

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

TRIGEN-KANSAS CITY ENERGY)
CORPORATION,)
)
Plaintiff,)
)
v.)
MISSOURI GAS ENERGY, a division of)
SOUTHERN UNION COMPANY,)
)
Defendant.)

Case No. 1016-CV24880

FILED - CIRCUIT COURT
JACKSON CO., MO. MC
10 OCT 29 PM 2:33

**DEFENDANT MISSOURI GAS ENERGY'S
REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Defendant Missouri Gas Energy, a division of Southern Union Company ("MGE"), hereby replies to the Opposition to MGE's Motion to Dismiss filed by Plaintiff Trigen-Kansas City Energy Corporation ("Trigen"):

This metering and billing complaint relating to Trigen's use of natural gas that it received via MGE's regulated utility system is controlled by tariffs approved by the Missouri Public Service Commission ("PSC" or "Commission"). Because MGE's metering and billing practices are governed by its tariffs, the PSC has jurisdiction over these practices.

The operation of MGE's meters and its collection of amounts due are directly related to these practices. Therefore, any issue regarding MGE's meters and amounts due from customers requires the expertise of the Commission.

Primary jurisdiction over this case rests with the Commission and Trigen has failed to exhaust its administrative remedies by filing this case before presenting its complaint to the PSC.

I. DISMISSAL STANDARD.

In its Opposition to Defendant's Motion to Dismiss ("Opposition"), Trigen fails to quote the proper standard for a Motion to Dismiss, which is found in Missouri Rule of Civil Procedure 55.27(g)(3). This rule requires the Circuit Court to dismiss a claim for lack of subject matter jurisdiction "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."

"Exhaustion of administrative remedies is a jurisdictional requirement, and a circuit court does not have jurisdiction to hear a petition or render a judgment when available administrative remedies have not been exhausted." Brazilia, L.L.C. v. Collector of St. Louis County, 117 S.W.3d 704, 706 (Mo. App. E.D. 2003). "When exhaustion is required and a party fails to pursue all administrative remedies, the circuit court is without subject matter jurisdiction and the only recourse is to dismiss the cause." Parker v. City of St. Joseph, 167 S.W.3d 219, 221 (Mo. App. W.D. 2005). Furthermore, "the existence of jurisdiction to grant a declaratory judgment does not invalidate other obstacles to the granting of judicial relief. If administrative remedies are adequate, they must be exhausted before declaratory relief may be granted." Farm Bureau Town and Country Ins. Co. v. Angoff, 909 S.W.2d 348, 353 (Mo. en banc 1995).

II. TRIGEN IS SEEKING RELIEF UNDER MGE'S TARIFFS.

- A. **Trigen's complaint that MGE "negligently transmitted false information to Trigen's facility related to Trigen's natural gas usage" is a metering issue expressly governed by MGE's tariffs, Commission regulations, and Missouri law.**

No creative pleading can hide the fact that the central issue in Trigen's Petition is whether it was wrongfully billed due to a metering error. Trigen asserts in its Petition that "MGE negligently installed faulty metering equipment at Trigen's facility" (Petition at 2) and in its Opposition that it seeks damages "because MGE negligently transmitted false information to Trigen's facility related to Trigen's natural gas usage" (Opposition at 1). By Trigen's own

admission, this case revolves around a metering error. Such metering errors are clearly governed by MGE tariffs, Commission regulations, and Missouri statute.

First, Trigen's statement that "it is MGE's sole responsibility to install and maintain its metering equipment and to ensure that its metering equipment performs as intended" (Petition at ¶ 9) originates from MGE's duties pursuant to its tariffs, which govern MGE and customer responsibilities regarding meter installation and maintenance. See MGE Tariff Sheet Nos. R-40-44 "Measurement and Regulation" at Hack Affidavit Ex. 7.¹ These tariffs provide that "[f]ailure of Company to obtain a meter reading shall not relieve customer of the obligation to pay for all gas received." See MGE Tariff Sheet No. R-41 §5.05 "Meter Reading" at Hack Affidavit Ex. 8.

