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October 14, 1998

FILED

NOV - 2 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 (Utility Assessments)

Dear Mr. Roberts:

On behalf of The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service, enclosed is an original and fourteen (14) copies each of the following documents for filing with the Commission in the referenced matter:

1. **Post-Hearing Brief of The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service**; and

2. A proposed **Report and Order**.

I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel.

I have enclosed an extra copy of both documents, each of which I request that you stamp "Filed" and return to the person delivering them to you.

Thank you in advance for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Paul A. Boudreau

PAB:db
enc.

cc: Office of the Public Counsel
All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF OF THE EMPIRE DISTRICT ELECTRIC COMPANY, ST. JOSEPH LIGHT & POWER COMPANY, ARKANSAS WESTERN GAS COMPANY d/b/a ASSOCIATED NATURAL GAS CO., MISSOURI-AMERICAN WATER COMPANY, AND UTILICORP UNITED INC. d/b/a MISSOURI PUBLIC SERVICE

I. INTRODUCTION

This case examines the Missouri Public Service Commission's inclusion in public utility assessments for the fiscal year commencing July 1, 1998 of over $1.2 million dollars that have been transferred out of the Public Service Commission Fund (the "Fund") and into the General Revenue Fund ("General Revenues") by the Missouri General Assembly for the distribution of excess state revenues to the income taxpayers of the State of Missouri for tax years 1995, 1996, and 1997.

On June 29, 1998, the Commission issued its *Supplemental Order No. 52* ("Order 52 ") in its Case No. 11,110[1] pursuant to which it purported to estimate the amounts of expenses directly attributable to all groups of public utilities and, also, the amounts of expenses not attributable to any such group.[2] The purpose of Order 52 was to make the assessments against public utilities provided

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[1] *In the Matter of the Assessment against the Public Utilities of the Sate of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 1998.*

[2] Stip., ¶42; Exh. F.

for by §386.370 RSMo[3] for the Commission's fiscal year commencing July 1, 1998. Order 52 was made effective on the date of issuance. The assessments so determined were transmitted to the affected public utilities under cover of separate letters dated June 30, 1998.[4]

On July 28, 1998, a group of public utilities, including Empire, SJLP, ANG, MAWC and UtiliCorp (hereinafter the "Companies"), filed an *Application for Rehearing and Stay* ("Application") alleging a number of errors with respect to Order 52. Thereafter, on August 5, 1998, the Commission issued its Order Regarding Application for Rehearing and Stay pursuant to which it established Case No. OO-99-44 to address the issues raised by the Application.

The Companies contend that the Commission erred in attempting to recover Hancock Amendment tax refunds in this year's public utility assessments. The Hancock Amendment never contemplated, much less authorized, that distributed revenues, excess revenues to which the State of Missouri is not entitled, could be recovered directly or indirectly by the State in later years. Thus, these assessments are in direct conflict with Missouri's constitutional limits on state revenue collection.

II. DISCUSSION AND ARGUMENT

Issue No. 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?

Although the Companies believe that their discussion and argument of this issue is otherwise sufficiently addressed in their *Memorandum of Law* filed in this case on October 6, 1998, the Companies would like to respond to the Staff's argument concerning the alleged "implicit repeal"

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[3] All statutory references are to RSMo 1994, as amended.

[4] Stip., ¶43; Exh. G.

in Staff's *Proposed Conclusions of Law* and Staff's *Memorandum of Law and Argument.*

Staff argues that "[t]o the extent of the transfers directed by House Bills No. 1004 (1996), No. 4 (1997) and No 1004 (1998), these bills implicitly repeal the proscription of Section 386.370.4 RSMo Supp. 1997, that the PSC Fund shall be devoted solely to payment of the Commission's expenditures for the regulation of public utilities."[5] Staff cites County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487 (Mo. banc 1995) in support of this proposition. However, Quiktrip is clearly distinguishable from the circumstances now before the Commission.

