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October 6, 1998

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

FILED

OCT - 6 1998

Missouri Public  
Service Commission

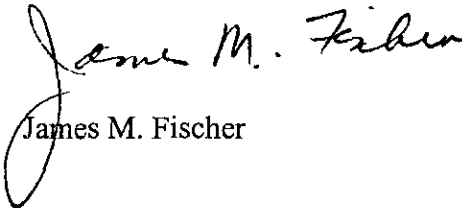
RE: Case No. OO-99-44

Dear Mr. Roberts:

Enclosed are the original and fourteen (14) copies of the Small LDCs' Memorandum of Law and Argument for filing in the above-referenced matter. A copy has been hand-delivered or mailed this date to parties of record.

Thank you for your attention to this matter.

Sincerely,

  
James M. Fischer

/jr  
Enclosures

cc: All Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION  
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 ) Case No. OO-99-44  
for the Expenses of the Commission for the )  
Fiscal Year Commencing July 1, 1998. )

**SMALL LDCs' MEMORANDUM OF LAW AND ARGUMENT**

COME NOW Atmos Energy Corporation, through its divisions of United Cities Gas Company and Greeley Gas Company; Fidelity Natural Gas, Inc. and Fidelity Telephone Company; and Southern Missouri Gas Company, L.P. (hereinafter, collectively referred to as "Small LDCs"), and respectfully file this Memorandum of Law and Argument to address the issues in this proceeding:

**Procedural History of Proceeding**

On July 28, 1998, West Elm Place Corporation, The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Laclede Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service (hereinafter "The Companies") filed an Application for Rehearing and Stay pursuant to Section 386.500, RSMo 1994,<sup>1</sup> and 4 CSR 240-2.160, seeking rehearing regarding the Commission's June 29 Supplemental Order No. 52 ("Order 52")<sup>2</sup> in Case No. 11,110. The

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<sup>1</sup> All statutory references are to Revised Statutes of Missouri 1994, unless otherwise stated.

<sup>2</sup> Order 52 is the order in which the Commission has set out its assessments of expenses directly attributable to all groups of public utilities and also the amounts of expenses not directly

Commission established Case No. OO-99-44 to address the Application for Rehearing and Stay. The Companies have requested the Commission to reconsider its decision in this order. In its Order Regarding Application for Rehearing and Stay issued on August 5, 1998, the Commission established an intervention deadline of August 31, 1998.

Numerous public utilities, including the Small LDC Intervenors, timely filed their respective Applications to Intervene, which were granted in the Commission's Order Granting Intervention issued on September 1, 1998.

On September 2, 1998, the Commission held a prehearing conference to discuss issues related to the proceeding. On September 17, 1998, the Commission issued its Order Regarding Responses of Applicants and Intervenors requesting the parties to provide the Commission with certain information. Subsequently, numerous public utilities provided the Commission with responses and other information requested from them in the Commission's September 17, 1998 Order.

On or about October 6, 1998, the parties filed their Stipulation of Facts and Statement of Issues Presented.

### **Legal Issues Presented**

The purpose of this Memorandum is to briefly discuss the following Legal Issues raised in this proceeding:

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attributable to any such group. The purpose of Order 52 was to make the public utility assessments provided for, pursuant to Section 386.370, for the Commission's fiscal year commencing July 1, 1998 (the 1999 fiscal year or FY99).

1. Whether the Article X transfers from the Public Service Commission Fund to the General Revenue 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 included 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.
4. 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.
5. Whether the PSC funds must be considered within the definition of "total state revenue".

### **Legal Arguments**

The Small LDCs generally support the position of the Joint Applicants and Intervenor Kansas City Power & Light Company (hereinafter "KCPL") that the Commission's inclusion of Article X transfers in its public utility assessments should be reexamined. The Small LDCs believe the Commission lacks the jurisdiction and statutory authority to assess public utilities for transfers of funds from the PSC Fund to fund Article X refunds to taxpayers.

Section 386.370 clearly states that all funds deposited into the PSC 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." Article X refunds do not appear to meet this statutory criteria. This is the key issue to be resolved. Refunds of excess state revenues, pursuant to the Hancock Amendment, have nothing whatsoever to do with expenditures actually incurred by the Commission and attributable to the regulation of public utilities. The fact that the General Assembly may have required the Commission to transfer funds to the General Revenue Fund to pay for Hancock Amendment refunds to taxpayers does not modify the limitation of Section 386.370 that the PSC Fund "must be devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities." As a result, the Small LDCs believe that the Article X transfers from the Public Service Commission Fund are not consistent with the limitation of Section 386.370, and therefore are not authorized by law.

Even if the General Assembly could lawfully require the Commission to transfer any excess reserves in the PSC Fund to General Revenue, the Small LDCs do not believe that the Commission may lawfully recover Article X transfers, or otherwise prospectively build up its PSC Fund, by increasing the assessments of public utilities to recover expenses that are not directly attributable to the regulation of public utilities. Otherwise, there would be no limitation upon the State of Missouri from requiring public utilities, and eventually their ratepayers, to fund the refunds that may be mandated by the Hancock Amendment in the future. This procedure would appear to merely circumvent the apparent intent of the Hancock Amendment to put a lid upon the growth of tax revenues since public utilities and their ratepayers would be required to replace the refunds made to taxpayers, rather than having state government itself return the excess revenues paid by taxpayers.

Finally, the Small LDCs do not believe that the issue of whether a utility assessment paid to the Commission constitutes a "tax, excise, custom, duty or other source of income" is determinative

of the issues presented in this proceeding. The Small LDCs, however, concur with the legal analysis of the Joint Applicants and KCPL on this issue. Similarly, whether the PSC Fund must be considered within the definition of "total state revenue" for purposes of calculating the overall revenue lid under the Hancock Amendment does not affect whether public utilities may lawfully be required to pay assessments that are designed to provide the State of Missouri with the funds to make the required Article X refunds to taxpayers. Section 386.370(4) is the relevant statutory provision which determines the Commission's authority on this issue. Under Section 386.370(4), the Commission may not include Article X transfers in the calculation of public utility assessments since these expenditures do not represent "payments of expenditures actually incurred by the commission and attributable to the regulation of such public utilities." Id.

#### **Nature of the Stay Requested and the Remedy Sought**

The Small LDCs concur with the Joint Applicants and Intervenor KCPL that it is reasonable and appropriate for the Commission to stay the effectiveness of its assessment order to the extent that the assessments include Article X transfers. The appropriate remedy would be for the Commission to issue a supplemental assessment order consistent with the Stipulation of Facts and/or legal arguments presented at the oral argument and hearing.

**WHEREFORE**, Atmos Energy Corporation, through its divisions of United Cities Gas Company and Greeley Gas Company; Fidelity Natural Gas, Inc. and Fidelity Telephone Company;

and Southern Missouri Gas Company, L.P., respectfully submit the foregoing Memorandum of Law and Argument, and request 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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### CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered or mailed, postage prepaid, this 6<sup>th</sup> day of October, 1998, to:

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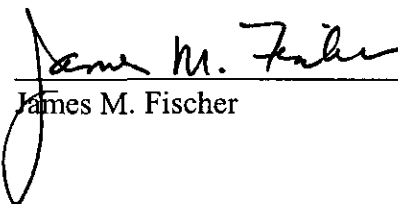
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