

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY**

August 5, 1998

CASE NO: 00-99-44

Office of the Public Counsel

P.O. Box 7800
Jefferson City, MO 65102

Paul A. Boudreu

Brydon, Swearingen & England P.C.
P.O. Box 456
Jefferson City, MO 65102

Jeremiah W. Nixon, Attorney General

Attn: Ron Molteni
P.O. Box 899
Jefferson City, MO 65102

General Counsel

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael Pendergast

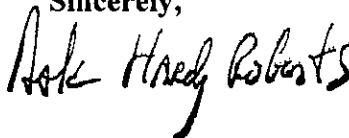
Laclede Gas Company
720 Olive St., Room 1520
St. Louis, MO 63101

Karen Winn, General Counsel

Capitol Building, Room 125
Jefferson City, MO 65101

Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Uncertified Copy:

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 5th
day of August, 1998.

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

ORDER REGARDING APPLICATION FOR REHEARING AND STAY

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 (Applicants) filed an Application For Rehearing And Stay pursuant to Section 386.500¹ and 4 CSR 240-2.160. Applicants seek rehearing regarding the Commission's June 29 Supplemental Order No. 52 (Order 52) in Case No. 11,110. The Commission has established Case No. OO-99-44 to address the application for rehearing and stay.

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 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). The Applicants have requested the Commission reconsider its decision in this order.

Monies paid into the Public Service Commission fund (the Fund) by regulated utilities have been transferred, in part, out of the Fund and

¹ All statutory citations herein are RSMo. 1994 unless otherwise stated.

into the General Revenues of the State of Missouri to facilitate tax refunds to the general public which have been mandated by Mo. Const. art. X, §16-24 (the Hancock Amendment). The Applicants assert that the depletion of the Fund for this purpose is not authorized by law. According to the Applicants, Section 386.370.4 provides that any amount in the Fund "shall not revert to the general revenue fund." However, the statute read in its entirety states that the amount remaining in the PSC fund at the end of the year shall not revert into the general revenue fund. (Emphasis added.) It is unclear whether funds can be removed from the PSC Fund during the year for an "Article X transfer." This may be a case of first impression on this issue and the applicants should be prepared to brief this issue.

For their remedy, Applicants request that the Commission stay the effectiveness and enforcement of its Order 52. Applicants also assert that this particular order is unlawful and of no effect inasmuch as the order the Commission was made effective the day of issuance. Two cases exist which have addressed effective dates of Commission orders. Those cases state that the Commission must provide a reasonable amount of time between the issuance of its order and the effective date. Making a Report and Order effective one day after its issuance causes the report and order to be unlawful. State ex rel. St. Louis v. Public Serv. Comm'n, 228 S.W.2d 1, 2 (Mo. 1950). The court has found the Commission complies with Section 386.500 by making orders effective ten days after issuance. State ex rel. Kansas City, Independence & Fairmount Stage Lines Co. v. Public Serv. Comm'n, 63 S.W.2d 88, 93 (Mo. 1933).

However, it is important to note that these cases specifically, and exclusively, deal with orders which resolve contested cases. In fact, the Circuit Court of Cole County has recently issued a declaratory judgment in

which it has likewise directed the Commission to provide an adequate effective date but limited the effect of that order to prohibiting "making an order or decision, in which a controverted matter is decided, effective on the date thereof ..."² This distinction is important inasmuch as Supplemental Order No. 52 was not issued to resolve a controverted matter and for that reason it is not clear that an effective date "on the date hereof" was, in fact, inappropriate.

Notwithstanding that fact, the Commission will grant rehearing for the purpose of adducing additional facts on the record and accepting pertinent legal arguments regarding the constitutional and procedural issues set out in the Applicants' motion. The Commission will provide an opportunity for intervention and additional pleadings prior to determining the need for an evidentiary hearing. The Commission will also direct the applicants to plead with specificity their intent as to the assessments in question.

Several of the Applicants have sent letters to the Commission, as well as to the Department of Revenue, in which they either "challenge" or "protest" some portion of the assessment in question. Copies of those letters will be made a part of this record so that they may be available and any party wishing to may respond to the statements contained therein. The Applicants will be directed to file a pleading to indicate whether they intend to pay their assessments "under protest" and, if so, what authority exists for the interim treatment of those payments.

