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October 6, 1998

**FILED**

OCT - 6 1998

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 **MEMORANDUM OF LAW** 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

FILED  
OCT - 6 1998  
Missouri Public  
Service Commission

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

TRIGEN-KANSAS CITY ENERGY CORPORATION  
MEMORANDUM OF LAW

COMES NOW Trigen-Kansas City Energy Corporation ("Trigen"), and  
respectfully submits this Memorandum of Law pursuant to the Commission's Order  
Regarding Procedural Schedule, issued on September 23, 1998 ("Order").

In its Order, the Commission directed the parties to address whether a utility  
assessment paid to the Commission constitutes a tax, excise, custom, duty or other source  
of income which the State receives into its treasury in a given fiscal year. This language  
appears to be taken from previous Missouri Supreme Court cases addressing the  
definition of the term "total state revenues" in the context of Mo. Const. art. X; *see, e.g.,*  
*Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983). Trigen respectfully submits that  
the Commission's Order failed to include an important qualification on the foregoing  
language; namely, that the taxes, excises, customs, duties, and other sources of income be  
received into the treasury "**for public use**". (emphasis added) *Id.* at 613; *see also, Kelly*  
*v. Hanson*, 959 S.W.2d 107 (Mo. banc 1997). Section 386.370(4) RSMo. Supp. 1997  
clearly establishes that a PSC utility assessment is 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;” furthermore, any amount remaining in the PSC fund at the end of a fiscal year “**shall not revert** to the general revenue fund” but shall **only** be applied to “payment of such expenditures of the commission in the succeeding fiscal year.” Section 386.370(4) RSMo. Supp. 1997 (emphasis added). Therefore, Trigen submits that a utility assessment paid to the Commission does not constitute a tax, excise, custom, duty or other source of income which the State receives into its treasury for public use in a given fiscal year; accordingly, such funds should not be considered within the definition of “total state revenue.”

The Commission’s Order also requested the parties comment on the definition and meaning of “assessment”, and whether an assessment constitutes a fee or a tax within the meaning of the Hancock Amendment. Trigen submits that the term “assessment” must be examined not in the abstract but in the particular context in which it is used; in this case, a PSC utility assessment. *See, Zahner v. City of Perryville*, 813 S.W.2d 855 (Mo. banc 1991). In *Zahner*, the Court stated that the term “ ‘special assessment’ is generally understood to be related either to a specific property or a specific purpose” and went on to state that “an exaction demanded by the government for specific purposes and not intended to be paid into the general fund to defray general public needs or governmental expenditures is not a tax.” This describes the utility assessments at issue in the instant case, as they are to be “devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities.” Section 386.370(4) RSMo. Supp. 1997. Therefore, the utility assessments at issue in the instant case do not constitute a fee or tax within the Hancock Amendment.

The Commission's Order also requested the parties address whether the utility assessments may be transferred from the PSC fund, assuming that they fall within the limitations of the Hancock Amendment. It should first be noted that this is an almost untenable hypothetical, given the analysis set forth above that utility assessments do not fall within the Hancock Amendment. However, assuming that they do, Section 386.370(4) RSMo. Supp. 1997, quoted above, indicates that they are not subject to transfer.

#### Issue 1

Turning to the Statement of Issues Presented set forth in the Stipulation of Facts and Statement of Issues Presented filed herein by the parties, issue number one asks 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. Trigen respectfully submits that they are not. As discussed above, PSC utility assessments should not be considered within the definition of "total state revenue" in the context of Mo. Const. art. X. As also discussed above, 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 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.” Therefore, the transfers are not authorized by law.

### Issue 2

The second issue set forth in the Statement of Issues is whether the Article X transfers represent expenses to be incurred by the Commission that are reasonably attributable to the regulation of public utilities. Trigen submits that the obvious answer to this question is that they are not. The transfers were to fund the refunds under Mo. Const. art. X, Section 18, not for the regulation of public utilities. Furthermore, 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.