First of all, Quiktrip recognized the general rule that repeals by implication are not favored. Id. at 490[3] (citing Poling v. Moitra, 717 S.W.2d 520, 522 (Mo. banc 1986); Kansas City Terminal Ry. Co. v. Industrial Comm'n, 396 S.W.2d 678, 683 (Mo. 1965)).

Second, and most fatal to Staff's argument, is the principle that an *appropriations* bill cannot explicitly or implicitly repeal a Missouri statute. In Quiktrip, the court dealt with a situation where two different statutes appeared to be in conflict.[6] The present case is quite different because it does not deal with two different statutory provisions. Rather, it involves only one statute[7] and several appropriations bills.[8] This distinction makes all the difference in the world.

Under longstanding Missouri Supreme Court case law, an appropriation that contravenes general statutory law is unenforceable. In State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. banc

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[5] Staff's *Proposed Conclusions of Law*, p. 2; see also Staff's Memorandum of Law and Argument, pp. 6-7.

[6] The conflict was between §99.845 and §§67.582.3 and 67.700.3 RSMo.

[7] §386.370, RSMo.

[8] HB 1004-88, HB 4, and HB 1004-89 (Stip., Exh B, C, and E)

1934), an appropriation had transferred $3,000 from the general revenue funds to the Board of Barber Examiners' Fund to pay the board's compensation. However, the general statute limited the payment of salaries to the amount of revenue received by the board during the year. The dispute arose when Davis, a member of the Board of Barber Examiners, sought a writ of mandamus to require the state auditor to pay Davis $125 in compensation for attending board meetings.

Although the Davis court construed the general statute to prohibit the payment of salaries to members of the board from the General Fund, Davis argued that he was still entitled to be paid because the appropriation bill had specifically amended the general statute. The Davis court disagreed, noting that "legislation of a general character cannot be included in an appropriation bill." Id. at 830. According to the Davis court, "[t]here is no doubt but what the amendment of a general statute . . . and the mere appropriation of money are two entirely different and separate subjects." Id. Thus, the Davis court held that the act appropriating $3,000 to the Board of Barber Examiners Fund could not amend the general statutory limitation because a bill that makes an appropriation and also amends a general statute would contain more than one subject, thereby violating Missouri's Constitution. Id.

The Davis decision was recently confirmed in Rolla 31 School Dist. v. State, 837 S.W.2d 1, 4 (Mo. banc 1992) ("This constitutional limitation, which provides that no bill shall contain more than one subject and limits appropriations to appropriations only, is still good law.") Also, a number of Missouri Attorney General Opinions echo the prohibition on including general legislation in appropriation bills. (See e.g. Opinions No. 23-85; 53-84; 206-1980; 43-1980; 51-1979) (attached hereto as Appendix A)

Thus, the Companies renew their contention that the disputed transfers out of the Fund

pursuant to HB 1004-88, HB 4 and HB 1004-89 were not authorized by law. The transfers out of the Fund were not for the regulation of public utilities but, rather, were a reversion of monies in the Fund to General Revenues in direct violation of §386.370, RSMo.

Issue No. 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.

The Companies believe that their discussion and argument of this issue is sufficiently addressed in the Companies' *Memorandum of Law* filed in this case on October 6, 1998.

Issue No. 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?

The Companies believe that their discussion and argument of this issue is sufficiently addressed in the Companies' *Memorandum of Law* filed in this case on October 6, 1998.

Questions from the Bench

a.) Payment of Assessments under Protest

On August 31, 1998, the Companies filed a *Responsive Statement of Joint Applicants* which explained their decision to pay the Commission's utility assessments under protest. The *Responsive Statement* analogized this payment under protest to the procedure provided for by the Missouri General Assembly to protest taxes. *See* §139.031, RSMo.

Although the Commission's utility assessments may or may not ultimately construed to be

in the nature of a tax, the Companies have made these payments under protest in a good faith effort to preserve their rights to the assessments. The Companies have declined the alternative – simply withholding payment of the assessments pending resolution of this case – in order to avoid causing disruption of the Commission's day-to-day operations while at the same time preserving their rights to a refund of any portion of the assessments paid which ultimately may be determined to have been unauthorized by law.

