requested that the Commission enter an order in direct contravention of a City ordinance. Furthermore, the relief requested by Jackson County, if granted, will create delays in the construction and erection of a major public improvement, specifically, the Kansas City Downtown Arena. As a consequence, the City has an interest in this proceeding unlike that of the general public and will be affected by the decisions in this case differently than the public in general. The requested relief interferes with the duly enacted and authorized police powers of the City and its authority to enforce the terms of its utility franchises. Grant of the City's application to intervene would serve the public interest.

5. Kansas City is wholly opposed to the relief requested in the complaint and asserts that the complaint is groundless as a matter of law and should be dismissed.

SUGGESTIONS IN SUPPORT OF MOTION TO DISMISS

6. The Public Service Commission “is purely a creature of statute” and its “powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.” *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). While the Commission properly exercises “quasi judicial powers” that are “incidental and necessary to the proper discharge” of its administrative functions, its adjudicative authority is not plenary. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. 1982), quoting *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 279 (Mo. 1942) “Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise.” *State Tax Commission, supra*. Therefore, in determining the sufficiency of a complaint, the Commission must consider whether the pleading contains adequate allegations on each element of the authorizing statute or statutes. Likewise, the complaint must meet any special requirements or restrictions imposed by the authorizing statute or statutes.

7. Jackson County recites that it brings its Complaint under Section 386.390 and Regulation 4 CSR 240-2.070. Only the statutory reference authorizes the Commission to hear and determine complaints.¹ Section 386.390.1 is the Commission’s general complaint power and is the only section under which Jackson County’s complaint can be brought and judged.

¹ Regulation 4 CSR 240-2.070 is the Commission’s rule establishing procedures for complaint cases. It is not independent authority under which a complaint may be brought.

8. Section 386.390.1 effectively contains two distinct complaint powers. In a broad grant of authority, Section 386.390.1 authorizes the Commission to determine complaints as to “any act or thing done or omitted to be done by any corporation, person or public utility . . . **in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]**” [emphasis supplied] Such a complaint may be brought by anyone, and such a complaint may be brought to challenge a “rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility[.]” A complaint brought under this authority **necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.** *St. ex rel. Ozark Border Electric Cooperative v. PSC*, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

9. In paragraph 7 of its complaint, Jackson County contends that Trigen “would no longer be providing safe, reliable and adequate service” under Section 393.130 if it complies with the City’s ordinance and Trigen’s franchise. There is no allegation in the complaint of any current violation of law or Commission rule, order of decision. The Complaint cannot go forward. In essence it asks the Commission to enter an injunction the consequences of which interfere with the operations and police powers of a municipality of the state of Missouri.

10. The Commission, and other executive administrative agencies, do not have the power to apply or announce any principles of law or equity. The Commission is not a court of law. No statute or case authority confers upon the Commission the power to enjoin the parties who appear before it, notwithstanding the provisions of Section 386.310, which is entirely in apposite in the first instance; there has been no believable allegation asserted that the life or property of the citizens of Kansas City or of Jackson County are in peril because Trigen is honoring its obligations under municipal ordinances.

11. As stated in *State Tax Commission v. Administrative Hearing Commission*, 641

S.W.2d 69, 75 -76 (Mo.banc 1982):

“[T]he judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law.” *See also Lightfoot v. City of Springfield*, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission “has no power to declare ... any principle of law or equity”); *State ex rel. Kansas City Terminal Railway v. Public Service Commission*, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern Railroad v. Public Service Commission*, 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914) (Public Service Commission has no power to declare statutes unconstitutional); *State ex rel. Missouri & North Arkansas Railroad v. Johnston*, 234 Mo. 338, 350-51, 137 S.W. 595, 598 (banc 1911) (secretary of state has no power to declare a statute unconstitutional).

12. Additionally, by its complaint Jackson County attempts to negate the City's rights, and to enlarge Trigen's authority, under the municipal franchise, without which Trigen could not operate. Section 393.170. In general, the certificates and regulations of this commission cannot affect, enlarge or modify the franchise (or license) conferred by the municipal authorities.