### Issue 3

Issue number three in the Statement of Issues asks 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. 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”.

Furthermore, even assuming for the sake of argument that the assessments are properly included in the definition of "total state revenues" for purposes of the Hancock Amendment and that the transfers themselves were authorized, allowing recovery of such transfers in the calculation of public utility assessments flies in the face of the purpose behind the Hancock Amendment, i.e., to refund excess revenues and to penalize the government for collecting too much revenue and "to rein in increases in governmental revenue and expenditures." See, e.g., *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100 (Mo. banc 1997). To allow recovery of such transfers would be tantamount to increasing the tax burden by \$200 in 1998 on an individual who received a \$200 Hancock refund for 1997, because of such refund.

#### Issue 4

The fourth issue set forth in the Statement of Issues is whether the assessment process followed by the IAD [the Commission's internal accounting department] and Commission, as described on Exhibit A to the Stipulation of Facts and Statement of Issues Presented, is in compliance with Section 386.370 RSMo. Supp. 1997. Trigen submits 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. 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).

However, a review of Exhibit A reveals that this statutorily-required process was not followed; instead, an additional unauthorized step (or steps) was inserted between the statutorily-required steps (b) and (c). Specifically, a five-year average assessment percentage was developed based on the cost allocations for each utility group. The allocations to each group of public utilities were then based on this five-year average. This caused the process to not be in compliance with Section 386.370(2) RSMo. Supp. 1997, and in the case of the heating group to which Trigen belongs, resulted in a group allocation of \$29,554 rather than \$20,917 when done according to the statutorily-required process (according to the internal accounting department’s calculations), of which Trigen was assessed 56.87%.

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 discussed herein.

Respectfully submitted,



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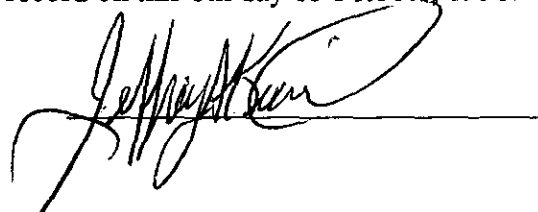
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ATTORNEY FOR TRIGEN-KANSAS

CITY ENERGY CORPORATION

### **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 6th day of October, 1998.





theca therapeutics

$C_{17}H_{21}NO_3$ , obtained from opium. [Gk. *Thēbai*, Thebes + *-ine*.]

**the-ca** (thē'kə) *n.*, *pl.* -cae (-sē, -kē). A case, covering, or sheath, as the spore case of a moss capsule or the outer covering of the pupa of certain insects. [NLat. < Lat. case < Gk. *thēkē*.] —**the-cal** (-kəl) *adj.*

**the-cate** (thē'kāt) *adj.* Having a theca; encased or sheathed.  
**thee** (thē) *pron.* Archaic. The objective case of thou. 1. Used: a. As the direct object of a verb. b. As the indirect object of a verb. c. As the object of a preposition. 2. Used in the nominative as well as the objective case, esp. by members of the Society of Friends.

**thee-lyn** (thē'lin) *n.* Estrone. [Gk. *thēlus*, female + *-in*.]

**thee-ly** (thē'ly) *adj.* Estriol. [THEEL(IN) + *-ly*.]  
**theft** (thēft) *n.* 1. The act or an instance of stealing; larceny. 2. Obs. That which is stolen. [ME < OE *theft*.]

**their** (thair) *pron.* The possessive form of they. 1. Used attributively to indicate possession or the agent or recipient of an action: *their house*; *pursuing their tasks*; *suffered their first defeat*. 2. Informal. His, hers, or its: *Does everyone have their books?* —See Usage note at *everyone*. [ME < ON *ðeira*.]

