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FILED

OCT - 6 1998

Missouri Public
Service Commission

October 5, 1998

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

RE: Case No. 00-99-44

Dear Mr. Roberts:

Enclosed for filing with the Commission in the above-referenced matter are the original and 14 copies of Kansas City Power & Light Company's Memorandum of Law and Argument. A copy of the foregoing Memorandum has been hand-delivered or mailed this date to parties of record.

Please bring this filing to the attention of the Commission.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Susan B. Cunningham".

Susan B. Cunningham

Enclosures

cc: Parties of Record
Office of the Public Counsel

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Public
Service Commission

In the Matter of the Assessment Against)
the Public Utilities in the State of Missouri) Case No. 00-99-44
for the Expenses of the Commission for the)
Fiscal Year Commencing July 1, 1998.)

KANSAS CITY POWER & LIGHT COMPANY'S
MEMORANDUM OF LAW AND ARGUMENT

The parties to this proceeding set out the following issues to be presented for discussion:

(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; (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; (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; and (4) whether the assessment process followed by the Commission's internal accounting department is in compliance for Section 386.370, RSMo?

In addition, in its Order dated September 23, 1998, the Commission raised several other issues that it requested the parties to address, including: (1) any legal authority which defines an assessment and whether an assessment constitutes a fee or a tax within the meaning of the provisions within the Hancock Amendment; and (2) whether utility assessment shall be included

within the definition of total state revenues as that limit is established in Article X, Section 18(a) of the Hancock Amendment?

KCPL has consolidated several of the above issues and addresses them as follows.

A. Whether Assessments Paid Into the Public Service Commission Fund Are Considered Within the Definition of "Total State Revenues"

The Commission requested the parties to address the issue of "whether or not utility assessment shall be included within the definition of total state revenues as that limit is established in Article X, Section 18(a) of the Hancock Amendment." Order, September 23, 1998. KCPL argues that because public utility assessments deposited by the state treasurer into the Public Service Commission Fund (Fund) are not funds that are available for public use (i.e., not subject to appropriation), such funds, therefore, do not constitute revenue for the purpose of determining total state revenues.

"Total state revenues" is defined as:

...all general and special revenues, license and fees, excluding federal funds, as defined in the budget message of the governor for fiscal year 1980-81. Total state revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities.

Mo. Const. Art. X, Sec. 17. The term "revenue" as used in the definition of "total state revenues" is not itself defined in the Hancock Amendment, so the courts have adopted the plain meaning of that term as found in the dictionary. According to Webster's Third New International Dictionary 1942 (1964), "revenue" is defined as:

The annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state, or municipality collects and receives into the treasury for public use....

Kelly v. Hanson, 959 S.W.2d 107, 111 (Mo. 1997); Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. 1983).

To understand whether public utility assessments constitute "revenue" for purposes of determining "total state revenues," the court in Kelly is instructive. In that case, the court stated:

...funds may not be considered *revenue* in the context of [total state revenue] unless they meet the two-part test derived from the definition of revenue adopted in Buechner: (1) the funds must be received into the state treasury, and (2) the funds must be subject to appropriation.

Kelly, 959 S.W.2d at 111. With regard to the second point, the court specifically stated, "because revenue consists of funds that are available 'for public use,' funds that are not subject to appropriation -- either by the General Assembly or by operation of law -- will not be considered revenue." Kelly, 959 S.W.2d at 111, citing Buechner, 650 S.W.2d at 613.

Section 386.370.4 1997 Supp., RSMo provides that all funds deposited into the Fund are to be "*devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities.*" Given this express language, KCPL argues that utility assessments paid into the Fund clearly are not available for public use (i.e., not subject to appropriation), and, therefore, are not considered revenue for the purpose of determining total state revenue.

B. 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

The Commission's assessment authority is found generally at Sec. 386.370 1997 Supp., RSMo. The assessment process is described in the parties' Stipulation of Facts and Statement of Issues Presented, paras. 17 and 20-23. Specific to the above issue, subsection (4) provides in pertinent part:

The state treasurer shall credit such payments to a special fund, which is hereby created, to be known as "The Public Service Commission Fund," which 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, as aforesaid. Any amount remaining in such special 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....