The Companies have found no legal authority directly on point for this situation. Thus, absent a court decision, the Companies are not confident that the Commission is a "collector" of taxes (given their contention that the Commission's assessments are not "taxes") and that their payments under protest have any legal effect under these circumstances. Given this uncertainty, the Companies believe that the Commission should immediately stay the enforcement of the public utility assessments in *Supplemental Order No. 52* so that the Companies can preserve their legal rights without having to make payments under protest or resort to withholding subsequent installment payments. Again, the Companies simply wish to preserve their legal rights to the disputed assessment payments in the least disruptive fashion.

b.) "Revert" vs. "transfer"

At the hearing, the parties were requested to explore whether a "transfer" of monies out of the Fund to General Revenues amounts to a "reversion" to the General Revenues. Specifically, the parties were asked to address the use of the term "revert" in the Public Service Commission Fund

and the term "transfer" in the three appropriations bills[9] included in the Stipulation of Facts.

Section 386.370.4, RSMo, governs the assessments made against utilities that constitute the Fund. Under the statute, the State Treasurer is to credit the payments made by the utilities to the Fund that are "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." Id. The statute then specifically provides:

> 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.

Id. (emphasis added)

The term "revert" is not otherwise defined in the statutes covering the Missouri Public Service Commission. Thus, the best source for construing the meaning of the statute's wording is

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[9] See House Bill No. 1004, 88th General Assembly (1996) Section 4.035 ("There is *transferred* out of the State Treasury, chargeable to the funds listed below, such amounts as are necessary for refunds required by Article X, Section 18(b), Constitution of Missouri, to the General Revenue Fund."); House Bill No. 4, 89th General Assembly (1997) Section 4.035 ("There is *transferred* out of the State Treasury, chargeable to various funds, such amounts as are necessary for refunds required by Article X, Section 18(b), Constitution of Missouri, to the General Revenue Fund."); House Bill No. 1004, 89th General Assembly (1998) Section 4.035 ("There is *transferred* out of the State Treasury, chargeable to various funds, such amounts as are necessary for refunds required by Article X, Section 18(b), Constitution of Missouri, to the General Revenue Fund.") (emphases added).

their plain ordinary meaning found in the dictionary.[10] The American Heritage Dictionary 3d ed. (1992) defines **revert** as "1. To return to a former condition, practice, subject, or belief. 2. *Law* To return to the former owner or the former owner's heirs. Used of money or property." Black's Law Dictionary, 6th ed. (1991) defines **revert** as "To turn back, to return to . . . ."

The term "transfer" is used in the three appropriations bills included in the Stipulation of Facts, and the term "transfer" is not defined within those appropriations bills. Here again, the best source for construing this term's meaning is its plain ordinary meaning found in the dictionary.[11] The American Heritage Dictionary 3d ed. (1992) defines **transfer** as "1. To convey or cause to pass from one place, person or thing to another. 2. *Law.* To make over the possession or legal title of; convey." Black's Law Dictionary, 6th ed. (1991) defines **transfer** as "To convey or remove from one place, person, etc., to another; pass or hand over from one to another; specifically, to change over the possession or control of . . . ."

Under these definitions, it appears that "transfer" is a general conveyance from one place, person, or thing, and "revert" is a specific kind of transfer, that is, a transfer to the former possessor by a subsequent possessor. Although §386.370, RSMo, and the three appropriations bills use two different words, their meaning is the same: funds are not to "revert" or be "transferred" *back* to the general revenue fund. Thus, these terms have substantially the same meaning within the different contexts that they are used. Certainly, the *effect* of the Article X transfers in this case is no different

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[10] In construing a statute, words should be given their plain and ordinary meaning. §1.090 RSMo 1994. The best source for common terms is the dictionary. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982).

[11] See Roberts v. McNary, supra note 8 at 335.

than the statutory proscription on reversion, that is, money intended for the exclusive use of the Commission for the regulation of public utilities has been moved into General Revenues to be used for general public purposes (i.e. distribution of excess state revenues) and not for the regulation of public utilities.

