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October 6, 1998

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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, MO 65102

Re: Case No. OO-99-44 (Utility Assessments)

Dear Mr. Roberts:

On behalf of The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service, enclosed is an original and fourteen (14) copies of a **Memorandum of Law of The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service** for filing with the Commission in the referenced matter. I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel.

I have an extra copy of this document which I request that you stamp "Filed" and return to the person delivering it to you.

Thank you in advance for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: _____
Paul A. Boudreau

PAB:db
enc.

cc: Office of the Public Counsel

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. 00-99-44

MEMORANDUM OF LAW OF THE EMPIRE DISTRICT ELECTRIC COMPANY, ST. JOSEPH LIGHT & POWER COMPANY, ARKANSAS WESTERN GAS COMPANY d/b/a ASSOCIATED NATURAL GAS COMPANY, MISSOURI-AMERICAN WATER COMPANY AND UTILICORP UNITED INC. d/b/a MISSOURI PUBLIC SERVICE

I. INTRODUCTION

This case has many facets but the ultimate question is straightforward, that is, whether it is appropriate for the Missouri Public Service Commission (the "Commission") to undertake a *de facto* end run around the Hancock Amendment to the Missouri Constitution[1] by including in public utility assessments for the fiscal year commencing July 1, 1998, over $1.2 million dollars that have been transferred out of The Public Service Commission Fund (the "Fund") and into the General Revenue Fund ("General Revenues") by the Missouri General Assembly for the distribution of excess state revenues to the income taxpayers of the State of Missouri for tax years 1995, 1996 and 1997. The answer is clearly no. The Hancock Amendment never contemplated, much less authorized, that distributed revenues, excess revenues to which the State of Missouri is not entitled, could be recovered directly or indirectly by the State in later years. This would be in direct conflict with the constitutional limitation on State revenue collection.

For the reasons hereinafter set forth, the Commission erred when it attempted to recover Hancock Amendment tax refunds in this year's public utility assessments. It should recalculate its

[1] *Mo. Const.*, Art. X, §§ 16-24.

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assessment for its fiscal year commencing July 1, 1998, omitting the Article X transfer amounts, and issue revised assessments for each of the public utilities subject thereto.

II. BACKGROUND

A. PROCEDURAL CONTEXT

On June 29, 1998, the Commission issued its *Supplemental Order No. 52* ("Order 52") in its Case No. 11,110[2] pursuant to which it purported to estimate the amounts of expenses directly attributable to all groups of public utilities and, also, the amounts of expenses not directly attributable to any such group.[3] The purpose of Order 52 was to make the assessments against public utilities provided for by §386.370, RSMo,[4] for the Commission's fiscal year commencing July 1, 1998. Order 52 was made effective on the date of issuance. The assessments so determined were transmitted to the affected public utilities under cover of separate letters dated June 30, 1998.[5]

On July 28, 1998, a group of public utilities, including Empire, SJLP, ANG, MAWC and UtiliCorp (hereinafter the "Companies"), filed an *Application for Rehearing and Stay* ("Application") alleging a number of errors with respect to Order 52. Thereafter, on August 5, 1998, the Commission issued its *Order Regarding Application for Rehearing and Stay* pursuant to which it established Case No. OO-99-44 to address the issues raised by the Application. Said order scheduled a prehearing conference and established an intervention deadline.

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[2]*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.*

[3]Stip., ¶42; Exh. F.

[4]All statutory references are to RSMo 1994, as amended.

[5]Stip., ¶43; Exh. G.

By separate orders dated September 1, 1998 and September 23, 1998, the Commission granted a number of additional public utilities the opportunity to intervene and participate in the proceeding.

On September 23, 1998, the Commission issued an *Order Regarding Procedural Schedule* which, among other things, established a procedural schedule of events and activities in connection with this case. The Commission also directed the parties to address a number of issues related to the Article X transfers.