Second, Commission regulations explicitly tackle standards of metering quality. Chapter 10 of the Commission's Rules, attached hereto as Exhibit 1, delineates the standards of quality of utilities. Specifically, these regulations state that "[n]o gas service meter shall be allowed in service which . . . is in any way mechanically defective." 4 CSR 240-10.030(18). These regulations provide for the periodic inspection and testing of gas meters, and also provide gas meter standards and adjustment factors for utilities with more than one hundred gas meters. 4 CSR 240-10.030(19)-(22).

Finally, the issue of accuracy in metering for gas utilities like MGE, as well as other regulated public utilities, is governed explicitly by Section 393.160,² entitled "Inspection of gas, water and electric meters." Pursuant to that section, the Commission may appoint inspectors of gas meters to ascertain their accuracy (Section 393.160.1), no corporation shall put in use any gas meter which has not been inspected in accordance with rules promulgated by the Commission (Section 393.160.2), the Commission shall have inspected and tested any meters

¹ The Affidavit of MGE's Chief Operating Officer Robert J. Hack and its exhibits are attached to MGE's Motion to Dismiss.

² All statutory citations are to the Missouri Revised Statutes (2000), as amended by the Cumulative Supplement (2009).

that consumers request in writing that the Commission inspect (Section 393.160.5), and the Commission may prescribe rules and regulations to carry into effect the provisions of this section as it may deem necessary (Section 393.160.6).

Metering errors thus are clearly the province of the Commission. Any purported failure on the part of MGE resulting in the metering error at Trigen's facility is governed by MGE's tariffs, Commission regulations, and Missouri law.

B. Trigen's complaint that it was led "to believe that its natural gas costs were far less than is now alleged" results from MGE's attempts to collect for its undercharge, which are acts expressly governed by MGE's tariffs.

Trigen further complains that the metering error led it "to believe that its natural gas costs were far less than is now alleged." See Opposition at 1. Trigen asserts damages because its costs are now higher than it anticipated. See Opposition at 1-2. This is a result of MGE's attempts to bill and collect for its undercharge, both also governed by MGE's tariffs. See MGE Tariff Sheet No. R-43-44 § 5.11 "Billing Adjustment" at Hack Affidavit Ex. 2. Under these tariffs, MGE is obligated to correct the "false information" allegedly transmitted to Trigen's facility and to seek repayment and is, therefore, within its rights to issue a bill for the undercharged amount. Id.

C. Trigen's "negligence claim" is governed by MGE's tariffs.

Furthermore, Trigen asserts simple negligence by MGE. A metering error is exactly the type of error for which MGE is held harmless pursuant to its tariffs, which state that MGE shall not be liable for loss, damage, or injury "attributable to the negligence of the Company, its employees, contractors or agents." See MGE Tariff Sheet No. R-34 §3.19 "Company Liability" at Hack Affidavit Ex. 9 (last line of final paragraph).

Missouri courts have not, as asserted by Trigen, regularly entertained simple negligence causes of action against utilities where the type of negligence alleged was governed by the utilities' tariffs. See Opposition at 7.

First, the cases Trigen cites at page 7 of its Opposition in support of its allegation that "Missouri courts have regularly entertained causes of action against utility companies for damages without any mention of a previous determination from the PSC" all involve rural electric cooperatives, which are only regulated by the PSC in a limited fashion under Section 394.160. Pursuant to that section, the Commission's jurisdiction over rural electric cooperatives extends only to the "construction, maintenance and operation of the physical equipment of such cooperative to the extent of providing for the safety of the public and the elimination or lessening of induction or electrical interference" Section 394.160.1. Section 394.160 does not confer Commission jurisdiction "over the service, rates, financing, accounting or management of any such cooperative." Id. Clearly there would be no mention of Commission jurisdiction in the cases Trigen cites because the Commission has no jurisdiction.

Second, the cases Trigen cites at page 7 of its Opposition in support of its allegation that "MGE routinely admits that courts have jurisdiction over common law negligence claims against it" involved torts resulting in property damage and personal injury resulting from fires and gas leaks. In none of these cases did the plaintiff allege damage resulting from a simple metering error governed by tariff, nor did MGE admit PSC jurisdiction over such a claim. Each of the claimed negligence cases cited by Trigen is inapposite.