III. CONCLUSION

The Article X transfers in the Commission's 1999 fiscal year budget effectively nullified the constitutional state revenue limitation put in place by the citizens of the State of Missouri and carried out by the General Assembly. Thus, the Commission's Order 52 was unlawful and unconstitutional to the extent that it undertakes to recover through public utility assessments for the fiscal year commencing July 1, 1998, any portion of the Article X transfers provided for by HB 1004-88, HB 4 or HB 1004-89. The Commission should recalculate and reissue its public utility assessments omitting any amount attributable to said transfers out of the Fund.

Respectfully submitted,

Paul A. Boudreau #33155
Brian T. McCartney #47788
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P. O. Box 456
Jefferson City, MO 65102-0456
(573) 635-7166

Attorneys for The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 2nd day of November, 1998, to:

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***1317** 1985 WL 202727
Office of the Attorney General
State of Missouri

Opinion No. 23-85
February 14, 1985

The Honorable Edwin Dirck
Senator
District 24
State Capitol Building
Room 221
Jefferson City, Missouri 65101

Dear Senator Dirck:

This letter is in response to your request for an opinion of this office asking whether in view of the **legislative appropriation** history of S.C.S.H.B. 1013, Eighty-Second General Assembly, the Department of Social Services had authority to utilize funds from C.C.S.H.B. 1011 for the purpose of relocation and movement of personnel from the Kansas City State Office Building or for the purpose of renovation of the office building.

It is our understanding that the appropriations to which you refer were in C.C.S.H.B. 1011, summarized in pertinent part as follows:

Section 11.100. To the Department of Social Services, For the Division of Family Services, for the purpose of funding Administrative Services, Expense and Equipment.

Section 11.105. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Income Maintenance Administration, Expense and Equipment.

Section 11.140. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Children's Services Administration, Expense and Equipment.

Section 11.171. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Field Service Operations, Expense and Equipment.

Section 11.210. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Services for the Blind Administration, expense and equipment.

We believe that the threshold question is whether the Executive Branch of state government has the power to move personnel from the Kansas City State Office Building, to rent quarters from private interests and to renovate either the Kansas City State Office Building premises or the rented premises to make them suitable for present and future operations. In this respect we note that the Governor's Executive Order 84-10 dated July 24, 1984, found an asbestos hazard to exist in the Kansas City State Office Building and accordingly ordered the Office of Administration to implement a temporary relocation plan for state employees who work in that building, ordered that the directors and employees of the state agencies having personnel located in said building cooperate with the Office of Administration in the implementation of the temporary relocation plan and that the directors of such agencies provide adequate funding for that portion of the temporary relocation plan which affects their respective agency from existing F.Y. 1985 appropriations.

We are of the view that the Governor did in fact have the substantive authority to cause the agencies involved to move from said state office building and to rent space to house such agencies operations and to renovate such space to make it suitable for such agencies operations. The facts that we have at this time are not clear as to the expenditures that may have been made with respect to the renovation of the Kansas City State Office Building.

Your principal question asks whether the appropriations, which we have quoted above, made in C.C.S.H.B. 1011, could be expended for such moving, rent and renovation. In our view the purpose of said appropriations, 'expense and equipment', was sufficient to cover such expenditures. You have inquired as to whether the **legislative** determination in the history of the **appropriations** measures would be sufficient to limit the purpose of the **appropriations** as stated in C.C.S.H.B. 1011. If the **appropriations** language was doubtful or ambiguous, it would be proper for a court to resort to the journals of the **legislative** assembly to ascertain the intent of the **legislature**. See Ex Parte Helton 93 S.W. 913 (St. Louis App. 1906). Further, under Section 490.160 RSMo 1978 the printed journals of the Senate and the House are prima facie evidence to the same extent that duly authenticated copies of the originals would be. Again, however, legislative intent appears to be only relevant when there is a statutory provision which is susceptible of several different constructions. Ex parte Helton at l.c. 915.