In accordance with the Commission's September 23, 1998, scheduling order, the parties filed with the Commission a *Stipulation of Facts* in lieu of an evidentiary hearing and, also, a *Statement of Issues Presented* on October 6, 1998.

B. FACTS

The Companies adopt and incorporate herein by reference the *Stipulation of Facts* (including all exhibits) filed with the Commission on October 6, 1998.

III. DISCUSSION AND ARGUMENT

Issue No. 1: 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?

A. The Commission's Public Utility Assessments Paid into the Fund are not a "Fax, License or Fee" for Hancock Amendment Purposes.

The Companies contend that the Commission's public utility assessments are true assessments and not taxes "in everything but name."[6] As stated in *Zahner v. City of Perryville*, 813 S.W.2d 855, 858 (Mo. banc 1991), an assessment for Hancock Amendment purposes a charge

[6]*See, Keller v. Marion County Ambulance District*, 820 S.W.2d 301, 303 (Mo. banc 1991).

"related . . . to a . . . specific purpose" and not a forced proportional contribution levied by the state for the support of government and for all public needs.[7] Monies paid into the Fund by public utilities are devoted solely and specifically to the payment of expenditures actually incurred by the Commission and attributable to the regulation of public utilities.[8] As such, they are in the nature of a charge to cover the costs of regulation and not to raise revenue to defray customary governmental expenditures. This is evidenced by the simple fact that the Commission, not the General Assembly, imposes the assessment. The Commission is not a political subdivision and has no taxing power whatsoever.[9]

It follows that the Commission's public utility assessments are not a "tax, excise, custom or duty or other source of income" received into the State treasury "for public use." *Buechner v. Bond,* 650 S.W.2d 611, 613 (Mo. banc 1983).[10] The statute granting the Commission the authority to make assessments against the public utilities it regulates specifically states that the Fund "shall be devoted *solely* to the payment of expenditures actually incurred by the Commission and attributable to the regulation of public utilities" and, further, that the amount remaining in the 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

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[7]In *Zahner*, the Missouri Supreme Court determined that a special assessment for street work is not a "tax, license or fee" within the meaning of §22(a) of the Hancock Amendment.

[8]Stip., ¶21.

[9]Stip., ¶15. This distinguishes public utility assessments from the parks and building inspection fees imposed by St. Louis County which were discussed in *Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982).

[10]The *Keller* decision has called into question the breadth of *Buechner's* determination of what constitutes "revenue" as that term is used in §17 of the Hancock Amendment.

year and shall be applied by the commission to the reduction of the amount assessed to such public utilities in such succeeding year."[11] (emphasis added). As noted above, public utility assessments are a charge against utilities for a specific purpose. They are not collected for the general public use.

The Commission's public utility assessments are not imposed or applied in the same manner as are taxes. Thus, they are not taxes, excises, customs, duties or any other source of general income for Hancock Amendment purpose.

B. Are the Commission's Public Utility Assessments Part of "Total State Revenue"?

Whether the Commission's public utility assessments are part of "Total State Revenue" or "TSR" as that term is defined in §17 of the Hancock Amendment is somewhat more problematic. The Missouri Supreme Court appears to have established a two-part test for purposes of making this determination. In *Kelly v. Hanson*, 959 S.W.2d 107, 111 (Mo. banc 1997), the Court determined that funds may not be considered "revenue" within the meaning of TSR unless (1) the funds are received into the state treasury, and (2) the funds are subject to appropriation.[12] One could argue that both parts of this test are met with respect to public utility assessments. As a result of some relatively recent legislation, it appears that public utility assessments are paid into the state treasury.[13] Also,

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[11]§386.370.4 RSMo; Stip., ¶23.

[12]*Buechner* at 613.