III. TRIGEN MISUNDERSTANDS THE ADMINISTRATIVE PROCESS.

A. MGE's tariffs unambiguously address the issues of which Trigen complains.

Trigen incorrectly asserts that this case does not present any issues that may be addressed by the PSC. See Opposition at 3. Trigen's complaint that MGE "negligently transmitted false

information to Trigen's facility related to Trigen's natural gas usage" and that Trigen thus was led "to believe that its natural gas costs were far less than is now alleged" is exactly the type of complaint between a utility and its customer that the Missouri legislature specifically authorized the PSC to regulate and adjudicate. See Section 386.390.

Trigen makes much of Goens v. Southern Union Co., 2010 WL 2777391 (W.D. Mo. 2010), arguing that the common law applies where a tariff is silent regarding liability. See Opposition at 4. The issue in Goens on a motion for summary judgment was whether the tariff precluded a tort claim regarding a fire or whether the tariff was silent on the issue, giving rise to a common law duty. Goens, 2010 WL 2777391 at *5. Nowhere did the court discuss jurisdiction.

This is not the case here, where MGE's tariffs explicitly address the issues presented in this case and are the authority regarding this metering and billing complaint. See, e.g., MGE Tariff Sheet No. R-43-44 § 5.11 "Billing Adjustment" at Hack Affidavit Ex. 2; "Measurement and Regulation" at Hack Affidavit Ex. 7; MGE Tariff Sheet No. R-41 §5.05 "Meter Reading" at Hack Affidavit Ex. 8; MGE Tariff Sheet No. R-34 §3.19 "Company Liability" at Hack Affidavit Ex. 9.

B. The PSC explicitly lays out the steps necessary to exhaust administrative remedies.

The Commission's own regulations delineate the complaint process to be exhausted where a customer and a utility have a disagreement. 4 CSR 240-2.070, entitled "Complaints," "establishes the procedures for filing formal and informal complaints with the commission." If a customer of a utility feels aggrieved by a violation of any statute, rule, order, or decision within the Commission's jurisdiction, that customer may file a formal or informal complaint. 4 CSR 240-2.070(1).

The informal complaint process aims to quickly resolve disagreements between public utilities and their customers. An informal complaint may be made by telephone, in person, or in writing under 4 CSR 240-2.070(2). The PSC will then attempt to resolve the complaint. If the complainant is not satisfied with the outcome of the informal complaint, it may file a formal complaint, pursuant to 4 CSR 240-2.070(3).

The formal complaint process to the Commission is a more prescribed process, and must be initiated in writing. Id. ~~This process requires a respondent to file an answer that raises all~~ grounds of defense under 4 CSR 240-2.070(8). In the formal complaint proceeding, there is a discovery procedure that must be followed, and parties may compel the appearance of witnesses and documents by subpoena. See 4 CSR 240-2.090-.100. After a formal complaint is filed, the PSC investigates, holds a hearing, and renders a decision on the merits under Sections 386.390–386.500.

After an order or decision has been made by the PSC, any corporation, person, or public utility interested therein has the right to apply for a rehearing with the PSC, pursuant to Section 386.500. Only after an application for rehearing is denied, or after a decision on rehearing if the application is granted, may a circuit court review the PSC’s decision under Section 386.510. Therefore, without a decision by the Commission, there is literally nothing for this Court to review.

C. Trigen has an administrative remedy.

Trigen incorrectly asserts that because the Commission cannot award monetary damages, Trigen has no adequate remedy before the PSC and therefore need not exhaust the administrative process. See Opposition at 3, 9–10. Again, Trigen misunderstands the administrative process, and the role of the courts in that process. Far from being “completely futile and meaningless”

(Opposition at 10), a PSC determination on this case is an essential component of Trigen's pursuit of monetary damages.