It is clear that the Executive Branch of state

government does not generally have the authority to change the purpose of an appropriation. State ex. inf. Danforth v. Merrell, 530 S.W. 2d 209 (Mo. banc 1975). However, where the purpose of the appropriation is sufficiently broad to cover the expenditures made under the appropriation the rule of Merrell does not apply since there is no change of purpose.

***1318** Implicit within the questions you ask is the question of **legislative** control of expenditures by the **appropriation** process.

Article IV, Section 23, provides in pertinent part:

> Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose.

Section 21.260 RSMo 1978 provides:

> Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriations shall be made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount of purpose.

Therefore it is clear that the **legislature** has a constitutional mandate to state the purpose for which **appropriations** are made. See our Opinion No. 331-1974, copy enclosed. However, this office concluded in Opinion No. 212-1974, copy enclosed, that, even assuming the **legislature** in a particular **appropriation** act did intend to set certain personnel positions and salaries, such would constitute general **legislation** in an **appropriation** bill and would be prohibited by Article III, Section 23, Missouri Constitution. See also Opinion No. 189-1974, copy enclosed.

We are also enclosing a copy of our Opinion No. 401-1971 which summarizes various instances in which this office expressed the view that certain limitations in **appropriation** acts constituted prohibited substantive **legislation**.

In the precise situation you present it seems likely that even an express and clear negative expression of **legislative** direction in an **appropriation** measure which is otherwise sufficient to permit such expenditures may be construed as invalid substantive **legislation**. From the prior opinions of this office which we have enclosed it can further be concluded that a descent into minute detail could be construed as substantive legislation and prohibited as such or, depending upon the circumstances, may constitute a violation of the separation of powers clause in Article II, Section 1, Missouri Constitution.

Clearly, however, the Constitution mandates that the **legislature** distinctly specify the amount and purpose of the **appropriation** without reference to any other law. In this respect we again refer you to our Opinion No. 331-1974, copy enclosed, which found a limitation on expenditures based on the language used in the appropriation act.

Very truly yours,

William L. Webster

Attorney General

***1369** 1984 WL 194840
Office of the Attorney General
State of Missouri

Opinion No. 53-84
August 13, 1984

The Honorable Roger B. Wilson
Senator
District 19
State Capitol Building
Room 424
Jefferson City, Missouri 65101

Dear Senator Wilson:

This opinion is in response to your question asking:

Does the Cancer Commission have the power to issue a grant for cancer research to a private, not-for-profit Missouri corporation, who is affiliated with the State Cancer Center for research purposes, from funds which the general assembly has appropriated for the purpose of funding cancer detection and research grants through agencies affiliated with the State Cancer Center: (a) Does the Cancer Commission have the power to do the above for a private, not-for-profit Missouri corporation, who is not affiliated for cancer research purposes with the State Cancer Center; (b) If the Cancer Center does have the power to issue such grants as described above, may it issue a grant upon the Commission's opinion that the General Assembly's appropriation directed the Cancer Commission to issue such without competitive bidding, and to the not-for-profit Missouri corporation as a sole source recipient?

The question mentions an appropriation act that may purport to authorize such a grant. **Appropriation** acts may not contain substantive **legislation**. State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338, 340 (Banc 1926); State ex rel. McKinley Pub. Co. v. Hackmann, 314 Mo. 33, 282 S.W. 1007, 1010-1011 (Banc 1926). Therefore, appropriation acts may not authorize the Cancer Commission to make the grants described.

We have not been directed to, nor has independent research revealed, a statute purporting to authorize the Cancer Commission to make the grants described in the question. Accordingly, we must conclude that such grants are not authorized.

Very truly yours,

John Ashcroft

Attorney General

***1962** 1980 WL 115464
Office of the Attorney General
State of Missouri

Opinion No. 206
November 25, 1980

The Honorable Wayne Goode
Chairman
House Appropriations
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Goode:

This letter is in response to your question asking:

Your official opinion is requested to determine whether the language in Section 4.041 of House Bill 4, First Regular Session of the 80th General Assembly legally restricts the expenditures of the Branch Offices to $1.00 per transaction; and, if so, whether any costs or functions of the Branch Offices may be excluded when figuring the cost per transaction?