[13]In 1983, the Missouri General Assembly abolished the Public Service Commission Fund and transferred those funds to a special account within the state treasury. *See*, §33.571, RSMo; §386.370.4, RSMo. It is clear, however, that the sole intent of the enactment was to facilitate "handling and investment" of the monies in the Fund by the State Treasurer. §33.571.4, RSMo. The restrictive use language of §386.370.4, RSMo, was specifically retained even though it makes express mention of the legislation abolishing the special fund.

the moneys in the Fund are appropriated by the Missouri General Assembly[14] for the benefit of the Commission to defray expenses incurred by it each year.[15] This creates the anomaly that the Commission's public utility assessments are clearly not taxes but may well be part of TSR under the Hancock Amendment using the *Kelly* test.[16] On the other hand, the *Keller* decision suggests that context is everything and that the substance of each charge must be examined.[17] Thus, absent a definitive decision on the Commission's public utility assessments, no certain conclusion is possible.

Until the Missouri Supreme Court resolves the specific question of whether an assessment may be included in the calculation of TSR, these two seemingly conflicting conclusions must be reconciled. The Companies contend that this can be done consistent with the provisions of both the Hancock Amendment and the Public Service Commission Act (the "Act").

C. The Monies in the Fund May Not Be Diverted and Used to Refund Excess State Revenues to State Income Taxpayers

Even if the Commission's public utility assessments are a component in the calculation of TSR, the Companies contend that it does not necessarily follow that the Fund is a lawful source from

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[14]Stip., ¶22.

[15]It is the limited purpose for which monies may be appropriated out of the Fund which may provide the rationale for excluding the public utility assessments paid into it from the calculation of TSR. One can argue that the *Buechner* analysis assumes that the purpose of appropriation by the General Assembly is to defray general governmental expenditures, not special assessments for a specific purpose.

[16]The conflict is apparent. The Hancock Amendment was intended to put a stop to excessive State taxation. Its stated purpose is to limit "state *taxation* and spending" and to establish a "limit on the total amount of *taxes* which may be imposed by the general assembly." *Mo. Const.*, Art. X, §§16 and 18. Yet, the *Kelly* analysis would appear to include in the revenue distribution calculation provisions the Commission's public utility *assessments*.

[17]*Keller* at 305.

which to obtain the moneys necessary to make distributions of excess state revenues. The Hancock Amendment does not direct a return of funds to taxpayers on the same basis as TSR was determined; it merely limits the aggregate level of State revenues by requiring a refund to the income taxpayers of the State in the event the revenue limit is exceeded. It is simply "a penalty imposed on the government for collecting too much revenue." *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100, 104 (Mo. banc 1997). *Where* the revenues for the distribution are to come from is not set forth.

No provision of the Hancock Amendment expressly or by necessary implication authorizes the Missouri General Assembly to ignore the express prohibition contained in §386.370 RSMo that the monies in the Fund shall only be used by the Commission to pay for regulatory expenditures and shall not revert to the general revenue fund for general State governmental use. In other words, including the Commission's public utility assessments in the *calculation* of TSR for the purpose of determining the amount of excess revenues collected by the State in any particular year does not expressly or implicitly authorize or direct the *diversion and use* of the monies in the Fund for making revenue distributions to income taxpayers. No court decision has held that the Hancock Amendment overrides, invalidates or supercedes any restrictive application or purpose of a statutory fund in general or the Fund in particular. Accordingly, the Article X transfers are not authorized by law.

As a practical matter, this may not be an issue for which the Commission can provide a remedy inasmuch as the Article X transfers out of the fund were undertaken by the actions of the General Assembly.[18] Nevertheless, it *is* within the Commission's authority in the first instance to

[18]Stip., ¶¶25-34, 36-39.

rule on issues which have been placed within its special competence. *Holland Industries v. Division of Transportation*, 736 S.W.2d 666 (Mo. 1989).[19] Thus, the Commission, for the benefit of the courts, may make a factual finding that the Article X transfers at issue in this case were not for an authorized purpose given the unambiguous provisions of §386.370 RSMo prohibiting the use of the Fund for any reason other than defraying the Commission's expenses. Such a determination would enable interested parties to pursue an appropriate judicial remedy.

