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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, MO 65102

RE: Case No. OO-99-44

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of **Staff's Memorandum of Law and Argument** and **Staff's Proposed Conclusions of Law**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

*Wm K Haas*

William K. Haas  
Senior Counsel  
573-751-7510  
573-751-9285 (Fax)

WKH:sw

Enclosure

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

**STAFF'S MEMORANDUM OF LAW AND ARGUMENT**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its  
Memorandum of Law and Argument states:

**Introduction**

The Missouri Public Service Commission (Commission or PSC) established this case to  
address an application for rehearing and stay regarding the Commission's June 29, 1998  
Supplemental Order No. 52 (Order 52) in Case No. 11,110. In Order 52, the Commission set out  
the public utility assessments, pursuant to Section 386.370, RSMo Supp. 1997, for the Commission's  
fiscal year commencing July 1, 1998.

At a prehearing conference held on September 2, 1998, the parties agreed to a proposed  
procedural schedule. On September 23, 1998, the Commission issued its Order Regarding  
Procedural Schedule which generally adopted the parties' proposal for the parties to jointly file a  
stipulation of facts and a statement of issues on October 6, for the parties to separately file  
memoranda of law and arguments also on October 6, and for the parties to appear on October 14 for  
a hearing and argument of legal issues. The Commission added that the parties may optionally file

proposed conclusions of law and that the parties shall address certain questions within each party's memorandum of law and argument.

**Commission's Statement of Issues Presented**

1. 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?

Yes. The PSC assessment is a source of income received into the State's treasury. Section 386.370.3, RSMo Supp. 1997, directs each public utility to pay the amount assessed to the Director of Revenue who shall remit such payments to the State Treasurer. Section 386.370.4, RSMo Supp. 1997, directs the State Treasurer to credit such payments to a special fund to be known as the Public Service Commission Fund. Section 33.571, RSMo 1994, abolished the Public Service Commission Fund and replaced it with an account in the General Revenue Fund within the state treasury.

2. Whether the funds must be considered within the definition of "total state revenue"?

Yes. Payments of PSC assessments are included within the definition of "total state revenue."

Article X, Section 17 (1) of the Hancock Amendment generally defines "total state revenue" to include "all general and special revenues, license and fees, excluding federal funds."<sup>1</sup> The Missouri Supreme Court held that funds may not be considered revenue in the context of total state revenues unless they meet a two-part test: (1) the funds must be

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<sup>1</sup>Sections 16 through 24 of Article X of the Missouri Constitution are popularly known as the Hancock Amendment.

received into the state treasury, and (2) the funds must be subject to appropriation. Kelly v. Hanson, 959 S.W.2d 107, 111 (Mo. banc 1997).

First, as discussed in paragraph 1 above, utility assessments are received into the state treasury.

Second, assessments received into the Public Service Commission Fund are subject to appropriation. Article III, Section 36 of the Missouri Constitution provides that all revenue collected and money received by the State shall go into the treasury and the General Assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. Likewise, Article IV, Section 28 of the Missouri Constitution provides that no money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law.

3. What is an appropriate definition and meaning of "assessment"?

An appropriate definition of a word is the plain meaning derived from the dictionary. Boone County Court v. State of Missouri, 631 S.W.2d 321, 324 (Mo. banc 1982). In Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982) and again in Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983), the Missouri Supreme Court adopted the plain meaning of terms as found in Webster's Third New International Dictionary.

The most applicable definition of "assessment" found in Webster's Third New International Dictionary (1986) reads: "a specific charge or tax determined upon by assessing." The most applicable definition of "assess" found in this dictionary reads: "to determine the amount of and impose (as a tax, charge or fine) according to an established rate or apportionment."