You further state:

House Bill 4 of the First Regular Session of the 80th General Assembly, Section 4.041 states the following:

Section 4.041. To the Department of Revenue

For the Division of Motor Vehicle and Drivers Licensing

For Personal Service, Equipment Purchase and Repair and Operation expenditures for the existing branch offices; this appropriation is to be the sole source of funding for the twelve offices on the basis of One Dollar ($1.00) per transaction and any funds not required on this basis shall elapse.

From State Highway Department Fund $2,559,593

The director of revenue maintains branch offices pursuant to § 32.040, RSMo.

It is our understanding that the present expenditures under § 4.041 exceed the one dollar basis figure. It is not clear whether the excess expenditure exists for each branch office or for all branch offices. However, in view of the result that we reach, such a determination is not relevant.

Your request involves the question of whether such **legislation** which descends to minute levels in an **appropriation** bill amounts to general **legislation** which cannot be passed in an **appropriation** act. It is our view that such provisions are in the nature of substantive legislation. In this respect we enclose our Opinion No. 207, April 19, 1974, to Young, which is self-explanatory.

We are therefore of the view that § 4.041 should not be given an interpretation which would restrict the expenditures for revenue branch offices to one dollar per transaction.

In view of our answer to your first question, an answer to your second question is not necessary.

Very truly yours,

John Ashcroft

Attorney General

***2165** 1980 WL 115392

Office of the Attorney General
State of Missouri

Opinion No. 43
February 13, 1980

Honorable Dennis K. Hoffert
Chairman
State Tax Commission
623 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Hoffert:

This letter is in response to your question asking:

Does the State Tax Commission of Missouri possess the statutory authority to convene assessors' training schools to be conducted by a professional assessment organization, to pay the assessors' tuition for the schools, and to pay a per diem to attending officials, as set forth in the budget request of the Commission and as included in an appropriation bill enacted by the General Assembly?

You also state:

In the last session of the General Assembly an appropriation bill was enacted funding the State Tax Commission for FY 1980. The State Tax Commission had included $70,750 in its budget request for a priority item entitled 'Assessor Education.' This amount was granted to the Commission in its operations allotment. Included in the $70,750 was $31,250, appropriated for the purpose of providing a $25.00 per diem reimbursement to assessing officials who attend assessor training schools and $27,500 to cover the cost to the Commission of providing for a professional assessment organization to conduct the schools.

The Office of Administration has expressed the opinion that there is insufficient statutory authority for the Commission to authorize the payment of the per diem to attending officials.

We also understand that it is anticipated that the courses of instruction will be given at approximately four locations in Missouri. The $25.00 per diem expense allowance is intended to cover the personal expenses of the assessors in attending such a meeting and mileage expenses will not be paid to such assessors in attending such meeting.

However, in order to accomplish these objectives, it is necessary that the State Tax Commission have the requisite statutory authority. Unquestionably, the Commission has general statutory authority over assessing officials pursuant to § 138.410, RSMo 1978, but this section cannot be used to expand the Commission's power into an area specifically covered by other sections of law. The **appropriation** of money by the general assembly does not constitute authority for the Commission to act because **legislation** of a general character cannot be included in an **appropriations** bill. See State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934), and State ex rel. Gaines v. Canada, 113, S.W.2d 783, 790 (Mo. En banc 1937).

Section 138.450, RSMo 1978, authorizes the Commission to call an annual group meeting of two or more assessors and to reimburse them for actual transportation expenses at the same rate as that established by the Commissioner of Administration under the provisions of § 33.090, RSMo. Per diem for such meetings is set at $9.00. More importantly, § 53.091, RSMo 1978, specifically deals with the assessment studies required of assessors. Section 53.091 reads as follows:

The assessors of this state, in addition to their other duties, shall attend a course of studies as prescribed by the state tax commission as is herein provided. Such studies shall be designed to develop standarized means and methods of assessment of and a professional competence regarding assessments of real property and tangible personal property. The state tax commission shall establish such a course containing a curriculum containing the practices and procedures of assessors. Instructors shall be persons of professional competence from the staff of the state tax commission and such county assessors as the commission may deem to have adequate qualifications and professional experience. Each assessor shall as early in his term as is reasonably convenient attend such course at location and time set by the commission, and upon completion thereof be given a certificate. From time to time, assessors may be required by the commission to attend further instruction where the need exists and facilities are available and where the commission believes such studies are necessary to have assessors current on developments in practices and procedures of assessing real and tangible personal property, and the expenses for attending such course of study shall be reimbursed in the same manner as is provided in section 138.450, RSMo.

This section deals exhaustively with the Commission's authority to hold training sessions for assessors. It not only outlines the purposes to be accomplished by such training sessions and the instructors to be utilized, said section limits the allowable expenses to those set forth in § 138.450. Therefore, it is our opinion that the appropriations mentioned in your opinion request cannot be utilized in the manner suggested.

***2166** Very truly yours,

John Ashcroft

Attorney General

***2366** 1979 WL 37817

Office of the Attorney General
State of Missouri

Opinion No. 61
February 20, 1979

MENTAL HEALTH:

APPROPRIATIONS:

The Department of Mental Health is headed by the Director of the Department and the legislature cannot appropriate money to the Mental Health Commission for the Commission to allocate to various facilities of the Department of Mental Health.

Honorable Ron Bockenkamp
Representative
District 128
Room 115
State Capitol Building
Jefferson City, Missouri 65101

Honorable Joe D. Holt
Representative
District 109
Room 309
State Capitol Building
Jefferson City, Missouri 65101

Dear Messrs. Bockenkamp and Holt:

This is in response to your request for an official opinion on the following questions:

"1. Is the Department of Mental Health headed by the Mental Health Commission or a director appointed by the Mental Health Commission?

"2. Can the commission have funds appropriated to it which it would then allocate to various subparts or agencies of the Department of Mental Health?"

Furthermore, you have stated the following in your request:

"The Governor in his executive budget has stated that the 'Mental Health Commission is the statutory head of the Department of Mental Health.' He recommends that as the head of the department, certain financial resources be appropriated to the commission, and that the commission thereafter have the authority to allocate those funds consistent with the commission's strategic plans for the department."

The recommendation of the Governor is contained in an appropriation bill, House Bill No. 9, First Regular Session, 80th General Assembly. The particular section provides as follows:

"Section 9.010. To the Department of Mental Health--Mental Health Commission

For improved institutional care and treatment
Personal Service and Expense and Equipment

From General Revenue Fund . . . . . .$2,825,033."

Concerning your first question, Art. IV, § 37(a), of the Missouri Constitution explicitly provides that the Department of Mental Health shall be under the control of the Department director as follows:

"The department of mental health shall be in charge of a director who shall be appointed by the commission, as provided by law, and by and with the advice and consent of the senate. The department shall provide treatment, care, education and training for persons suffering from mental illness or retardation, shall have administrative control of the state hospitals and other institutions and centers established for these purposes and shall administer such other programs as provided by law." (Emphasis added.)

During the first regular session of the 79th General Assembly im 1977, the legislature enacted House Bill 841, which repealed and reenacted § 202.035 to conform with the constitutional mandate in § 37(a), Art. IV. Section 202.035, RSMo Supp., 1977, provides as follows:

"The head of the department of mental health shall be the director of the department who shall be appointed by the mental health commission, by and with the advice and consent of the senate. The director shall serve at the pleasure of the commission and his salary shall be set by the commission at an amount not to exceed $40,000 per year." (Emphasis added.)

In attorney general's opinion No. 161, dated April 4, 1974, to Harold P. Robb, M.D. (copy enclosed), we held that § 9.1 of the Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp., 1975, is unconstitutional to the extent that it attempts to make the Mental Health Commission the head of the Department of Mental Health. The provisions of § 202.035 as amended are in conformance with § 37(a)

Art. IV of the Constitution. Thus, the statutory head of the Department is the Director.