As the Commission observed in its August 5, 1998, *Order Regarding Application for Rehearing and Stay*, the Commission may hear evidence and create a record for a constitutional issue to be resolved judicially. *Missouri Bluffs Golf Venture v. St. Charles County Board of Equalization*, 943 S.W.2d 752, 755 (Mo. App. 1977) Given the fact that §386.370 RSMo provides that the Fund is to be used solely and specifically to defray the Commission's expenses actually incurred in the regulation of public utilities and that the amount remaining in the Fund reduces the following year's assessment, the Commission should make a finding that the Article X transfers were not for a permitted purpose under its enabling legislation.

Ultimately, whether the Commission's public utility assessments should or should not be included in the calculation of TSR does not answer the additional question of whether the Commission acted properly in attempting to *recover* the Article X transfers out of the Fund in a subsequent assessment. As will be demonstrated in the next section, the Commission's attempt to do so is unauthorized by law.

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[19]Where a statute is reasonably open to construction, the Commission has the power in the first instance to determine is own jurisdiction. *State ex rel. and to Use of Public Service Commission v. Blair*, 146 S.W.2d 865 (Mo. 1941).

Issue No. 2: 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?

The Commission is a creature of statute. As such, its powers are limited to those conferred by statute, either expressly, or by clear implication as necessary to carry out the powers specifically granted. *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). While its enabling legislation is remedial in nature and should be liberally construed in order to effectuate the purpose for which they were enacted, neither convenience, expediency or necessity are proper matters for consideration in the determination of whether an act of the Commission is authorized by statute. *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979) [quoting *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (Mo. banc 1923)].

These general principles are as applicable to the Commission's authority to assess public utilities under §386.370 RSMo as they are to the exercise of any other power or authority conferred by virtue of the Act. Accordingly, to determine whether the Commission has properly included the Article X transfers in this year's assessments, one must closely examine the language of that statute.

Subsection 1 of §386.370, RSMo, provides that the Commission must "make an estimate of the expenses to be incurred by it during such fiscal year reasonably attributable to the regulation of public utilities." Accordingly, an allowable item must pass a three-part test. First, it must be an "expense" of the Commission. Second, it must also be one "to be incurred" by the Commission in the coming fiscal year. In other words, expenses from a prior fiscal year may not be included.

Finally, it must be "reasonably related to the regulation of public utilities."[20] The Article X transfers included by the Commission in the calculation of its expenses for its 1999 fiscal year meet none of the elements of the test.

A. The Article X Transfers Do Not Represent "Expenses" to the Commission.

The term "expenses" is not defined in the Act. Nevertheless, in construing a statute, words should be given their plain and ordinary meaning. §1.090 RSMo. The best source for common terms is the dictionary. *Roberts v. McNary*, 636 S.W. 2d 332, 335 (Mo. banc 1982). Webster's Dictionary defines the word "expense" as the laying out or disbursing of money. It further states that the term "expenditure" means a spending or using up of money. The Article X transfers are not an expense to the Commission.

The Article X transfers were not an expenditure or disbursement of monies out of the Fund. To the contrary, they merely represented a movement of monies out of one account in the State treasury and into another (i.e., General Revenues) by the General Assembly (hence the term "transfer"). This is a mere accounting entry on the books of the State of Missouri. The three House Bills effecting the transfers each recite that:

> [t]here is *transferred* out of the State Treasury, chargeable to various funds, such amounts as are necessary for refunds required by Article X, Section 18(b), Constitution of Missouri, to the General Revenue Fund . . . [specified amounts][21]

The sums so transferred replenish general revenues used to make revenue distributions to the income taxpayers of the State. In no possible meaning of the term do the transfers represent a using up or disbursement of money by the Commission in the performance of its regulatory responsibilities.

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[20]§386.370.1 RSMo.