**theirs** (thairz) *pron.* (used with a sing. or pl. verb). 1. That or those belonging to them: *The choice ought to be theirs*. Mine is here, and theirs are on the table. 2. Informal. His or hers: *brought his skis and expected everybody else to bring theirs*. [ME < *their*, *their*.]

**the-ism** (thē'izəm) *n.* Belief in the existence of a god or gods, esp. belief in a personal God as creator and ruler of the world. —**the-ist** *n.* —**the-ist'ic**, **the-ist'ical** *adj.* —**the-ist'ically** *adv.*

**them** (thēm, thəm) *pron.* The objective case of they. Used: a. As the direct object of a verb: *She accompanied them*. b. As the indirect object of a verb: *He offered them a new contract*. c. As the object of a preposition: *It was ruined by them*. —See Usage notes at *be*, *everyone*, and *i*. [ME, partly < ON *ðeim*, and partly < OE *ðem*.]

**the-mat'ic** (thī-măt'ik) *adj.* 1. Of, constituting, or relating to a theme. 2. Ling. Constituting the theme or stem of a word. [Gk. *thematikos* < *thema*, *themat*, theme.] —**the-mat'ically** *adv.*

**theme** (thēm) *n.* 1. A topic of discourse or discussion. 2. An idea, point of view, or perception embodied and expanded upon in a work of art; an underlying or essential subject of artistic representation. 3. A short composition assigned to a student as a writing exercise. 4. Mus. A principal melody in a musical composition. 5. Ling. A stem. [ME < Lat. *thema* < Gk., proposition < *tithenai*, to place.]

**theme song** *n.* 1. A melody or song played throughout a dramatic performance and often intended to convey a mood. 2. A song that is identified with a performer, group, or radio or television program; signature.

**them-selves** (thēm-selvz, thəm-) *pron.* 1. Those ones identical with them. Used: a. Reflexively as the direct or indirect object of a verb or the object of a preposition: *prepared themselves for battle*; *gave themselves plenty of time*; *were left by themselves*. b. For emphasis: *they themselves were affected*. 2. Their normal or healthy condition or state: *The members of the cast were themselves again after the crisis passed*. —See Usage note at *myself*.

**then** (thēn) *adv.* 1. At that time in the past: *I was younger then*. 2. Next in time, space, or order; immediately afterward: *I watched the late movie and then went to bed*. 3. Used after but to make noticeable or to balance a preceding statement: *lost the election, but then never really expected to win*. 4. In that case; accordingly: *If you're late, then you'd better go now*. 5. In addition; moreover; besides: *then there's the excise tax to pay*. 6. As it appears: *The case, then, is closed*. 7. Consequently: *If x equals 3 and y equals 2, then x plus y equals 5*. —*n.* A particular time or moment: *Until then let's remain here*. —*adj.* Being so at that time: *the then headmistress*. —*Idiom*, and *then some*. With considerably more in addition: *It'll take all his skill and then some*. [ME < OE *ðenne*.]

**the-nar** (thē'nār) *n.* The fleshy mass on the palm of the hand at the base of the thumb. —*adj.* Of, pertaining to, or related to the thenar. [Gk.]

**thence** (thēns, thēns) *adv.* 1. From that place; from there. 2. From that time; thenceforth. 3. From that circumstance or source; therefrom. [ME *thannes* < *thanne*, from there < OE *ðanon*.]

**thence-forth** (thēns-fōrth, -fōrth, thēns-) *adv.* From that time forward; thereafter.

**thence-for-ward** (thēns-fōr'wōrd, thēns-) *also thence-for-wards* (-wōrdz) *adv.* 1. Thenceforth. 2. From that time or place onward.

**theo-** or **the-** *pref.* God; *theomorphism*. [Gk. *theos*, god.]  
**the-o-bro-mine** (thē'ō-brō'mēn) *n.* A bitter, colorless alkaloid,  $C_{17}H_{21}NO_3$ , that occurs in chocolate products, is derived principally from the cacao bean, and is used as a diuretic and a nerve stimulant. [NLat. *Theobroma*, genus of trees (Gk. *theos*, god + *brōma*, food) + *-ine*.]