As to your second question, the State Mental Health Commission was established by the Omnibus State Reorganization Act of 1974, § 9.2, Appendix B, RSMo Supp. 1975 which provides as follows:

> "On the effective date of this act a 'state mental health commission', composed of seven members, shall be established and it shall be the successor to the former state mental health commission and it shall have all the powers, duties and responsibilities of the former commission."

In subsection 3 of § 9 of the Reorganization Act, the "powers, duties, and functions" assigned by law to the officials of the former division of mental health of the Department of Public Health and Welfare were transferred to the Department of Mental Health.

The "powers, duties, and functions" of the State Mental Health Commission are set forth as follows in subsection 6 of § 202.031, RSMo 1969:

> "6. (1) The commission shall advise the director of the [department] of mental health as to all phases of professional standards including patient care, training of personnel, establishment of treatment programs, obtaining adequate staffs, establishment of medical and statistical records and operation of practices in order that they may be compatible with professional requirements.
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> "(2) The commission shall advise the director in the approval and guidance of research projects and distribution of research funds.
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> "(3) The commission shall assist the director in establishing and maintaining the best possible practices in all mental health facilities."

***2367** Thus, as to any responsibility to staff and to operate the various facilities of the Department, the Commission has merely an advisory role as to what standards should be employed to obtain adequate staffs and establish professional practices under subdivision (1) of subsection 202.031.6. Furthermore, they are to "assist the director in establishing and maintaining . . . practices" in the facilities under subdivision (3) of the subsection. Under the Constitution and applicable statute, they do not have any active or primary function to allocate staff, expenses, and equipment to the various facilities.

When subsection 6 of § 202.031 which provides that the Commission shall be advisory in nature is read in conjunction with § 37(a), Art. IV, of the Missouri Constitution and § 202.035, RSMo Supp. 1977, which provide that the Director of the department is in charge of the department, it is clear that the Director has the statutory duty and power to administer the department with advice and assistance from the Commission.

If the General Assembly in its appropriation bill were to adopt the recommendation of the Governor to appropriate $2,825,033 to the Mental Health Commission for it to use to improve institution-based care consistent with its strategic plans, the General Assembly would be attempting to modify the statutory duties, powers, and functions of the Commission as expressed in § 202.031, supra, to enable the commission to have administrative duties without statutory authority. It has been, and is, the holding of the courts of this State and the holding of this office that the **legislature** cannot **legislate** in an **appropriations** act. State ex rel Davis v. Smith, 75 S.W.2d 828, 830 (Mo. banc 1934); State ex rel Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. banc 1938), reversed on other grounds 305 U.S. 337; Attorney General's Opinion 152, dated March 27, 1974, to Alfred C. Sikes, and Attorney General's Opinion 401, dated August 27, 1971, to Donald L. Manford.

In Opinion No. 10 to I.T. Bode, Director of the Missouri Conservation Commission, June 11, 1953, a copy of which is enclosed, this office stated:

> "The law is well established in this State that the General Assembly cannot **legislate** by an **appropriation** act. **Legislation** of a general character cannot be included in an **appropriation** bill. To do so would violate the provisions of the Constitution of Missouri, namely, section 23, Art. III, . . . which . . . reads:
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> 'No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which monies are appropriated.'"

Consequently, it is our opinion that if the **legislature** were to adopt the Governor's recommendation to appropriate money to the Commission for it to spend in its discretion, the **appropriation** would be invalid as an attempt to **legislate** in an **appropriations** bill.

We do not believe that it is necessary to rule at this time whether the legislature could enact a statute which would authorize the Mental Health Commission to spend money appropriated to such Commission for operational purposes of the Department of Mental Health in view of the provisions of § 37(a), Art. IV of the Constitution.

CONCLUSIONS

It is the opinion of this office that the Department of Mental Health is headed by the Director of the Department and the legislature cannot appropriate money to the Mental Health Commission for the Commission to allocate to various facilities of the Department of Mental Health.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Reginald H. Turnbull.

Very truly yours,

John Ashcroft

Attorney General