As stated previously, this statute clearly states that all funds deposited into the Fund are to be "*devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities.*" It is certainly not apparent how any transfers related to Article X refunds the Commission might be ordered to make, or which the Commission might agree to make, from the Fund would be legal given the express limitations placed on that Fund by the wording of the statute (i.e., Article X transfers are not attributable to the regulation of public utilities).

In support of this rationale, KCPL directs the Commission's attention to a similar situation with regard to whether certain moneys related to the State Highway Commission's state road fund were appropriately credited to the state's general revenues. In State Highway Commission v. Spainhower, the State Highway Commission brought action against the state treasurer with regard to whether it was constitutionally required that interest on state road fund investments be paid into the state road fund and not diverted to general revenue. The state treasurer invested excess funds from the state road fund at the State Highway Commission's request. The state treasurer then credited the interest earned on the investments to the General Revenues Fund. The court held that interest or income from the state road fund must be credited to that fund under constitutional provisions and held against withdrawal or use for any purpose

other than highway purposes, including diversion to the General Revenues Fund. 504 S.W.2d 121, 125 (Mo. 1973).

While this case does not address Article X transfers, it is instructive nonetheless. The State Highway Commission's state road fund is similar to the Public Service Commission Fund. Like the Fund, the state road fund is a statutory creation that receives moneys and credits from stated sources and provides for the payment or transfer out of the fund only for state highway purposes enumerated in Article IV, Section 30(b) of the Missouri Constitution. See Section 226.220, RSMo. Just as the state treasurer was required to refund the interest earned on state road fund investments to the state road fund because payment into general revenue (for any reason) did not constitute a "state highway purpose," Article X refunds do not constitute expenses incurred that are attributable to the regulation of public utilities and should be refunded to the Fund.

C. Whether the Article X Transfers Represent Expenses To Be Incurred by the Commission That Are Reasonably Attributable to the Regulation of Public Utilities

Certain amounts were transferred out of the Fund into the General Revenues Fund for Article X refunds. Pursuant to Article X, Section 18(b) of the Missouri Constitution, the State of Missouri is required to refund state revenues on a pro rata basis to Missouri state income taxpayers when "total state revenues" exceed the revenue limit established in Article X, Section 18(a) by more than one percent. The purpose of this provision is to "rein in increases in governmental revenue and expenditures." Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 102 (Mo. 1997), citing Roberts v. McNary, 636 S.W.2d 332, 336 (Mo. Banc 1982). KCPL argues that such transfers obviously do not represent expenses to be incurred by the Commission that are reasonably attributable to the regulation of public utilities.

D. Whether the Commission May Recover Article X Transfers from the Fund to the General Revenues Fund in the Calculation of Public Utility Assessments

Related to the prior two issues is the question of whether the Commission may recover Article X transfers from the Fund to the General Revenues Fund in the calculation of public utility assessments. Again, citing Sec. 386.370, it is clear that the Commission is authorized only to assess public utilities those costs it incurs that are reasonably attributable to the regulation of public utilities. Therefore, to include Article X refunds in the calculation of public utility assessments clearly violates the express provisions of the statute.

WHEREFORE, Kansas City Power & Light Company respectfully submits the foregoing Memorandum of Law and Argument and requests that the Commission reconsider the inclusion of Article X transfers in its public utility assessments for fiscal years 1995, 1996 and 1997.

Respectfully submitted,



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ATTORNEY FOR

KANSAS CITY POWER & LIGHT COMPANY

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing Memorandum of Law and Argument of Kansas City Power & Light Company was deposited in the United States Mail, postage prepaid, on the 5th day of October, 1998, and addressed to the following:

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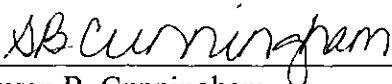
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