4. What legal authority defines “assessment”?

In State ex rel. Halferty v. Kansas City Power & Light Co., 145 S.W.2d 116, 120-21 (Mo. 1940), a property tax case, the Missouri Supreme Court quoted the following definition of assessment adopted in an earlier case:

“As the word is more commonly employed, an assessment consists of the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them; the designation of the person or things which shall be the subject of taxation and the apportionment of taxation among such persons or things in the ratio prescribed by law; the procedure on the part of the officials by which property is listed, valued, and finally the pro rata declared; not merely the valuation of the property for taxation, but the whole statutory mode of imposing the tax, embracing all the proceedings for raising money by the exercise of the power of taxation from their inception to their conclusion.’ 5 C. J. 816, 817.”

In Hansen v. United States, 455 F. Supp. 1367, 1369, (W.D. Mo. 1978), a federal court defined “assessment” for the purpose of determining its jurisdiction over a tax issue to mean “a formal administrative determination of tax liability.”

5. Whether an assessment constitutes a fee or a tax within the meaning of the provisions of the Hancock Amendment?

Leggett v. Missouri State Life Insurance Co., 342 S.W.2d 833 (Mo. banc 1960) is the seminal case defining taxes. The Leggett court stated:

“Taxes are ‘proportional contributions imposed by the state upon individuals for the support of government and for all public needs’ ... Taxes are not payments for a special privilege or a special service rendered ... Fees or charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes ... unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures ... rather than compensation of public officers for particular services rendered....” Id. at 875.

The Leggett court held that expenses paid by a life insurance company for a financial examination, conducted by the insurance departments of the states where the company did business, were not taxes where the expenses consisting of a per diem fee and a per diem allowance were set by the supervisory authorities of the states but were paid directly to the examiners. Id. at 875. The court stated that these expenses are inspection fees assessed as a mode of making business contribute to the expenses of its proper police regulation. Id. at 876.

In Craig v. City of Macon, 543 S.W.2d 772 (Mo. banc 1976), the Missouri Supreme Court applied the Leggett definition of taxes in holding that a monthly waste disposal charge that covered only the cost of waste disposal is not a tax but a service charge. Id. at 774.

In Roberts v. McNary, the Missouri Supreme Court adopted the following definitions from Webster's Third New International Dictionary: (1) tax - "a pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes: a forced contribution of wealth to meet the public needs of a government"; (2) license - "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful"; (3) fee - "a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; a charged fixed by law for services of a public officer." 636 S.W.2d at 335. The court also considered the Leggett definition of taxes in holding that fees charged for county services, such as parks and building inspection, fall within the phrase "tax, license or fees" as used in Section 22 of the Hancock Amendment.

The holding in Roberts, to the extent that it held that all "fee" increases are subject to Section 22 of the Hancock Amendment, has been overruled *sub silentio*. Keller v. Marion County Ambulance District, 820 S.W.2d 301, 304-05 (Mo. banc 1991). The Keller court held that an ambulance district's charges were not taxes labeled as fees but were user fees not subject to Section 22 of the Hancock Amendment.

Classification of the PSC assessment as either a tax or a fee is not dispositive under Section 18 of the Hancock Amendment. As discussed in paragraph 2 above, the PSC assessment meets the two-part test for inclusion in total state revenues; classification of the source of revenue as a tax or a fee is not a factor in that analysis.

6. Whether a utility assessment shall be included within the definition of total state revenue as that limit is established in Article X, Section 18 (a) of the Hancock Amendment?

As discussed in paragraph 2 above, assessments are included within the definition of total state revenue. Article X, Section 18 of the Hancock Amendment establishes a method to calculate an annual state revenue limit. For any fiscal year that total state revenues exceed the revenue limit by one percent or more, the excess funds shall be refunded to income taxpayers.

7. Whether assessment funds may be transferred from the PSC Fund?

Yes. The PSC Fund may be used as a source for Hancock Amendment refunds.

Although Section 386.370.4, RSMo Supp. 1997, provides 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 public utilities, that statutory pronouncement is subject to repeal by subsequent legislation.

When two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first. County of Jefferson v. Quiktrip Corporation, 912 S.W.2d 487, 490 (Mo. banc 1995). The Quiktrip court held that a later statute providing for a tax finance increment district to receive fifty percent of additional revenues from all county taxes except those specified provided an exception to two earlier statutes which provided that revenues received by a county under a capital improvement sales tax and under a law enforcement sales tax shall be used solely for their respective designated purposes. Id.

