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October 6, 1998

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
301 West High Street, Floor 5A  
Jefferson City, Missouri 65101

FILED

OCT - 6 1998

Missouri Public  
Service Commission

Re: Case No. OO-99-44

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and 14 copies of Southwestern Bell Telephone Company's Brief.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

A handwritten signature in cursive script that reads "Leo J. Bub /tm".

Leo J. Bub

Enclosure

cc: Attorneys of Record

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Service Commission  
99-44

Missouri Public  
Service Commission

## BRIEF

## Introduction

Southwestern Bell has not objected to the Commission's prior determinations as to the amount of funds it needed to operate and is not doing so now. Rather, the concern being raised here focuses on the use of monies generated by the Commission's utility assessment to fund Hancock Amendment refunds. By using proceeds from utility assessments for purposes other than expenses the Commission incurs in regulating public utilities, the Commission has had to *increase its assessment on Missouri utilities to fund its continued operations..*

<sup>2</sup>Section 386.370.3 RSMo (1994).

In Supplemental Order No. 52,<sup>3</sup> the Commission notified all regulated Missouri utilities that their annual assessment for the fiscal year beginning July 1, 1998 would increase significantly due to transfers of monies from the Public Service Commission Fund (the Fund) to the State's General Revenues. The Commission was directed to make these transfers to help fund Hancock Amendment refunds. Specifically, HB 1004-88 directed the Commission to transfer \$262,347. HB 4 directed a similar transfer but without specifying a dollar amount. (In February 1998, the State Office of Administration directed the Commission, pursuant to HB 4, to transfer \$425,871 to General Revenues for Hancock Amendment refunds.) And in 1998, HB1004-89 directed the Commission to transfer \$534,114.<sup>4</sup>

On a total basis, these transfers increased the assessment of all regulated Missouri utilities \$1.2 million. Southwestern Bell's assessment increased \$218,000 due to the transfers.<sup>5</sup> As explained below, these transfers are not consistent with Missouri statutes.

1. Missouri Statutes Do Not Permit Monies from the Public Service Commission Fund to Be Used for General Tax Payer Refunds.

Missouri statutes empower the Commission to fund its regulatory activities by assessing the utilities it regulates. But those statutes are very specific. Section 386.370.4 RSMo (1994), which created the Public Service Commission Fund, only permits it to be used for paying expenses the Commission actually incurred in regulating public utilities:

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<sup>3</sup>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. 11,110, Supplemental Order No. 52, issued June 29, 1998. (See, Stipulation of Fact, Exhibits F and G).

<sup>4</sup>See, Factual Stipulation, paras. 25-26, 28, 30-31, 36-37, 41-43.

<sup>5</sup>Id., Exhibit H.

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 or its successor fund created pursuant to Section 33.571 RSMo, 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. . . . (emphasis added).

Even in estimating its expenses, Section 386.370.1 permits the Commission to look only at the expenses it will incur that are reasonably attributable to regulation of public utilities:

The commission shall, prior to the beginning of each fiscal year . . . make an estimate of the expenses to be incurred by it during such fiscal year reasonably attributable to the regulation of public utilities as provided in Chapters 386, 387, 392 and 393, RSMo, and shall also separately estimate the amount of such expenses directly attributable to such regulation of each of the following groups of public utilities: Railroad corporations, street railroad corporations, other common carriers, electrical corporations, gas corporations, water corporations, heating companies and telephone corporations, telegraph corporations, sewer corporations and any other public utility as defined in Section 386.020, as well as the amount of such expenses not directly attributable to any such group. (emphasis added).

And highlighting the legislative intent that such funds are to be used only for the Commission's regulatory activities, Section 386.370.4 specifically forbids the reversion of any excess funds at the end of a fiscal year to General Revenue. And it requires such monies to be appropriated for the Commission's needs in the next fiscal year:

Any amount remaining in such special fund or its successor 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, such reduction to be allocated to each group of public utilities in proportion to the respective gross intrastate operating revenues of the respective groups during the preceding calendar year. (emphasis added).

2. The Use of Money in Public Service Commission Fund in Calculations to Determine Hancock Amendment Refunds Has No Bearing on Whether That Fund May Be Used as a Source of Such Refunds.

In its September 23, 1998 Order, the Commission asked the parties to address 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. The Commission also asked the parties to address whether the funds must be considered within the definition of “total state revenue” as that limit is established in Article X, Section 18(a) of the Hancock Amendment.<sup>6</sup> From the cases the Commission asked the parties to review in answering these questions, it appears that the Commission seeks to determine whether monies generated from its assessment on utilities may be used in the calculation to determine Hancock Amendment refunds. But that issue has no relation to the issue raised by petitioners in this case: whether those monies can be a source for Hancock Amendment refunds.

To achieve a goal of reigning in increases in government revenue and expenditures, the Hancock Amendment established an annual revenue limit for state government and requires the State to disgorge the excess when its annual revenues exceed the constitutional revenue ceiling. The calculation of that revenue limit in Article X, Section 18(a) of the Hancock Amendment is based on “total state revenues.” In Missourians For Tax Justice Education Project v. Holden, 959 S.W.2d 100, 106 (Mo. banc 1997), the Missouri Supreme Court held that “total state revenue” is used in Section 18(a) of the Hancock Amendment is the “sum (total) of ‘taxes, excises, customs, duties, and other sources of income’ the state receives into its treasury in a given fiscal year.” In

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<sup>6</sup>Order, p. 3.

Kelly v. Hanson, 959 S.W.2d 107, 111 (Mo. banc 1997), the Supreme Court further explained that since "revenue" consists of funds that are available "for public use," funds not subject to appropriation -- either by the General Assembly or by operation of law -- will not be considered revenue for purposes of determining total state revenue.

While funds generated from the Commission's public utility assessment are subject to appropriation by the Legislature, Section 386.480.4 strictly limits such appropriation 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."<sup>7</sup> This appropriation restriction may limit these funds' availability "for public use" and make questionable their use in the total state revenue calculation for Hancock Amendment refunds.

But even if monies generated from the Commission's utility assessment are appropriately considered in the total state revenue calculation, that does not convert those funds into a source for Hancock Amendment refunds. Section 386.370.4 still requires monies in the Public Service Commission Fund to be "devoted solely" to the payment of the Commission's expenditures actually occurred and attributable to the regulation of the public utilities under its jurisdiction.

Respectfully submitted,

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<sup>7</sup>See also, Factual Stipulation, para 22.

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on September 16, 1998.

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