The courts have recognized that the corporate charter and the local franchise provide the **fundamental bases** for a public utility's operation and that the certificate of the Commission cannot enlarge the authority thereby conferred. In *State ex rel. Harline v. Public Service Comm.*, Mo.App., 343 S.W.2d 177, 181(3), the court stated: 'The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent. *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607. [emphasis added]

State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton 379 S.W.2d 593, 599 (Mo. banc 1964).

13. As stated in *State ex rel. Union Electric Co. v. Public Service Commission*, 770 S.W.2d 283, 285-286 (Mo. App. W.D. 1989):

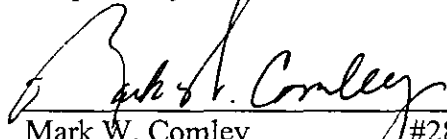
The statutory scheme at Section 393.170.2, R.S.Mo. 1986 establishes two layers of oversight by providing that the rights and privileges granted by a franchise may not be exercised without having first obtained commission approval. A commission certificate becomes an additional condition imposed by the State on the exercise of a privilege which a municipality or county may give or refuse under its delegated police power.

Id. [emphasis supplied].

14. By its complaint, Jackson County is seeking to create new rights for Trigen contrary to the plain terms, and the parties' interpretation, of the city franchise. The Commission is powerless to expand or enlarge those rights.

WHEREFORE, for the foregoing reasons, the City of Kansas City, Missouri, respectfully requests that the Commission grant its Application to Intervene in this matter, and furthermore to dismiss outright Jackson County's complaint.

Respectfully submitted,

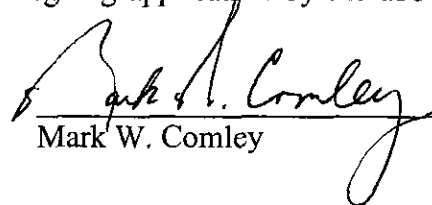

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Attorneys for City of Kansas City, Missouri

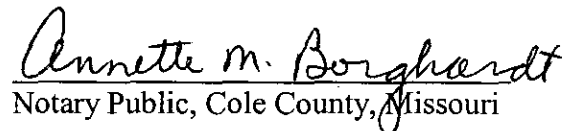
ATTORNEY VERIFICATION

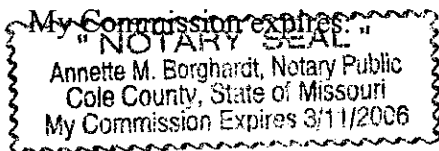
STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

I, Mark W. Comley, being first duly sworn, do hereby certify, depose and state that I am the attorney for The City of Kansas City, Missouri which seeks intervention in the above captioned proceeding before the Missouri Public Service Commission; that I have read the above and foregoing Application to Intervene and the allegations therein contained are true and correct to the best of my knowledge, information and belief; and I further state that I am authorized to verify the foregoing application by the above said applicant to intervene.


Mark W. Comley

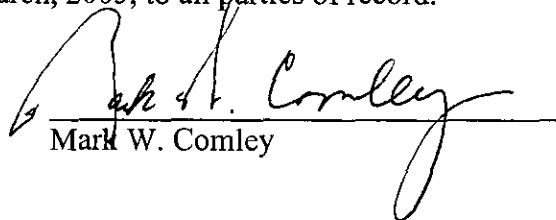
Subscribed and sworn to before me, a Notary Public, this 30th day of March, 2005.


Notary Public, Cole County, Missouri



Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 30th day of March, 2005, to all parties of record.


Mark W. Comley

64457

THIS ORDINANCE IS EFFECTIVE 10 DAYS
AFTER PASSAGE.AN ORDINANCE

GRANTING TRIGEN-KANSAS CITY DISTRICT ENERGY CORPORATION, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PERMISSION, PRIVILEGE AND AUTHORITY TO CONSTRUCT, MAINTAIN AND OPERATE PLANTS, MAINS AND OTHER APPLIANCES FOR THE PURPOSE OF SUPPLYING THERMAL ENERGY FOR DOMESTIC AND INDUSTRIAL PURPOSES.