The PSC must first determine that compensation is appropriate before Trigen can seek relief in this Court. In State v. Buzard, 168 S.W.2d 1044, 1046 (Mo. en banc 1943), the Supreme Court held that the circuit court had no jurisdiction over a petition seeking recovery for overpayment for electricity because "the Public Service Commission must first determine which of the two published rates and service is applicable to the plaintiff and after that fact has been determined by that body, then the plaintiff could bring an action in the courts for the money or damage prayed for in the petition." As the Court of Appeals held in DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674, 676 (Mo. App. St. L. 1978): "A circuit court has no jurisdiction to consider the plaintiff's action for recovery until the Commission makes its decision regarding the rates and classification." As a result, any "[m]atters within the jurisdiction of the Public Service Commission must first be determined by the Commission before the courts will adjudge any phase of the controversy." UtiliCorp United Inc. v. Platte-Clay Elec. Coop., Inc., 799 S.W.2d 108, 109 (Mo. App. W.D. 1990) (emphasis added). Because Trigen's claims are based on how MGE's gas meters functioned and billing procedures that govern undercharges, the Commission must be permitted to review those issues and construe the PSC-approved tariffs and PSC regulations that control their operation.

The fact that the Commission has no power to determine damages or award pecuniary relief is irrelevant. Trigen should follow the framework and procedures established by A.C. Jacobs and Co. v. Union Elec. Co., 17 S.W.3d 579, 583 (Mo. App. W.D. 2000), where the plaintiff sought a refund of overpayments for electricity. The process began at the PSC which determined what tariffs applied and whether a refund was owed. Id. at 581. Because the PSC did not have jurisdiction to award damages, the plaintiff filed a lawsuit. Id. The important

distinction between this case and A.C. Jacobs is that there the parties received a final decision from the PSC before the plaintiff filed its lawsuit. By contrast, Trigen has not initiated the PSC complaint process, let alone received any determination from the Commission.

Trigen asserts that “[t]he PSC does not even have the statutory authority to provide the relief requested in the Petition, which is why Trigen filed it in this Court.” See Opposition at 4. Trigen is confused about the administrative process. While only the courts can promulgate an order requiring a monetary reparation or refund, the courts cannot even consider a plaintiff’s action for recovery of that reparation or refund until the PSC has first issued an order regarding the same. See DeMaranville, 573 S.W.2d at 676.

D. Exhaustion of administrative requirements is required.

Trigen also incorrectly asserts that because Section 386.390.1 permits but does not require that a complaint be made before the PSC, Trigen is not required to file a complaint with the PSC and properly exhaust its administrative remedies before coming to this Court. See Opposition 8–9. Pursuant to Section 386.390.1, a “[c]omplaint may be made by . . . any corporation or person . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any . . . public utility”

The lack of mandatory language in this section, as well as in 4 CSR 240-2.070, does not mean that a complainant has the option to skip a defined administrative process and immediately file a lawsuit. It simply means that if a complainant so desires, he may file a complaint. However, to get into court, the complainant must first file a formal complaint with the PSC, have the Commission review the facts at hearing, and then appeal a final decision from the PSC or file a petition in circuit court. The Commission must determine whether a plaintiff is entitled to a refund before that plaintiff can seek damages in court. See A.C. Jacobs and Co. v. Union Elec.

Co., 17 S.W.3d 579, 583 (Mo. App. W.D. 2000) (determining the amount of damages when the PSC found the plaintiff was entitled to a refund of overpayments).

E. Trigen cannot recover damages from MGE without a PSC determination on MGE's liability according to its tariffs.

Trigen relies on Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. St. L. 1976), for the proposition that a utility may be accountable to a customer for damages caused by the utility's recovery of undercharged amounts. See Opposition at 6. However, the Laclede court itself concedes that "[n]o gas rate utility collection case in Missouri has been found by counsel or this court," 539 S.W.2d at 576, and no Missouri court has followed this decision since.³

The notable omission in the Laclede case is its failure to discuss what, if any, tariffs of Laclede Gas Company were on file at the time of the undercharges in that case. The explanation may be that the Commission did not promulgate its metering and billing rules until 1994. See 4 CSR 240-13.020-.025. See also A.C. Jacobs, 17 S.W.3d at 583 fn. 6. In any event, the Laclede case pre-dates MGE's tariffs on file with the PSC, which have the force and effect of law, by 18 years.