**the-o-cent'ric** (thē'ō-sen'trīk) *adj.* Centering on God as the prime concern: *a theocentric cosmology*.

**the-o-cra-cy** (thē'ō-kra-sē) *n.*, *pl.* -cies. 1. Government by a god regarded as the ruling power or by priests or officials

claiming divine sanction. 2. A state governed by a theocracy. [Gk. *theokratia* : *theos*, god + *-kratia*, -cracy, -cracy.]

**the-o-crat** (thē'ō-kra't) *n.* 1. A ruler of a theocracy. 2. A believer in theocracy. —**the-o-crat'ic**, **the-o-crat'ical** *adj.*

**the-o-dic'ty** (thē'ō-dī'sē) *n.*, *pl.* -cies. A vindication of justice in the face of the existence of evil. [After *Theodicy*, a work by Gottfried Wilhelm von Leibnitz (1646-1716); Gk. *theos*, god + *Gk. dikē*, order, right.]

**the-o-dol'ite** (thē'ō-dō'līt) *n.* A surveying instrument used to measure horizontal and vertical angles with a small unknown. —**the-o-dol'itic** *adj.*

**the-o-g'o-ny** (thē'ō-gō-nē) *n.*, *pl.* -nies. A recitation of the origin and genealogy of the gods, esp. as in ancient epic poetry. [Gk. *theogonia* : *theos*, god + *-gonia*, -gony.] —**the-o-g'o-ny'ic** (-gōn'ik) *adj.* —**the-o-g'o-nist** *n.*

**the-o-log'i-an** (thē'ō-lō'jən) *n.* A specialist in theology. —**the-o-log'i-cal** (thē'ō-lō'jī-kəl) *adj.* Also **the-o-log'ic** (-lō'jī-kəl) *adj.* Of or pertaining to a theology or religious philosophy. —**the-o-log'i-cal'ly** *adv.*

**the-o-log'ize** (thē'ō-lō'jīz) *v.* -gized, -giz-ing, -giz-es. To make theological in form or significance. —*intransitive*. To speculate about theology. —**the-o-log'iz'er** *n.*

**the-o-log'y** (thē'ō-lō'jē) *n.*, *pl.* -gies. 1. The study of the nature of God and religious truth; rational inquiry into religious questions, esp. those posed by an organized religious community. 2. An organized, often formalized body of opinions concerning God and man's relationship to God. 3. A course of specialized religious study usually at a college or seminary. [ME *theologie* < OFr. < Lat. *theologia* < Gk. : *theos*, god + *-logia*, -logy.]

**the-o-ma'chy** (thē'ō-mā'kē) *n.*, *pl.* -chies. Strife or battle among gods, as in the Homeric poems. [Gk. *theomakhia* : *theos*, god + *makhia*, fighting < *makhē*, battle.]

**the-o-morph'ism** (thē'ō-mōr'fiz-əm) *n.* The depiction or conception of man as having the form of a god. —**the-o-morph'ic** *adj.*

**the-o-ph'a-ny** (thē'ō-fā-nē) *n.*, *pl.* -nies. An appearance of a god to a man; divine manifestation. [Med. Lat. *theophania* < Gk. *theophania* : Gk. *theos*, god + *Gk. phainō*, to show.]

**the-o-ph'y-l'ine** (thē'ō-fī'lin, thē'ō-fī'en) *n.* A colorless crystalline alkaloid,  $C_{17}H_{21}NO_3$ , derived from tea leaves and also made synthetically, used as a diuretic and cardiac stimulant. [THEO(BROMINE) + PHYLLO- + *-ine*.]

**the-or-bo** (thē'ōr-bō) *n.*, *pl.* -bos. A 17th-century lute having two sets of strings and an S-shaped neck with two sets of pegs, one set above and somewhat to the side of the other. [Ital. *tiorba*.]