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section 1. Trigen-Kansas City District Energy Corporation, a corporation organized and existing under the laws of the State of Delaware and duly qualified in the State of Missouri, its successors and assigns, are hereby granted the right, permission, privilege and authority for a period of thirty (30) years from and after the date when this ordinance takes effect, within the corporate limits of Kansas City, Missouri, as now or hereafter established, to construct, maintain and operate plants, mains and other appliances for the purpose of generating, distributing and selling heat, steam, hot, chilled or condenser water, or other heating or cooling services ("Thermal Energy") for public and private use for all purposes for which Thermal Energy of any character may be used, to such persons, firms and corporations as may desire to purchase the same and to take and receive compensation therefor; and for said purposes to construct, maintain and operate pipes, conduits and manholes through, across and under any and all streets, boulevards, alleys, avenues, lanes and public grounds within said city, including the construction, maintenance and operation of service pipes through, across and under any and all streets, boulevards, alleys, avenues, lanes and public grounds within said city, to buildings and houses to be supplied with Thermal Energy for any purposes and to accomplish such purposes, the said Trigen-Kansas City District Energy Corporation, its successors and assigns, may enter upon any street, boulevard, alley, avenue, lane or public grounds within said city, and make such excavations therein as may be necessary for the purposes aforesaid under the restrictions and regulations hereinafter provided.

Section 2. All pavements and sidewalks shall be taken up and all excavations in the streets, boulevards, alleys, avenues, lanes and public grounds shall be made under the supervision of the Director of Public Works of Kansas City, and such pipes, conduits and appliances shall be located in such portion of the streets, boulevards, alleys, avenues, lanes and public grounds as may be designated by the Director of Public Works, using alleys as far as practicable. No excavations shall be made by the said Trigen-Kansas City District Energy Corporation, its successors and assigns, at any time in any street, boulevard, alley, avenue, lane or public grounds unless and until a permit therefor shall be obtained from the Director of Public Works, which permit shall state the particular street, boulevard, alley, avenue, lane or

Form 1777 - Law
(03247)

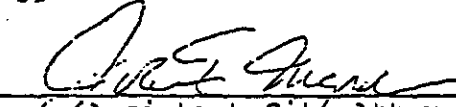
public grounds where the work is to be done, and the length of time the permit shall authorize the work to be done thereunder. All excavations shall be refilled by Trigen-Kansas City District Energy Corporation, its successors and assigns, and all pavements and sidewalks shall be replaced and restored at the expense of Trigen-Kansas City District Energy Corporation, its successors and assigns, and all of the aforesaid restoration shall be approved by the Director of Public Works. When used herein, "Director of Public Works" shall be construed to include such other officials as may be designated by the Director of Public Works or by ordinance.

Section 3. Trigen-Kansas City District Energy Corporation its successors and assigns, shall at all times use every reasonable and proper precaution to avoid damage and injury to persons or property and shall fully protect, indemnify and save harmless the City from and against any and all loss, damage, costs, expense (including a reasonable attorney's fee incurred in the defense of any action for damages), settlements, decrees, awards, penalties and claims of every kind or character arising from or growing out of, directly or indirectly, injury to or death of any person whomsoever or damage to any property whatsoever caused or occasioned by reason of any act or failure to act of said Trigen-Kansas City District Energy Corporation, its successors and assigns, in the construction, maintenance or operation of said plant, mains and appliances, or any part thereof.

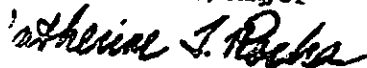
Section 4. This grant is made subject to the provisions of the present Charter of Kansas City, Missouri, and any amendments thereto, and subject to the provisions which may be embodied in any future charter of said City and any amendments thereto, and all of the same are hereby made a part of this ordinance by reference thereto.

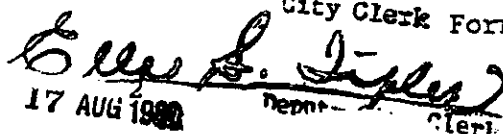
Section 5. This ordinance shall not become effective unless within ten (10) days after its passage Trigen-Kansas City District Energy Corporation shall file with the City Clerk of Kansas City, Missouri, its written acceptance thereof in form approved by the City Counselor of Kansas City, Missouri.

Approved as to form and legality:


Assistant City Attorney

ARD L. BERKLEY, Mayor




17 AUG 1900

City Clerk Form 1777 - Law
(03247)

Depot Clerk