[21]Stip., Exh. B, C, E (emphasis added).

Indeed, the tax year 1997 refunds have taken place prior to the Article X transfer out of the Fund.[22] The transfers were not the result of a direct or indirect cost incurred by the Commission that necessitated a disbursement of funds. Additionally, in the case of the Article X distributions, the responsibility for disbursing the excess State revenues to income taxpayers has fallen to the State Treasurer. The Commission was an entirely passive party in this process.

Moreover, the transfers are to facilitate a return of revenues to which the State is not entitled. By definition, the State cannot expend monies to which it has no lawful claim. It can merely be made to "give back money to the persons from whom" it has been taken. *Holden* at 104. Distributing those excess revenues to the taxpayers from which they were taken does not represent an expenditure of those revenues by the State. It is merely a return of those revenues to their rightful owners.

B. The Article X Transfers do not Represent an Expense "to be Incurred" by the Commission.

Even if the Article X transfers can be viewed as an expense to the Commission,[23] nearly $690,000 of the $1.2 million at issue does not represent an expenditure "to be incurred" by it in the coming fiscal year. The Commission's calculation of its cost of operations is a budgeted, or forward-looking, analysis. The Commission estimates the expenses that it will incur in the upcoming fiscal year and makes its assessments on that basis.[24]

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[22]Stip., ¶39-40.

[23]The Companies do not concede that any of the Article X transfers are an expense to the Commission or to the State.

[24]*See*, Stip., Exh. A. Indeed, it is this prospective analysis that permits the Commission to include in its assessments for its 1999 fiscal year "costs for the move of the Public Service Commission from the Harry S Truman Building to the former Hotel Governor site," a cost not yet incurred by the Commission. Stip., Exh. G.

The Article X transfers for fiscal years 1995 and 1996, a total of $688,218, took place on June 17th and 22nd of 1998, respectively.[25] These transfers plainly occurred prior to the commencement of the fiscal year commencing July 1, 1998. As such, there is no lawful basis for including this amount in the calculation of the Commission's expenditures for the coming year. It is clearly an attempt to recover an amount related to an event that took place outside of the relevant fiscal year (i.e., 1999).

The only portion of the disputed Article X transfers that passes the "to be incurred" test is $534,114 for fiscal year 1997. It is anticipated that this amount will be transferred early in 1999.[26]

C. The Article X Transfers are not Expenses "Reasonably Attributable to the Regulation of Public Utilities".

None of the Article X transfers have anything to do with the regulation of public utilities. As noted above, they merely represent transfers of monies out of the Fund into General Revenues to provide a funding source for distributions of excess state revenues as mandated by the Hancock Amendment. Nothing could be more remote from or alien to the regulation of public utilities by the Commission.

Furthermore, the Commission's role in the Article X transfers could not be more passive. The General Assembly ordered the transfers and the State Treasurer distributed the monies to the income taxpayers of the State. These events are in no way connected to any activity by Commission. Certainly, it has nothing to do with the Commission's regulation of public utilities. The *only* connection that any of these events have to public utilities is that the monies were diverted from the

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[25]Stip. ¶¶32-34.

[26]Stip., ¶¶37 and 39.

Fund which is supposed to be used to defray the Commission's cost of regulating them.

This tenuous connection is not sufficient to meet the third element of the test. Legislative raids on the Commission's coffers are not events reasonably attributable to the regulation of public utilities. Indeed, they have no connection to the Commission's regulatory activity whatsoever. They do not represent a customary cost of doing business in any sense by which that phrase may be reasonably understood. The transfers do not represent a cost associated with personnel payroll or benefits, equipment or overhead expenses of any nature, nor are they associated with any other customary expense such as consulting fees.