House Bill No. 1004, enacted in 1996, directs that \$262,347 is to be transferred out of the PSC Fund to the General Revenue Fund for Hancock Amendment refunds. House Bill No. 4, enacted in 1997, directs that \$42,284,895, chargeable to various funds, is to be transferred out of the state treasury to the General Revenue Fund for Hancock Amendment refunds. House Bill No. 4 did not specify the amount to be charged to each fund as House Bill No. 1004 had done. The Office of Administration calculated the PSC Fund's proportional share of the House Bill No. 4 transfer to be \$425,871. House Bill No. 1004, enacted in 1998, directs that \$534,114 is to be transferred out of the PSC Fund to the General Revenue Fund for Hancock Amendment refunds. These enactments provide an exception to the general rule in Section 386.370.4, RSMo Supp. 1997, that the PSC Fund shall be devoted solely to the payment of expenditures attributable to the regulation of public utilities.

8. Whether that transfer was properly conducted with respect to the recent transfer from the PSC Fund?



to the proscription in Section 386.370.4, RSMo Supp. 1997, that the PSC Fund shall be devoted solely to the payment of the Commission's expenditures 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?

Yes. Section 386.370.2, RSMo Supp. 1997, directs the Commission to assess public utilities for its estimated expenses attributable to the regulation of public utilities. The Commission receives no appropriations out of the State's General Revenue Fund in connection with its regulation of public utilities. The Legislature's repeal by implication of Subsection 4 of Section 386.370, RSMo Supp. 1997, to the extent of the Hancock Amendment transfers directed by House Bills No. 1004 (1996), No. 4 (1997) and No. 1004 (1998), did not repeal the Commission's authority, under Subsection 2 of that statute, to assess public utilities for its estimated expenses directly attributable to the regulation of public utilities.

4. Whether the assessment process followed by the IAD and Commission, as described on Exhibit A, is in compliance with Section 386.370, RSMo?

Yes. The assessment process, in general, and the application in that process of a five year average of each public utility group's percentage of the Commission's expenditures, in particular, comply with Section 386.370, RSMo Supp. 1997.

Subsection 1 of this statute directs that the Commission shall make an estimate of the expenses, attributable to the regulation of public utilities, to be incurred by it during the

upcoming fiscal year and shall also separately estimate the amount of such expenses directly attributable to each group of utilities: electric corporations, gas corporations, water corporations, heating companies, telephone corporations, sewer corporations, and other public utilities. The statute does not specify any particular method to "estimate" the amount of such expenses attributable to each of the groups. The Legislature has therefore left the determination of the estimation method to the Commission's discretion. The expense that the Commission incurs for the regulation of each utility group fluctuates from year-to-year both in dollars and as a percentage of the total of all such expenditures. It is reasonable to use a five year average of each group's annual percentage of such expenditures to smooth the fluctuations.

### **Conclusion**

As the Commission noted in its Order Regarding Application for Rehearing and Stay, agency adjudicative power extends only to the ascertainment of facts and the application of existing law in order to resolve issues within the given area of agency expertise. In re City of Kinloch, 242 S.W.2d 59, 63 (Mo. 1951). As the Commission also noted, the common law of Missouri suggests that a hearing in this case would be limited to the creation of a record for the issue(s) to be resolved judicially.

Accordingly, the Commission should make findings of fact based upon the parties' stipulation of facts and upon any additional evidence that may be adduced at the hearing. The Commission should recite conclusions of law based upon legislative enactments and judicial opinions that explain the Commission's authority and duty, as discussed above, to act as it has in this

matter. Consistent with such conclusions of law, the Commission should order that the applicants' request to set aside Supplemental Order No. 52 is denied.

Respectfully submitted,

*Wm K Haas*

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#### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 6th day of October, 1998.

*Wm K Haas*

**SERVICE LIST FOR  
CASE NO. OO-99-44  
October 6, 1998**

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