MGE's tariffs directly address MGE's right and duty to collect undercharged amounts. See MGE Tariff Sheet Nos. R-43-44, § 5.11 "Billing Adjustment" at Hack Affidavit Ex. 2. These tariffs have the force and effect of law. See Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." American Tel. and Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 227 (1998). Moreover, "[t]he filed tariff doctrine conclusively

³ Not only has no Missouri court cited Laclede for the proposition that a utility may be accountable to a customer for damages caused by recovery of undercharged amounts, but those courts that have cited Laclede on this proposition have done so unfavorably. See Boone County Sand and Gravel Co. v. Owen County Rural Elec. Coop. Corp., 779 S.W.2d 224, 226 (Ky. App. 1989) (holding "a customer cannot assert a counterclaim for damages resulting from negligent underbilling in an action by a utility to recover the amount underbilled").

presumes that both a utility and its customers know the contents and effect of the published tariffs.” Bauer, 958 S.W.2d at 570. Because MGE’s tariffs supersede Laclede and contain specific provisions that directly address MGE’s rights regarding collection of undercharges, Laclede is irrelevant to this Court’s jurisdictional considerations.

Even if the holding in Laclede were applicable to the instant case, the Court of Appeals’ reasoning why a utility should be accountable for damage caused to the customer as a result of collection of undercharges is wholly inapplicable here. There the customer was a real estate management corporation that could not collect correct amounts due from its tenants, and thus was “placed in a position where it could not recover as a part of the rent the additional amount which it was compelled to pay for the gas used upon the premises.” Laclede, 539 S.W.2d at 576. Trigen, on the contrary, can recover the amounts it owes MGE for undercharges. Trigen so admits in its Petition, where it complains that due to any collection by MGE of its undercharged rates Trigen “will be forced to petition the PSC for yet another rate increase in the near future.” See Petition at ¶ 23. Because Trigen can recover through its ratemaking process the legitimate cost of the natural gas which it received from MGE, it stands in quite a different position than did the real estate management corporation in Laclede.

IV. THE PUBLIC SERVICE COMMISSION IS THE EXPERT ON UTILITY METERING AND BILLING PRACTICES, AS WELL AS ITS OWN STATUTES.

Trigen attempts to invoke this Court’s jurisdiction by asserting that it seeks this Court’s construction of certain statutes, alleging that “the PSC has no power to declare or enforce any principle of law or equity.” See Opposition at 3. Primary jurisdiction, however, requires courts to refrain from deciding a matter “(a) where administrative knowledge and expertise are demanded to determine technical, intricate fact questions and (b) where uniformity is important to the regulatory scheme.” MCI Metro Access Trans. Services, Inc. v. City of St. Louis, 941 S.W.2d 634, 644 (Mo. App. E.D. 1997). It is for this reason that the rule requiring exhaustion of

administrative remedies is premised upon the fact that “agencies have special expertise and a factual record can be developed more fully by pursuing the designated channels for relief within the agency.” Premium Standard Farms, Inc. v. Lincoln Township, 946 S.W.2d 234, 237 (Mo. en banc 1997).

Although recast as tort theories, Trigen’s claims focus on whether MGE acted in accordance with its tariffs and the regulations promulgated by the PSC, according to Missouri law. Whether MGE was negligent in installing and maintaining its meters, and whether certain statutes and Commission regulations bar MGE from collecting the contested charges, turn on the unique facts presented in this litigation. The PSC has the knowledge and expertise to make factual findings relating to the metering and billing practices of MGE under its tariffs that were approved pursuant to the PSC’s authority under Sections 393.140, 393.150, and 393.160. Therefore, primary jurisdiction for the claims asserted in Trigen’s Petition is with the PSC.

Indeed, by approving MGE’s tariffs, the Commission has already determined that MGE’s metering and billing adjustment provisions are just and reasonable, and have the same force and effect as a statute enacted by the legislature. See A.C. Jacobs and Co. v. Union Elec. Co., 17 S.W.3d 579, 582–83 (Mo. App. W.D. 2000) (holding that because the Commission had approved the tariff limiting billing adjustments to 60 prior billing periods for non-residential customers, the Commission determined that this billing adjustment period was just and reasonable). Nevertheless, Trigen asks this Court to declare that Section 400.2-725 is the applicable statute of limitations. See Petition at ¶ 32, Opposition at 5. The Commission has already spoken on this issue. See MGE Tariff Sheet No. R-43–44, § 5.11 “Billing Adjustment” at Hack Affidavit Ex. 2. Interpreting this tariff provision, which has the force and effect of law, to determine whether Trigen is liable to MGE for the entire amount of the undercharged natural gas provided to Trigen requires the PSC’s administrative knowledge and expertise.

Such is also the case with Trigen's purported declaratory relief claim concerning Section 393.130.3. See Petition at ¶ 32; Opposition at 5. It is well established under Missouri law that utility tariffs are, when filed with the Commission, valid and effective without any finding of facts or further order of the Commission. State ex rel. Jackson County v. PSC, 532 S.W.2d 20, 28 (Mo. en banc 1975). Once a public utility rate is filed and published, it becomes the lawful rate and remains so "until set aside or altered by order of the commission." Sonken-Galamba Corp. v. Missouri Pac. R.R., 40 S.W.2d 524, 529 (Mo. App. K.C. 1931). By approving a tariff, the PSC has already made a determination that the provisions of that tariff are just and reasonable. A.C. Jacobs, 17 S.W.3d at 583. Furthermore, the Missouri legislature has unambiguously determined that the PSC is the entity that determines whether a utility's practices are just and reasonable. See Section 386.250.

MGE's tariffs thus are prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the method prescribed by PSC law. See Section 386.270; State ex rel. GTE North, Inc. v. PSC, 835 S.W.2d 356, 367 (Mo. App. W.D. 1992); Peoples Tel. Exch. v. PSC, 186 S.W.2d 531, 534 (Mo. App. K.C. 1945). In its Opposition, Trigen erroneously attacks the lawfulness of MGE's tariffs through a declaratory action brought pursuant to Mo. R. Civ. P. 87.02(c). See Opposition at 11. That rule in full reads:

The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of agency rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented [emphasis added].

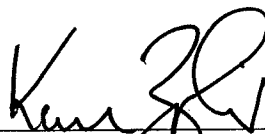
Trigen has not sued the PSC alleging that its rules and regulations are in violation of Missouri law, and cannot rely on this statute in its declaratory judgment action regarding MGE's application of its tariffs and of Commission regulations.

V. CONCLUSION.

Based upon the uncontested facts of this case, and firm legal precedent, this Court has no subject matter jurisdiction to adjudicate Trigen's action for declaratory judgment and damages until Trigen has exhausted its administrative remedies and the Public Service Commission issues a decision. Because the PSC has not rendered a decision, this Court is without subject matter jurisdiction to consider Trigen's Petition. Therefore, Trigen's Petition must be dismissed.

WHEREFORE, Defendant Missouri Gas Energy respectfully requests that its Motion to Dismiss be granted, that MGE be awarded its costs, and for such other relief as this Court believes just and reasonable.

Respectfully submitted,



Karl Zobrist, MBN 28325
Andrea M. Kimball, MBN 61316
Lisa A. Gilbreath, MBN 62271
SNR Denton US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: (816) 460-2400
Fax: (816) 531-7545
Karl.zobrist@snrdenton.com
Andrea.kimball@snrdenton.com
Lisa.gilbreath@snrdenton.com

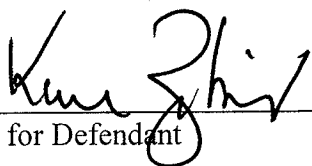
Attorneys for Defendant Missouri Gas Energy, a
division of Southern Union Co.

Certificate of Service

A certified copy of the foregoing was sent via electronic mail on and mailed, postage prepaid, this 29th day of October, 2010 to the following:

James D. Lawrence
Bryan Cave LLP
One Kansas City Place
1300 Main Street, Suite 3500
Kansas City, MO 64105-2100

Attorney for Plaintiff Trigen-Kansas City Energy Corp.



Attorney for Defendant

EXHIBIT 1