D. Conclusion

While the Commission may be of the opinion that it needs to recover these monies to be adequately funded, that is not the relevant test.[27] The items that the Commission may include in the calculation of its annual assessment must meet the three requirements set forth in §386.370.1 RSMo. If it is not (1) an expense (2) to be incurred by the Commission in the fiscal year and (3) reasonably attributable to the regulation of public utilities, the Commission is not authorized by law to include it in its assessments. As demonstrated above, the Article X transfers do not meet the straightforward and exclusive statutory standard. Accordingly, the Commission's Order 52 is in error to the extent that its assessment calculation included the approximately $1.2 million associated with the Article X transfers.

[27]To the contrary, the transfers represent the General Assembly's judgement that the Commission in fact has *more* money than it needed to perform its statutory responsibilities, a determination that would argue *against* an attempt by the Commission to attempt to recover them.

Issue No. 3: 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?

In essence, the Commission's attempt to recover the Article X transfers in the public utility assessments for the fiscal year commencing 1999 is a *de facto* end run around the State revenue limitation set forth in the Hancock Amendment to the Missouri Constitution.[28] The public utilities of this state have already paid the $1,222,332 into the Fund as a result of assessments made in prior fiscal years. The General Assembly has determined that this sum should be returned to the income taxpayers of this state, yet the Commission is attempting to recover this money in this fiscal year's assessment. In other words, the Commission is apparently attempting to recover tax revenues to which the State is not entitled.

This effort by the Commission is both unconstitutional and unfair. Cast in its best light, recovery of these sums through public utility assessments frustrates the purpose and the consequence of the Hancock Amendment. The monies that have been distributed to the income taxpayers of this State have been, by constitutional declaration, revenues to which the State is not entitled. For the Commission to attempt to recover them, directly or indirectly, frustrates the constitutional purpose of the revenue limit. Furthermore, the attempt to recover the revenue distributions undoes what the General Assembly has done via HB 1004-88, HB 4 and HB 1004-89. The Commission cannot follow a practice which results in nullifying the expressed will of the legislature. *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission*, 225 S.W.2d 792, 794 (Mo. App. 1950).

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[28]The purpose of the Hancock Amendment is to "limit state spending by restricting revenues the state may generate in any given fiscal year." *Buechner* at 613.

The Commission should also keep in mind that it is asking public utilities to pay this $1,222,332 twice. It should not lose track of the fact that the monies that have been transferred out of the Fund were paid into it by public utilities in the first place. Now, the Commission has ordered public utilities to pay it *again*.

Issue No. 4: Whether the assessment process followed by the IAD and Commission, as described on Exhibit A, is in compliance with Section 386.370, RSMo?

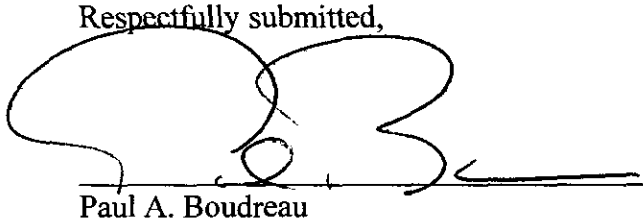
See discussion under Issue No. 2. The companies are challenging the lawfulness of including the Article X transfers in the Commission's 1999 fiscal year public utility assessments. Without in any way waiving their right to challenge future assessments upon any other basis, the companies do not otherwise take issue with the Commission's 1999 public utility assessments method in this case.

IV. CONCLUSION

Simply put, recovery of the Article X transfers in the Commission's 1999 fiscal year budget nullifies the constitutional state revenue limitation put in place by the citizens of the State of Missouri. This may not have been the Commission's conscious object when it prepared its budget for the current fiscal year, but it is the irrefutable effect of Order 52.

The Commission's Order 52 is unlawful, unconstitutional and unreasonable to the extent that it undertakes to recover through public utility assessments for the fiscal year commencing July 1, 1998, any portion of the Article X transfers provided for by HB 1004-88, HB 4 or HB 1004-89. The Commission should recalculate and reissue its public utility assessments omitting any amount attributable to said transfers out of the Fund.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 6th day of October, 1998, to:

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