**the-o-rem** (thē'ō-rəm, thī'rəm) *n.* 1. An idea that is demonstrably true or is assumed to be so. 2. Math. a. A proposition that is provable on the basis of explicit assumptions. b. A proven proposition. [LLat. *theoremā* < Gk. *theōrēma* < *theōrein*, to look at < *theōros*, spectator. —see *THEORY*.]

**the-o-ret'i-cal** (thē'ō-rēt'ī-kəl) *adj.* Also **the-o-ret'ic** (-rēt'ik) *adj.* 1. Of, pertaining to, or based on theory. 2. Restricted to theory; lacking verification or practical application: *theoretical physics*. 3. Given to theorizing; speculative. [LLat. *theoreticus* < Gk. *theōrētikos*, contemplative < *theōrētos*, observable < *theōrein*, to look at. —see *THEOREM*.] —**the-o-ret'ically** *adv.*

**the-o-re-ti-cian** (thē'ō-rē-tī'shən) *n.* A person who formulates, studies, or is expert in the theory of a science or art.

**the-o-ret'ics** (thē'ō-rēt'iks) *n.* (used with a sing. verb) The theoretical part of a science or art; principles.

**the-o-ris't** (thē'ō-rīst) *n.* A theoretician.

**the-o-rize** (thē'ō-rīz) *intr.v.* -rized, -rizing, -rizes. 1. To formulate or analyze theories. 2. To analyze by means of theory. 3. To speculate. —**the-o-riz'a-tion** *n.* —**the-o-riz'er** *n.*

**the-o-ry** (thē'ō-rē, thī'rē) *n.*, *pl.* -ries. 1. A systematically organized knowledge applicable in a relatively wide variety of circumstances, esp. a system of assumptions, accepted principles, and rules of procedure devised to analyze, predict, or otherwise explain the nature or behavior of a specified set of phenomena. b. Such knowledge or such a system distinguished from experiment or practice. 2. Abstract reasoning; speculation. 3. An assumption or guess based on limited information or knowledge. [LLat. *theoria* < Gk. *theōria* < *theōros*, spectator < *theasthai*, to observe.]

**theory of games** *n.* Game theory.

**the-o-s'o-ph'y** (thē'ō-sō-fē) *n.*, *pl.* -phies. 1. Religious philosophy or speculation based on mystical insight into the nature of God and divine teachings. 2. Often Theosophy. The doctrines and beliefs of a modern religious sect, the Theosophical Society, incorporating aspects of Buddhism and Brahmanism. [Med. Lat. *theosophia* < LGk. : Gk. *theos*, god + *Gk. sophia*, wisdom.] —**the-o-soph'ic** (-sō'fīk) *adj.* —**the-o-soph'ical** *adj.* —**the-o-soph'ically** *adv.* —**the-o-soph'ist** *n.*

**ther-a-peu'tic** (thēr'ā-pyō'tīk) *adj.* Also **ther-a-peu'ti-cal** (-tī-kəl) *adj.* 1. Having healing or curative powers. 2. Of or pertaining to therapeutics. [Gk. *therapeutikos* < *therapeuō*, one who administers < *therapeuō* < *therapeia*, attendant. —see *THERAPY*.] —**ther-a-peu'ti-cal'ly** *adv.*

**ther-a-peu'tics** (thēr'ā-pyō'tīks) *n.* (used with a sing. verb) The medical treatment of disease. —**ther-a-peu'tist** *n.*

ā pat / ā pay / ā care / ā father / b bib / ch church / d deed / ē pet / ē be / f fife / g gag / h hat / hw which / i pit / i pie / ir pie / j judge / k kick / l lid, needle / m mum / n no, sudden / ng thing / ō pot / ō toe / ō paw, for / oi noise / ou out / ōō took / ōō boot