Although the Commission intends to review the Applicants' Motion for Rehearing it must be noted that agency adjudicative power extends only to the ascertainment of facts and the application of existing law in order to

² State ex rel. County of Jackson v. The Public Service Commission of Missouri, CV197-1833cc, Declaratory Judgment (March 11, 1998).

resolve issues within the given area of agency expertise. In re City of Kinloch, 242 S.W.2d 59, 63 (1951). "[A]n administrative body or even a quasi-judicial body is not and cannot be a court in a Constitutional sense." *Id.* The judicial power of the State is vested only in the courts designated in Mo. Const. Art. V, Sec. 1. The Public Service Commission has no power to declare any principle of law or equity. Lightfoot v. City of Springfield, 236 S.W.2d 348, 352 (1951). Therefore, the PSC has no power to declare statutes unconstitutional. State ex rel. Missouri Southern Railroad v. Public Service Commission, 168 S.W.2d 1156, 1164 (banc 1914). The PSC may hear evidence from a party regarding the constitutionality of the statute but only for the purposes of creating a record for the issue to be resolved judicially. Missouri Bluffs Golf Venture v. St. Charles County Board of Equalization, 943 S.W.2d 752, 755 (Mo. App. Ct. 1997).

Because Missouri common law states that an administrative agency, such as the Missouri Public Service Commission, has no jurisdiction to determine the constitutionality of a statute, it seems equally apparent that the Commission also lacks the jurisdiction to rule on the constitutionality of an Executive Order such as the directive issued by the Missouri Office of Administration to transfer moneys out of the Fund and into general revenues. Therefore, the Commission will entertain requests for hearing. However, the common law of Missouri suggests that any such hearing would be limited to the creation of a record for the issue(s) to be resolved judicially.

The Commission will schedule a prehearing conference for the purpose of entertaining arguments and motions as to the next step in this matter. The Commission will expedite the time period for interventions and expedite the setting of the prehearing conference. The Commission will also direct

the Records Department to serve a copy of this order upon the Office of Administration and the Attorney General.

IT IS THEREFORE ORDERED:

1. That the Application For Rehearing And Stay shall be granted in part in that a rehearing is hereby granted.
2. That the Application For Rehearing And Stay shall be denied in part as to the Stay pending submission of pleadings ordered herein regarding the exact nature of the stay requested.
3. That each of the individual applicants shall file a pleading setting out with specificity:
 - A. the exact nature of the stay requested and the remedy sought,
 - B. the nature of any "protest" or "challenge" to the assessment payments and whether the protest goes only to the increased portion of the assessment or to the entirety of the assessment,
 - C. Details setting out the total amount of "Article X" distribution received by each Applicant to date, and
 - D. legal authority in support of the respective applicant's argument(s) on each issue, e.g. authority in support of the stay, the protest and other legal issues.
 - E. These pleadings shall be filed not later than August 31, 1998.
4. That any party seeking to intervene shall do so by submitting an application to intervene to: the Secretary of the Commission, P.O. Box 360, Jefferson City, MO 65102-0360 not later than August 31, 1998. Copies of Applications to Intervene shall be submitted to:

James C. Swearengen
Paul A. Boudreau
Brydon, Swearengen & England P.C.
P.O. Box 456
Jefferson City, MO 65102-0456

and

Michael C. Pendergast
Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, MO 63101.

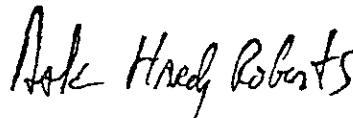
5. That the parties shall appear for prehearing conference for the purpose of narrowing the issues and legal question(s) presented by the Application For Rehearing And Stay. This prehearing conference shall be held in Room 520B of the Harry S Truman State Office Building on September 2, 1998, at 9:00 a.m.
6. That anyone with special needs as addressed by the Americans With Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one of the following numbers: Consumer Services Hotline -- 1-800-392-4211, or TDD Hotline -- 1-800-829-7541.
7. That the Records Department shall serve a copy of this order upon:

Jeremiah W. Nixon, Attorney General
Attn: Ron Molteni
Office of Attorney General
Supreme Court Building
Washington and High Streets
P.O. Box 899
Jefferson City, MO 65102-0899

and

Karen Winn, General Counsel
Office of the Commissioner of Administration
Capitol Building, Room 125
Jefferson City, MO 65101
8. That this order shall become effective on August 15, 1998.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(SEAL)

Lumpe, Ch., Murray, Schemenauer, and
Drainer, CC., Concur.
Crumpton, C., Absent.

Roberts, Chief Regulatory Law Judge

Att/Sec'y: Roberta Fridman
8-5-98 00-99-44
Date Circulated CASE NO.
17
Lumpe, Chair
Crumpton, Commissioner
sm
Murray, Commissioner
RF
Schemenauer, Commissioner
RF
Drainer, Vice-Chair
8-5-98
Agenda Date
Action taken: 4-04A
Must Vote Not Later Than _____

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 5th day of August, 1998.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge