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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS  
Hearing  
October 14, 1998  
Jefferson City, Missouri  
Volume 2

In the Matter of the Assessment )  
Against the Public Utilities in )  
the State of Missouri for the ) Case No. 00-99-44  
Expenses of the Commission for )  
the Fiscal Year Commencing )  
July 1, 1998. )

DALE H. ROBERTS, Presiding,  
CHIEF REGULATORY LAW JUDGE.  
SHEILA LUMPE, Chairperson,  
HAROLD CRUMPTON,  
M. DIANNE DRAINER,  
CONNIE MURRAY,  
ROBERT G. SCHEMENAUER,  
COMMISSIONERS.

REPORTED BY:  
KELLENE K. FEDDERSEN, CSR, RPR  
ASSOCIATED COURT REPORTERS, INC.

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9 St. Joseph Light & Power Company.  
10 Arkansas Western Gas Company, d/b/a  
11 Associated Natural Gas Company.  
12 Missouri-American Water Company.  
13 UtiliCorp United, Inc., d/b/a  
14 Missouri Public Service.

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FOR: Staff of the Missouri Public  
Service Commission.

1 P R O C E E D I N G S

2 JUDGE ROBERTS: On the record, please.

3 Good morning, ladies and gentlemen. We're  
4 here for the oral argument of the legal issues in Case  
5 No. 00-99-44, in the Matter of the Assessment Against  
6 the Public Utilities in the State of Missouri for the  
7 Expenses of the Commission for the Fiscal Year  
8 Commencing July 1, 1998.

9 Before we went on the record, I handed out  
10 just a typed sheet that I had put together for my own  
11 use and thought I should share with the parties. I  
12 believe this captures the order in which we will  
13 proceed this morning.

14 I won't list the parties here, but if you  
15 want to do your entries of appearance in this order, I  
16 think we'll probably follow this order all morning  
17 long unless something extraordinary occurs.

18 So with that I'll ask for the entries of  
19 appearance starting with Empire District, please.

20 MR. BOUDREAU: Let the record reflect the  
21 appearance of Paul A. Boudreau and James C.  
22 Swearengen, the law firm of Brydon, Swearengen &  
23 England, 312 East Capitol Avenue, Post Office Box 456,  
24 Jefferson City, Missouri 65101, appearing on behalf of  
25 the Empire District Electric Company, St. Joseph Light

1       & Power Company, Arkansas Western Gas Company, doing  
2       business in the state as Associated Natural Gas  
3       Company, Missouri-American Water Company, and  
4       UtiliCorp United, Inc., doing business as Missouri  
5       Public Service.

6               MR. PENDERGAST: Michael C. Pendergast  
7       appearing on behalf of Laclede Gas Company. My  
8       business address is 720 Olive Street, St. Louis,  
9       Missouri 63101.

10              MR. FISCHER: James M. Fischer, 101 West  
11       McCarty Street, Suite 215, Jefferson City, Missouri  
12       65101, appearing on behalf of Fidelity Natural Gas,  
13       Inc., Atmos Energy through its division United Cities  
14       Gas Company, Greely Gas Company, Southern Missouri Gas  
15       Company, LP, and Fidelity Telephone Company,  
16       collectively referred to as the Small LDC Group.

17              MR. HACK: Appearing on behalf of Missouri  
18       Gas Energy, a division of Southern Union Company,  
19       Robert J. Hack, 3420 Broadway, Kansas City, Missouri  
20       64111.

21              MR. BUB: Leo Bub for Southwestern Bell  
22       Telephone Company. Our address is One Bell Center,  
23       St. Louis, Missouri 63101.

24              MR. KOEGEL: William H. Koegel appearing on  
25       behalf of Kansas City Power & Light Company, 1201

1 Walnut, Kansas City, Missouri 64141-9679.

2 MR. KEEVIL: Appearing on behalf of  
3 Trigen-Kansas City Energy Corporation, Jeffrey A.  
4 Keevil of the law firm of Stewart & Keevil, LLC, 1001  
5 Cherry Street, Suite 302, Columbia, Missouri 65201.

6 MR. COFFMAN: John B. Coffman on behalf of  
7 the Office of the Public Counsel, P.O. Box 7800,  
8 Jefferson City, Missouri 65102.

9 MR. HAAS: The Staff of the Commission  
10 appears by William Haas. My address is Post Office  
11 Box 360, Jefferson City, Missouri.

12 JUDGE ROBERTS: Thank you.

13 Are there any motions or any issues to take  
14 up at this time?

15 MR. BOUDREAU: I might point out one thing.  
16 I don't know if it got filed, I believe this morning.  
17 I renewed my request for a stay of the Commission's  
18 Order to the extent of the amount of the assessments  
19 attributable to the Article X transfers. This had  
20 been discussed, I think, earlier at the prehearing on  
21 it.

22 Since that time Staff has generated some  
23 calculations which have identified the amount that's  
24 attributable to that particular issue and, as  
25 discussed at that time, I reserve the right to renew

1       that request. So that filing has been made. I don't  
2       know that I'm requesting a ruling at this time, but  
3       just to bring it to your attention.

4               JUDGE ROBERTS: Good, and thank you. We did  
5       get it. I believe it was filed on the 13th. I don't  
6       anticipate that we'll rule on it today. I certainly  
7       can't rule on that. You might bring that issue up  
8       again in your argument, if you would, please, to sort  
9       of address that to the Commissioners' attention and  
10      to -- that may generate some additional questions on  
11      that particular issue.

12             Anything else?

13             Just so that you'll be aware of this issue,  
14      there may be some questions, and you may be able to  
15      prepare for it before the Commissioners get here.  
16      There may be in this case the issue of -- simple issue  
17      of public policy, which I don't believe was addressed  
18      at least under that heading in the Stipulation of  
19      Facts or in any of your legal memoranda, and if you'd  
20      like to address it.

21             Otherwise, the Commissioners or the Bench  
22      may ask questions on what the public policy issues are  
23      regarding whether moneys should be collected from  
24      ratepayers by the utility companies, paid in the form  
25      of assessments to the Commission, transferred to the

1 State, and sent back to the ratepayers in the form of  
2 a tax, and I think it's called a rebate or a return.

3 I think they're not calling it a tax refund  
4 because that counts against your taxes. That's a  
5 credit against your taxes for the next year, I  
6 believe.

7 But in any event, there is that issue about  
8 sort of the circular motion, and there are some -- I  
9 think there will be some questions on that issue, just  
10 so that you'll be prepared.

11 Anything else? Hearing nothing, we'll go  
12 off the record. I'll ask the Commissioners to join  
13 us. I think they're probably ready.

14 (Discussion off the record.)

15 JUDGE ROBERTS: On the record, please.

16 Ladies and gentlemen, we're back on the  
17 record. The Commissioners have joined us on the  
18 Bench, and we're ready to proceed with the oral  
19 argument presentation on this case.

20 In the earlier portion this morning I'd  
21 handed out a list which I believe is the order that  
22 we'll follow this morning. Starts off with  
23 Mr. Boudreau. If you'd like to begin, Mr. Boudreau,  
24 please.

25 MR. BOUDREAU: Yes. Thank you.



1           May it please the Commission? Good morning.  
2       I believe I started this whole thing, so I guess it's  
3       only fitting that I should start off. My name is Paul  
4       Boudreau. I represent five utility companies that are  
5       participating in this case: the Empire District  
6       Electric Company, St. Joseph Light & Power Company,  
7       UtiliCorp United, Associated Natural Gas Company and  
8       Missouri American Water Company.

9           I believe -- I'm not going to try and repeat  
10      the procedural history that's gotten us to this point.  
11      I think we're all aware of what's happened. It's  
12      related to the Commission's Order, their Supplemental  
13      Order 52 in its Case No. 11-110, which, as I  
14      understand it, is a continuing docket in which the  
15      Commission customarily issues its annual PSC  
16      assessments.

17           For the assessments, or the Order 52 was the  
18      Order that the Commission issued to address what I in  
19      shorthand will refer to as the 1999 fiscal year  
20      budget, but it's a fiscal year that commences from  
21      July 1, 1998 and ends end of June of 1999. So that's  
22      the jargon I'm using. If I'm using it incorrectly, I  
23      hope you will forgive me for that.

24           The assessment, the letter that accompanied  
25      the assessments this year identified a couple of items

1       that resulted in what I think has -- even the  
2       Commission's characterized has been a significant  
3       increase in the PSC assessments.

4               One was some costs associated with the move  
5       to the Hotel Governor, which I understand are  
6       infrastructure-type costs which are anticipated as  
7       that moves takes place. And the other item is  
8       Article X transfers associated with legislative  
9       activity related to the Hancock Amendment revenue  
10      distributions for tax years 1995, 1996 and 1997.

11             We're not taking issue with the Hotel  
12      Governor costs. The interest that my client has or my  
13      clients have in this is strictly related to the  
14      Article X transfers, and specifically it's \$1,220,332,  
15      if I've done my math correctly, of what are referred  
16      to as Article X transfers out of Public Service  
17      Commission fund and into the general revenue's fund  
18      for Hancock distribution. That's included in the 1999  
19      fiscal year assessment.

20             My clients contend basically two things. I  
21      know there's three issues, but to me it's basically  
22      two things.

23             One, we contend that the transfers were not  
24      authorized by law, and we look to the language of  
25      Section 386.370, which is the statute that authorizes

1 the Commission to impose assessments and gives the  
2 standards by which the assessments are to be measured.

3 The Hancock Amendment we would contend in no  
4 way authorizes a transfer of funds out of the PSC or  
5 the Public Service Commission fund even if it -- even  
6 if the amounts in the fund or the assessments that are  
7 paid into the fund are included in the calculation of  
8 total state revenue. It's kind of it in a nutshell.

9 The second issue, and frankly it's the issue  
10 that I think is the one that's the most properly  
11 before the Commission, is even if the transfer was  
12 authorized by law, even if we get past the first issue  
13 and get to -- get past that, even if you assume that  
14 it's authorized by law, our argument is that the  
15 Commission's not authorized to recover the transfers  
16 in subsequent PSC assessments.

17 And that's because under the language of the  
18 assessment statute the Commission's got to calculate  
19 its budget based on expenses to be incurred reasonably  
20 attributable to the regulation of public utilities.  
21 That's the standard in the statute.

22 My argument, and if you've read the legal  
23 memorandum, I've gone through each of those items, and  
24 we contend that it doesn't meet the three-part test.

25 A related issue, it's identified as the

1     third issue in the agreed-to statement of issues, but  
2     I think it's related to this one, is whether the  
3     efforts -- or whether a recovery of these Hancock tax  
4     distributions frustrates the constitutional purpose of  
5     the Hancock Amendment, and we would argue that it  
6     does.

7             The whole pur-- if you get past the first  
8     issue and you agree that these should have been  
9     calculated in total state revenue, that the  
10    Legislature acted appropriately in transferring them  
11    to general revenues and then distributing them to the  
12    income tax payers, the whole purpose of the Hancock  
13    Amendment was to facilitate a mechanism for  
14    calculating how much excess revenue the State has  
15    recovered or taken in in any particular year and  
16    providing a mechanism for giving that back to the  
17    rightful owners. And the way the Hancock Amendment's  
18    drafted, it's directed toward the income tax payers of  
19    the state.

20            We would argue that it's inconsistent with  
21    that constitutional revenue limit to attempt to  
22    recover these transfers for the prior tax years in the  
23    coming tax year.

24            You've asked us to address a number of  
25    particular issues, but I will tell you that I don't --

1 after much looking at these issues, I'm not sure that  
2 I want to put -- or encourage the Commission to put  
3 too much weight on the first issue, because I'm not  
4 sure as a practical matter that the Commission's much  
5 in a position to do anything about it, the transfers  
6 that is.

7 And second of all, I'm not sure it really  
8 gets to the key issue in the case, but there are a  
9 number of issues that were rolled into that that the  
10 Commission's asked that we address, and I will address  
11 those at this point. If you want a more detailed  
12 discussion of them, you'll find that in my Memorandum  
13 of Law.

14 The first issue was -- that I'll point out  
15 is that for purposes of Hancock Amendment analysis, I  
16 think the PSC assessments are clearly assessments in  
17 the truest sense of the term. And there's a number of  
18 reasons for doing -- for concluding that.

19 First of all, they're called assessments,  
20 and I think there ought to be some presumption that  
21 the thing is what it's called. They're assessments  
22 that the Commission imposes on the utilities that it  
23 regulates.

24 I would also point out that the term  
25 assessment has been in effect at least since 1947 and

1 I think earlier. I think the assessment statute was  
2 first enacted and shows up in the 1939 version of the  
3 Revised Statutes of Missouri. But certainly by 1947,  
4 if you look at the text of the statute, they were  
5 already referring to the Commission's assessments  
6 using the term assessment.

7 So it predated -- the significance of that  
8 is it predates the adoption of the Hancock Amendment,  
9 and I think it would be clearly -- in view of the fact  
10 that it predates the Hancock Amendment, would not be  
11 the use of the word assessment just to get around the  
12 Hancock tax limitations.

13 So in other words, it doesn't appear to me  
14 that in 1947 the Legislature was anticipating the  
15 Hancock Amendment and called what otherwise would have  
16 been in taxes assessments to get around a  
17 constitutional limit that wasn't there.

18 So it is -- they're called assessments, and  
19 I think the presumption is that they ought to be  
20 considered assessments. They are related, in my view,  
21 to a specific purpose. If you look at the Zonner case  
22 that talked about special street assessments, the PSC  
23 assessments are not markedly different in terms of  
24 their purpose or their effect.

25 The Commission assesses the public utilities

1     that it regulates, and the utilities pay that money  
2     into the Public Service Commission fund. The  
3     Commission uses that money in terms of deferring its  
4     costs, its expenses of regulating the utilities. I  
5     mean, it's an assessment in the truest sense in which  
6     that term is used.

7             I do not believe -- and I do not believe  
8     there's any indication otherwise, that it can be  
9     fairly characterized as a tax, excise, custom, duty or  
10    other source of income received by the State for  
11    public use, and many of the same reasons drive that  
12    conclusion. It's paid into a special fund for a  
13    special purpose. I don't think it has any of the  
14    earmarks of being a tax.

15            And one of the obvious things to consider  
16    that is the Commission isn't a political subdivision.  
17    It doesn't have taxing power. It can assess because  
18    the Legislature's given it the power to assess, but  
19    it's not a political subdivision, it can't impose a  
20    tax.

21            Therefore, I don't think it's a tax. I  
22    don't think it -- it's like the old duck. It doesn't  
23    waddle, quack or have feathers like a duck. I just  
24    don't think it's a duck.

25            Is it part of total state revenue for

1 purposes of calculating the maximum revenues the State  
2 can take in in any particular year? Well, I'm not  
3 sure that I have a great answer for that one. If you  
4 look at the Kelly decision, it appears that the  
5 Missouri Supreme Court has looked at a two-part test  
6 for determining that.

7 But if you look at the language in which  
8 they addressed it, I'm not sure that you can conclude  
9 that they meant that to be an exclusive test. They  
10 said they can't be included, a source of revenues  
11 can't be -- or cannot be included in total state  
12 revenue unless it's paid into the state treasury and  
13 then drawn out through appropriations.

14 That's not the same thing as saying that  
15 that's the exclusive or that's the extent of the  
16 analysis. And the reason I think that is, if you look  
17 at the Keller decision, the Keller decision seems to  
18 suggest that you look at -- that the broad brush sort  
19 of tests don't really work under Hancock and that you  
20 have to look at each particular charge or whatever to  
21 determine whether or not it fits into that  
22 calculation.

23 And the bottom line is that nobody's -- no  
24 court at any rate has made that determination. So I  
25 don't think there's a good answer for you. There's



1 good arguments either way, but I don't think that I  
2 can give you a definitive answer.

3 One thing I would point out is, even if it  
4 is part of total state revenue for Hancock Amendment  
5 purposes, there's no authorization in Hancock that  
6 would either expressly or by implication authorize the  
7 transfer of the moneys out of the fund.

8 I mean, it's one thing for it to be -- for  
9 the assessments paid into the fund to be part of the  
10 calculation of the total state revenue. It's quite  
11 another thing to say that that means that that's a  
12 source of funding for purposes of distributions. I  
13 don't think that -- there's no language that I've  
14 found that says if it's over here, that means it falls  
15 out over there.

16 As far as the remedies, and this is why I've  
17 kind of come back full circle now, because I'm not  
18 sure the Commission can do much. Even if the  
19 Commission shares my opinion that these -- the  
20 transfers out of the fund are questionable, I'm not  
21 sure that it has the authority or the power to do  
22 much, other than to find that the use of the funds via  
23 these transfers was not for a purpose specified in the  
24 assessment statute 386.370. That's probably about the  
25 most the Commission can conclude.

1           Let me move on to the issue that I think is  
2       really the one that you need to focus on and the one  
3       that's the -- that really is before you and certainly  
4       within your area of expertise and within your power to  
5       determine, and that's whether or not there's statutory  
6       authority under your assessment power to include the  
7       Hancock tax or Han -- hand the Article X transfers,  
8       excuse me, in the assessment for the 1999 fiscal year.

9           And I come back to the language of the  
10      statute, the three-part test there. I think that in  
11      order for something to be included in the calculation  
12      of the Commission's assessment, it has to be an  
13      expense to the Commission.

14           It's got to be incurred, and I think the  
15      significance of that language is it's a  
16      forward-looking analysis. You look at what's going  
17      to -- what you anticipate's going to take place in the  
18      particular fiscal year, in this case 1999.

19           That by the way is why I think the Governor  
20      Hotel expenses are probably appropriate. I expect  
21      that the determination's been made that some of those  
22      expenses are expected to be incurred in the coming  
23      year.

24           The third thing is and probably the -- this  
25      may be all you have to do, is to determine whether

1     it's reasonably attributable to the regulation of  
2     public utilities. It's a three-part test. In my memo  
3     I've argued or pointed out why I don't think that the  
4     Article X transfers fit any one of those three  
5     categories.

6             I don't think they represent an expense. If  
7     you look at the legislation, it's simply an accounting  
8     convenience that was undertaken or authorized by the  
9     Legislature to allow the State Treasurer to move  
10    moneys from one State fund to another to facilitate  
11    the revenue distributions.

12            So it's not an expenditure of moneys in  
13    terms of defraying a cost that's been incurred by the  
14    Commission.

15            Getting back to what the Hancock Amendment's  
16    all for, if, in fact, this is pursuant -- if the  
17    transfers were pursuant to the Hancock Amendment, then  
18    the purpose is to provide a source of -- to return to  
19    the income tax payers revenues to which the State is  
20    not entitled.

21            If you don't have an entitlement to the  
22    funds, then there's no way that you can expend them,  
23    and it really is just kind of a title issue. You  
24    can't give title to somebody else if you don't have it  
25    to begin with, real basic legal concept.

1           And moreover, I may be wrong on this, but I  
2    think the Commission's been basically a passive party  
3    in this whole process. The Legislature said it's  
4    going to happen. You've been informed when it's going  
5    to happen and when it's happened. I don't think --  
6    you know, I don't think the Commission's had much of  
7    an active role in it at all.

8           So all those things indicate to me that you  
9    can't fairly characterize it as an expense. To be  
10   incurred, well, at least the 1995 and 1996 transfers  
11   took place in June of the prior fiscal year. So at  
12   least with that -- with respect to that \$690,000  
13   roughly, that certainly did not occur in the current  
14   fiscal year. It's not anticipated to occur in the  
15   current fiscal year.

16           But the third issue is reasonably related to  
17   the regulation of public utilities, and I would just  
18   suggest to you that it really doesn't have anything to  
19   do -- these Article X transfers have nothing to do  
20   with the regulation of public utilities.

21           The only connection is that, had they not  
22   been transferred out of the Public Service Commission  
23   fund, you would have had them to spend to defray the  
24   costs associated with the regulation of public  
25   utilities. I would suggest to you that that is just

1 way too tenuous to conclude that it has anything to do  
2 with your activities of regulating utilities.

3 I think you also need to consider in the  
4 appropriateness of including the Article X transfers  
5 in your assessment is whether or not including them  
6 frustrates the legislative purpose behind House Bills  
7 1004, which is from the 88th General Assembly, House  
8 Bill 4 and House Bill 1004 from the 89th General  
9 Assembly which said that this money's going to come  
10 out, it's going to be put in general revenue and  
11 distributed to the income tax payers of the state.

12 That's what the General Assembly decided is  
13 going to be done, and we can argue about the wisdom or  
14 appropriateness of that, but that's what they did.

15 And I would suggest to you that with the  
16 Springfield Warehouse decision, that if you -- if the  
17 Commission determines that these ought to be recovered  
18 in the 1999 fiscal year assessment, that that runs  
19 contrary to what the General Assembly did which was  
20 transfer them out in the first place.

21 Along the same lines, I think that any such  
22 action would frustrate the revenue lid intended by the  
23 Hancock Amendment. That's what the Hancock Amendment  
24 is. It's a revenue lid. It's a determination in the  
25 Constitution of this state that the State's only

1       entitled to a certain amount of revenues.

2               Once those have been given back, you know --  
3       again, you can argue about the public policy. You can  
4       argue about the wisdom of the Hancock Amendment, but  
5       it's there. It's a reality. That's the purpose of  
6       it, and that's what's happened here. And that  
7       including the Article X transfers in the assessment  
8       calculation frustrates or is in conflict with that  
9       constitutional purpose.

10              I'll wrap up here. I think I've overstayed  
11      my welcome. Well, I think I'll just wrap it up with  
12      that point. A couple things I'd like to point out  
13      just in closing. Initially, when we filed the  
14      Application for Rehearing we also included a Request  
15      for Stay. At that time the Commission had some  
16      questions about, well, what exactly are you requesting  
17      that we're staying?

18              We floated a few alternatives because,  
19      frankly, we didn't know at that time whether the  
20      Commission's accounting staff could identify a  
21      particular amount of the assessments for the 1999  
22      fiscal year attributable to just the Article X  
23      transfers. We got a lump sum number, but it wasn't  
24      broken down.

25              The Staff was able to go back, calculate

1     those numbers, and you will find those calculations as  
2     parts of -- as Exhibit H to the Stipulation of Facts  
3     where the accounting staff went back and calculated  
4     those amounts. So they were able to kind of pull  
5     those numbers out.

6             And I have just recently renewed my request  
7     that the Commission stay the effectiveness of its  
8     Order, but only to the extent that the assessments are  
9     attributable to the Article X transfers. In other  
10    words, I'm not asking the Commission at this point to  
11    stay the Order in its entirety.

12            The revenues, the assessment should -- the  
13    appropriate or the noncontested assessments should be  
14    paid into the funds. The Commission can continue with  
15    business. But given the fact that we can identify  
16    those numbers, I think that it would be appropriate to  
17    stay the effectiveness of it at least until this  
18    matter is resolved.

19            And finally, the Commission invited the  
20    parties to submit Proposed Findings of Fact and  
21    Conclusions of Law, something that I've been and  
22    members -- other members of my firm have been  
23    advocating, for lack of a better term, for a number of  
24    years. We think it's a good idea. They can be  
25    considered and used or rejected in whole or in part by

1 the Commission.

2 And you'll note that I didn't submit them,  
3 and the irony isn't lost on me. The problem was  
4 simply given the press of other events, the  
5 abbreviated schedule and technical difficulties  
6 associated with switching over to a new computer  
7 system, something had to give and it was that that  
8 gave.

9 But here I'd like to offer that I'd be  
10 willing to do that, and it might be appropriate that  
11 after this, that in lieu of a post hearing brief,  
12 assuming that there's not a lot of new issues brought  
13 up, that maybe we could be given another opportunity  
14 to submit Proposed Findings.

15 I appreciated the invitation. I think it's  
16 a good idea. I'm sorry that I wasn't able to carry  
17 through on a timely basis on that, but another  
18 suggestion I'd make.

19 With that, I will conclude.

20 JUDGE ROBERTS: Thank you.

21 Mr. Pendergast for Laclede.

22 MR. PENDERGAST: If it please the  
23 Commission, pursuant to your earlier directive in your  
24 September 23rd, 1998 Order, I will try and be as brief  
25 and concise as possible.



1           To that end, I'd simply tell you that  
2       Laclede Gas Company generally concurs in  
3       Mr. Boudreau's comments regarding the legal issues  
4       under consideration today and in the Memorandum of Law  
5       which was submitted by Mr. Boudreau on behalf of  
6       Empire and a number of other utilities.

7           I'd also direct your attention to  
8       Mr. Keevil's discussion of the use of a five-year  
9       average for purposes of determining allocations to  
10      various utilities. I think that's worth taking note  
11      of.

12          I'd just like to add three general  
13      observations that I hope will assist you in getting at  
14      the heart of the matter before you. First, I would  
15      like to go ahead and thank the Commission Staff,  
16      Mr. Haas, and the technical people that cooperated  
17      with us in preparing the Stipulation of Facts.

18          They were very cooperative, they were very  
19      professional, and I think they did an outstanding job  
20      in trying to present information that I think will  
21      assist both the Commission and certainly assisted us  
22      in preparing our arguments.

23          Second, I think we all have an appreciation  
24      for the fact that the dilemma faced by the Commission  
25      in this case is not one that you chose to create.

1 Through our discussions with the Staff and  
2 fact-finding process we've undergone, we've gained  
3 additional insights into the role played by the  
4 General Assembly and the Office of Administration in  
5 effecting the transfers out of the Commission's  
6 assessment fund.

7 For reasons that have been discussed in the  
8 parties' respective pleadings in this case, we believe  
9 that they may well have exceeded constitutional and  
10 statutory constraints in effecting these transfers,  
11 and perhaps by working together to develop a full  
12 record in this case we can ultimately get a court to  
13 say so.

14 I honestly think that everybody in this room  
15 believes that would be the preferred result. I think  
16 it would be the preferred result because of the  
17 problems you have if you don't have that kind of  
18 separation. Regardless of how these issues might turn  
19 out, I think you have to recognize that the current  
20 situation is difficult to justify, which brings me to  
21 my final point.

22 Simply put, I don't think it's really  
23 tenable to conclude that you can be half in and half  
24 out of the reach of the Hancock Amendment. I can see  
25 a court saying that the Commission's assessment fund

1 falls outside the ambit of Hancock and, therefore, the  
2 General Assembly really has to keep its hands off  
3 those funds, and I think that's the result that we  
4 should pursue in the first instance.

5 I think it's also possible, although less  
6 likely, that a court can conclude that the assessment  
7 fund does, in fact, fall within the reach of the  
8 Hancock Amendment.

9 What I can't see, however, is the court  
10 saying that the Hancock Amendment requires the  
11 Commission's assessment fund to be used in determining  
12 and refunding excess state revenues, and yet  
13 simultaneously permits those same excess revenues to  
14 be recouped through additional assessments.

15 In other words, if there's a strong enough  
16 nexus between the Commission's assessment fund and  
17 Hancock to justify both the inclusion of these funds  
18 in the calculation of excess state revenues and their  
19 use in making the associated refunds or distributions,  
20 there would seem to be a strong enough nexus to bar  
21 any attempt to recapture those excess revenues through  
22 an increase in assessments.

23 In the end, the fund is either a part of the  
24 Hancock process or it isn't, and I think that's what  
25 you have to decide today. Either way, though, I think

1 the end result as far as the collection of those  
2 refunds through the assessment is the same.

3 And for the reasons I've discussed  
4 previously, I would at least at the very minimum urge  
5 you not to make a finding that, in the Commission's  
6 view at least, what the Legislature did in this  
7 particular instance was appropriate. I don't think  
8 that's a finding you need to make.

9 I think Mr. Boudreau's comments about simply  
10 making factual findings about what the use of these  
11 funds has been put to would be sufficient, and I think  
12 that will provide some additional flexibility to make  
13 the arguments that I think will need to be made as  
14 this winds its way not only through the Commission but  
15 ultimately through the courts.

16 Thank you very much.

17 JUDGE ROBERTS: Thank you. Mr. Fischer?

18 MR. FISCHER: May it please the Commission?

19 My name is Jim Fischer, and today I'm representing  
20 Fidelity Natural Gas, Inc., Fidelity Telephone  
21 Company, Atmos Energy through its division United  
22 Cities Gas Company, Greely Gas Company and Southern  
23 Missouri Gas Company, LP. And I'll probably refer to  
24 those companies as just the small LDC group.

25 In one of the Commission's early pleadings

1 in this case, it requested information from the  
2 various utilities regarding the amount of their  
3 Hancock Amendment rebates. Two of my clients did not  
4 have that information available and, in fact, had to  
5 go to the Department of Revenue to find out if they  
6 did receive any.

7 Today I did learn that Greely Gas Company  
8 has received for the record a refund of \$24 in 1996,  
9 and United Cities Gas Company received a rebate of  
10 \$1,038 in 1996. They all also are expecting  
11 additional refunds in the future, but those will --  
12 they have not received.

13 Generally, going to the merits of the case,  
14 I guess I would say in the -- to be brief that we  
15 concur with the remarks of Mr. Boudreau this morning  
16 and to a large extent with Mr. Pendergast.

17 Section 386.370 is the source of the Public  
18 Service Commission's statutory authority to assess  
19 public utilities, and Paul has already gone through  
20 the tests of that statute. We think Hancock  
21 Amendments don't meet the statutory test to be  
22 included in an assessment by the Public Service  
23 Commission.

24 I'm not sure we're going to have the  
25 opportunity to do rebuttal today. So rather than

1 going back over what has been stated by Mr. Boudreau  
2 or Mr. Pendergast, I'd like to address one point that  
3 was made in the Staff's Memorandum of Law that had  
4 been previously filed.

5 In that Memorandum, the Staff suggested  
6 that -- they agreed that the Hancock Amendment rebates  
7 are not reasonably attributable to the regulation of  
8 public utilities. However, the Staff suggested that  
9 perhaps HB numbers 1004 in 1996, No. 4 in '97, and  
10 1004 in '98 may have repealed by implication  
11 subsection 4 of Section 386.370, which limits the use  
12 of the PSC funds to expenses that are reasonably  
13 attributable to the regulation of public utilities.

14 Now, such repeals by implication are not  
15 generally favored in statutory construction and in the  
16 law, and they should be avoided if possible.

17 But even if the Legislature had lawfully  
18 transferred the excess funds in the PSC fund to pay  
19 for such Hancock Amendment rebates, it did not amend  
20 Section 2 -- subsection 2 of 386.370, and that deals  
21 with prospective assessments and again limits the  
22 Commission's authority to estimating expenses directly  
23 attributable to the regulation of the various groups  
24 of public utilities.

25 Now, from my perspective, even if it was

1     lawful for the General Assembly to come along and tap  
2     the money, the excess money that was in your fund and  
3     transfer that out and say we're going to use that for  
4     Hancock Amendment rebates, it was not lawful for the  
5     Commission then to turn around and attempt to  
6     replenish that fund with -- by now assessing the  
7     utilities for an amount that is designated as Hancock  
8     Amendment refunds because that is not attributable to  
9     the regulation of public utilities. I think we all  
10    agree that that's the case.

11               So even if the Staff's theory is correct  
12    that subsection 2 of that statutory provision could be  
13    repealed by implication, it can't be, I don't believe,  
14    true that the Commission somehow as a result of that  
15    transfer out has the additional authority now to begin  
16    assessing public utilities and eventually ratepayers  
17    for Hancock Amendment refunds in the future.

18               I think this is a key point. The Commission  
19    can't prospectively assess public utilities for  
20    expenditures that are not directly attributable to  
21    regulation of public utilities. That's the question  
22    you have to answer, I think, to get to the point where  
23    it's lawful to assess the utilities for such Hancock  
24    refunds.

25               With that, I think I'm going to stop. I

1 would agree that if you reach the conclusion that  
2 somehow you can assess public utilities and the  
3 ratepayers for such Hancock Amendment refunds, it will  
4 be frustrating the Hancock Amendment purpose to limit  
5 the revenues that the State can take in. Otherwise,  
6 we can basically have the State asking the utilities  
7 to replenish what they would otherwise have to refund  
8 to their own taxpayers.

9 Thank you.

10 JUDGE ROBERTS: Thank you. Mr. Hack?

11 MR. HACK: I will be very brief. So I'll  
12 just do it from my appointed spot here.

13 We also were unable to provide the  
14 information within the time requested by the  
15 Commission, and I have since come across some  
16 information. I wanted to tell you about it.

17 MGE received no disbursement from the tax  
18 year '95. We have yet to receive a disbursement for  
19 the tax year '96. We understand from conversations  
20 with the Department of Revenue that the total  
21 disbursement will be about \$5,800. We expect to get a  
22 disbursement for the tax year '97, but don't know what  
23 that amount will be.

24 MGE also would concur with the remarks of  
25 Mr. Boudreau, Mr. Pendergast and Mr. Fischer. I will



1 not repeat those here. But the whole situation  
2 reminds me anyway of a statement, and I don't know who  
3 it's attributable to, but it's what he giveth with one  
4 hand he taketh away with the other. And I don't think  
5 that's what the Hancock Amendment was intended to  
6 achieve.

7 With that I'll conclude. Thank you.

8 JUDGE ROBERTS: Mr. Bub?

9 MR. BUB: Thank you. May it please the  
10 Commission? My name's Leo Bub, and I represent  
11 Southwestern Bell Telephone Company.

12 Like the others, we're not here questioning  
13 what the Commission has estimated that it actually  
14 needs to fund its operations. Historically, you've  
15 told us what you've needed and we've all paid it.

16 Our concern here is with the State's  
17 transfer of money from your fund to the general  
18 revenue fund for Hancock Amendment refunds. We  
19 believe that's inconsistent with the Commission's  
20 funding statute, Section 386.370, and with the Hancock  
21 Amendment itself.

22 Mr. Boudreau and the other utility attorneys  
23 have explained those inconsistencies, and we concur.  
24 And with that, we would join with the other utilities  
25 in requesting that you find that the use of funds for

1 Hancock Amendment refunds is not among the purposes  
2 specified in your funding statute, and that including  
3 Article X refunds in your Commission assessments is  
4 inconsistent with the Hancock Amendment and the  
5 funding statute.

6 Thank you.

7 JUDGE ROBERTS: Thank you, Mr. Bub.  
8 Mr. Koegel?

9 MR. KOEGEL: Thank you. May it please the  
10 Commission?

11 Kansas City Power & Light generally concurs  
12 with the statements made by the attorneys for the  
13 other utilities, and really we don't have much to add.  
14 I think it's the function of being this late in the  
15 agenda.

16 We would say that we understand that you  
17 guys have been put in a dilemma, that if these funds,  
18 in fact, were properly taken out, I'm not sure that  
19 you have the authority to assess the utilities for  
20 that under your own statute. I don't need to go into  
21 that again. I think that Mr. Fischer did a good job.

22 I have no other comments. Thank you.

23 JUDGE ROBERTS: Thank you, Mr. Koegel.  
24 Mr. Keevil?

25 MR. KEEVIL: Being the last speaker before

1 Staff and Office of the Public Counsel, I guess I'm  
2 the last to get to say ditto, but the -- if you've  
3 read the Memorandums of Law which were submitted by  
4 the parties, you know that the position that we have  
5 taken in this proceeding on the Article X transfers  
6 issue pretty much mirrors what Mr. Boudreau and Mr.  
7 Pendergast and all the others have said.

8 I would like to draw -- on the Article X  
9 transfers issue, I would like to draw your attention  
10 to one thing which was mentioned by Mr. Pendergast.  
11 The issue No. 4 we see as separate from the Article X  
12 issue. Frankly, it doesn't look to us like the  
13 statutorily prescribed procedure for assessments was  
14 followed.

15 And the reason I say that is a five-year  
16 average procedure was inserted after the statutorily  
17 prescribed steps and before the assessment itself.  
18 And I've quoted the statute in the Memorandum of Law,  
19 and you can see from Exhibit A, I believe it is, to  
20 the Stipulation what the internal accounting  
21 department did did not comply with that statute.

22 Again, I see this as separate from the  
23 Article X issue, and because of that, you probably  
24 have more ability to remedy this problem than you do  
25 the Article X problem which was imposed on you by the

1       Legislature, and would simply like to draw your  
2       attention to that.

3               I have nothing to add to it other than what  
4       I've got in my Memorandum of Law. So I'm not going to  
5       bore you with repeating that, but I just want to  
6       highlight that and ask that when you -- when you go  
7       back and consider the case, that that procedure be  
8       followed in making new assessments. And we'll be glad  
9       to answer any questions you may have.

10              Thank you.

11              JUDGE ROBERTS: Thank you, Mr. Keevil.  
12       Mr.Coffman?

13              MR. COFFMAN: Yes. The Office of the Public  
14       Counsel has taken a look at these issues regarding the  
15       application of Title X transfers to PSC assessments.  
16       The issues are very interesting and open to some  
17       interpretation, and after careful consideration we've  
18       decided to take no position in this matter and have  
19       redirected our resources elsewhere, but we will be  
20       closely watching this case.

21              It's hard to speculate how a court might  
22       address these issues, but we will be watching them on  
23       behalf of consumers who are paying rates that have  
24       these transfers included.

25              Missouri Gas Energy for one has these

1 amounts explicitly in their rate calculation, and our  
2 office -- if there was a recalculation or an  
3 adjustment made, our office would likely seek some  
4 remedy to compensate the consumers and prevent any  
5 unfair windfall to the utilities in that case.

6 That's all I have. Thanks.

7 JUDGE ROBERTS: Thank your, Mr. Coffman.  
8 Mr. Haas?

9 MR. HAAS: May it please the Commission?  
10 For the record, my name is William Haas, and I  
11 represent the Staff of the Commission in this case.

12 Subsections 1 and 2 of Section 386.370 of  
13 the Missouri statutes authorize the Commission to  
14 assess public utilities for its expenses attributable  
15 to the regulation of public utilities.

16 Subsection 4 of that statute provides that  
17 the assessments which have been paid into the Public  
18 Service Commission fund shall be devoted solely to the  
19 payment of expenditures incurred by the Commission in  
20 the regulation of public utilities.

21 House Bill No. 1004 enacted in 1996 and  
22 House Bill No. 1004 enacted in 1998 expressly direct  
23 transfers of moneys from the Public Service Commission  
24 fund into the general revenue fund for the payment of  
25 Hancock Amendment refunds.

1           House Bill No. 4 enacted in 1997 implicitly  
2       directs the transfer of moneys from the Public Service  
3       Commission fund into the general revenue fund for the  
4       payment of Hancock Amendment refunds.

5           The Commission's Supplemental Order No. 52  
6       reflects these three legislative directed transfers.  
7       The applicants challenge these transfers.

8           In support of its arguments, Kansas City  
9       Power & Light refers to the case State Highway  
10      Commission vs. Spainhower. That case is easily  
11      distinguished. In that case, the Missouri Supreme  
12      Court held that a constitutional provision which  
13      required that moneys in the State Road Fund be spent  
14      on state road purposes trumped a statute which said  
15      that interest on state funds would go into general  
16      revenue.

17          We do not have a conflict or apparent  
18      conflict in this case between a constitutional  
19      provision and a statute. Here we have a conflict or  
20      apparent conflict between an earlier legislative  
21      enactment and three later legislative enactments.

22          This situation is more similar to the case  
23      County of Jefferson vs. Quick Trip Corporation which I  
24      have cited in the Staff Memorandum. The Quick Trip  
25      court was looking at three statutes. The two earlier

1 statutes authorized counties to collect sales taxes  
2 for capital improvements and for law enforcement, and  
3 those two earlier statutes specifically required that  
4 the funds so collected should be spent on those  
5 purposes.

6 A later statute directed that 50 percent of  
7 additional county revenues go to a tax finance  
8 increment district. So the question before the court  
9 was whether 50 percent of the revenues from these two  
10 specific sales taxes should go for their specified  
11 purposes or should they go for the tax finance  
12 increment district?

13 In that case the court stated the general  
14 rule when two statutes are repugnant in any of their  
15 provisions, the later act, even without a specific  
16 repealing clause, operates to the extent of the  
17 repugnancy to repeal the first.

18 Specifically, the Quick Trip court held that  
19 the later statute provided an exception to the two  
20 earlier statutes and that the -- 50 percent of those  
21 funds would go to the tax increment district.

22 The applicants have also challenged the  
23 Commission's authority to recover the transferred  
24 funds, and I've addressed this matter on page 9 of my  
25 Memorandum where I state the Legislature's repealed by

1     implication of subsection 4 of 386.370 to the extent  
2     of the Hancock Amendment transfers directed the three  
3     House Bills did not repeal the Commission's authority  
4     under subsection 2 of that statute to assess public  
5     utilities for its estimated expenses attributable to  
6     the regulation of public utilities.

7             A couple of the applicants have challenged  
8     the Commission's use of a five-year average in  
9     calculating the assessments. Section 386.370 does not  
10    specify any particular method to estimate the amount  
11    of the expenses attributable to each of the utility  
12    groups. The Legislature has therefore left the  
13    determination of the estimation method to the  
14    Commission's discretion.

15            The expense that the Commission incurs for  
16    the regulation of each utility group, water, gas,  
17    electric, sewer, telephone, fluctuates from year to  
18    year both in dollars and as a percentage of the total  
19    of all such expenditures. It is reasonable to use a  
20    five-year average of each group's annual percentage of  
21    such expenditures to smooth out the fluctuations.

22            The Commission is the instrumentality of the  
23    Legislature. It is the Commission's function to carry  
24    out the policy of the Legislature.

25            The Legislature's policy in this case is



1       evidenced by its most recent enactments, those three  
2       House Bills, which provide for the transfer of funds  
3       out of the Public Service Commission fund to general  
4       revenue. Accordingly, the Commission should deny the  
5       Applicants' request to set aside Order 52.

6               Thank you.

7               JUDGE ROBERTS: Thank you, Mr. Haas. That's  
8       it from the parties at this time. We'll have  
9       questions from the Bench. Chair Lumpe?

10              CHAIR LUMPE: Yes. Mr. Boudreau, I think  
11       you made the -- you were the one that made the comment  
12       that the Public Service Commission does not have  
13       taxing authority. As an instrument of the State, the  
14       State has taxing authority, and could not then its  
15       assessment be part of the State's taxing authority?

16              How does it differ from, say, Insurance  
17       Department that assesses to pay for regulating  
18       insurance or the Division of Finance that assesses  
19       banks to pay for? Are those not state taxes?

20              MR. BOUDREAU: Well, I can't claim to be  
21       familiar with the funding of the Division of Insurance  
22       or --

23              CHAIR LUMPE: Finance and --

24              MR. BOUDREAU: -- Department of Finance.  
25       I'm just not familiar enough to respond, but I

1     don't -- I'd be surprised. I'd be surprised if they  
2     had taxing authority. That's about all I can say.  
3     But I don't know how their legislation's drafted.

4             CHAIR LUMPE: And I would agree with you.  
5     As an instrument, a piece of the State we don't, but  
6     the State of which we are part has taxing authority,  
7     does it not?

8             MR. BOUDREAU: Well, the Commission's  
9     clearly an agency of the State. It's part of the  
10    executive department. But I do not think that it  
11    follows from that that the executive departments have  
12    taxing authority. That's -- that's reserved to  
13    political subdivisions as provided by law.

14            CHAIR LUMPE: But the State itself has  
15    taxing authority, and as a part of the State, if the  
16    State decides that the way you gather funds to  
17    operate, whatever you call it, is a way of funding  
18    that, one could then define the assessment as a tax of  
19    the State.

20            MR. BOUDREAU: Well, I suppose the argument  
21    could be made. I think that the State clearly has  
22    taxing authority. I think the State also has the  
23    authority to authorize entities or agencies of the  
24    State that aren't political subdivisions to charge  
25    particular fees or assessments or whatever they should

1 be named, as is the case with the Public Service  
2 Commission.

3 I do not think that that gives them the  
4 characteristic of a tax. The point can probably be  
5 argued, but I don't think that a fee or assessment  
6 authority is in the nature of a tax, which is simply a  
7 revenue generating mechanism for general public  
8 purposes.

9 CHAIR LUMPE: I think there have been  
10 decisions on fees, but I'm not aware of any court  
11 decision that defined assessment as other than. And  
12 then the terms other source of income, could not an  
13 assessment be that other source of income which does  
14 fall within total State revenues?

15 MR. BOUDREAU: The only case that I'm aware  
16 of that's talked about assessments, and I don't claim  
17 to have exhaustively researched this, but the Zonner  
18 decision that I mentioned or that I cite in my brief  
19 made a finding as I -- and I'll have to work from  
20 recollection here. Maybe I don't. I may have it --  
21 that a special street assessment was not a tax -- let  
22 me see what the language was -- was not a tax, license  
23 or fee. Now, as to other sources of income --

24 CHAIR LUMPE: Could be still other?

25 MR. BOUDREAU: You can look at it as kind of

1 a catch-all, and I don't claim to have any great  
2 additional wisdom to add to that, other than I would  
3 suggest to you and suggest to the Commission that a  
4 tax is -- contemplates that it will be paid into a  
5 fund for the general public use for the defrayal of  
6 general government expenditures, however the governing  
7 authority determines that they ought to be used.

8 I would suggest to you that the fact that  
9 the assessments are for a specific and statutorily  
10 limited purpose takes them out of the characterization  
11 of a tax, fee or other source of income. I think you  
12 have to read in for general public use to make sense  
13 of that, but that -- that would be my response to your  
14 question.

15 CHAIR LUMPE: But you would -- you would  
16 agree -- maybe you wouldn't -- that Article X as a  
17 constitutional part of the constitution would trump a  
18 statute?

19 MR. BOUDREAU: To the extent of any  
20 inconsistency. I'm not sure there's an inconsistency.  
21 If you have a -- I think, generally speaking, if you  
22 have a constitutional provision that's in conflict, in  
23 direct conflict with a statute, the constitutional  
24 provision will govern. It's the superior source of  
25 authority.

1           CHAIR LUMPE: Okay. So how do you respond  
2 to the comment that I think was made that the  
3 definition of a tax includes the mode of imposing it?  
4 In other words, it encompasses not just the  
5 collection, but the assessment, the apportionment, the  
6 mode of imposing it is included in that definition of  
7 a tax?

8           MR. BOUDREAU: Well, I'm not sure that  
9 that's inconsistent with what I've said. I'm trying  
10 to -- was that a comment in --

11           CHAIR LUMPE: I think it was commented maybe  
12 in some.

13           MR. BOUDREAU: Oh, okay.

14           CHAIR LUMPE: -- some court opinion or  
15 something like that.

16           MR. BOUDREAU: You'll have to forgive me. I  
17 can't recall the exact source of it. I'm not sure  
18 that I would --

19           CHAIR LUMPE: I don't either. I know it's  
20 in there somewhere.

21           MR. BOUDREAU: I'm not sure that I would  
22 disagree with the general concept. But the manner in  
23 which it's imposed is some sort of an indicia of  
24 whether or not it's a tax or not.

25           So you have to look at who's imposing it,

1     how it's imposed, what purpose the revenues will be  
2     used for, and all of those things you have to look at  
3     in order to determine whether it's more in the nature  
4     of a tax or a special fee or assessment on the other  
5     end of the spectrum. So I think it's a fact dependent  
6     analysis.

7             CHAIR LUMPE: A tax if it included those  
8     attributes or those pieces of it, the assessment of  
9     it, the allocation of it, that that is all part of the  
10    tax, it could be part of the tax. So assessing and  
11    apportioning it could come into that definition and  
12    make it a tax?

13            MR. BOUDREAU: Well, I think the courts have  
14    suggested -- I'm trying to remember the exact case it  
15    was. Perhaps it was the Holden -- forgive me here.

16            Some of the case authority has suggested,  
17    particularly since the enactment of the Hancock  
18    Amendment, that we don't care what you call it. We're  
19    going to look at what it is to determine whether or  
20    not it's subject to Hancock Amendment as a tax, for  
21    revenue -- for Hancock Amendment analysis purposes.

22            So I think I agree with you that the name  
23    itself is not necessarily determinative of what it is.  
24    You do have to look at how it's imposed, who's  
25    imposing it, and what its use is to make that

1 determination. I think that's consistent with the  
2 case law. I don't know if that's helpful, if I'm  
3 being responsive or not, but --

4 CHAIR LUMPE: I think so. I have one more  
5 question of you. Given the discussion, is it possible  
6 or were you stating that -- it may be someone else --  
7 that the revenue from the assessment could be part of  
8 total state revenue but not necessarily then become  
9 part of the refund.

10 So it would meet the test of being part of  
11 the total revenue, but some other part of Hancock  
12 would -- or the statute would eliminate it from  
13 becoming part of the refund. Were you saying that?

14 MR. BOUDREAU: Very close. I'm not saying  
15 that there's another part of the Hancock Amendment  
16 that eliminates it, but I would suggest to you that  
17 simply because the moneys that are paid into the  
18 Public Service Commission fund are included in the  
19 calculation of total state revenue doesn't  
20 necessarily -- it doesn't necessarily follow from that  
21 that it's a proper source for the distribution of  
22 those revenues.

23 I'm suggesting that the calculation of total  
24 state revenue is just that. It's a calculation,  
25 figuring out what that cap is, and it does not -- the

1       Hancock Amendment does not in my view determine that  
2       because it's in that part -- it's in the calculation  
3       of that figure that it's necessarily a source of  
4       revenues for the distributions.

5               CHAIR LUMPE:   For the refund?

6               MR. BOUDREAU:   Yeah.   I don't see any  
7       explicit language in the Hancock Amendment that says  
8       because it's over here in this calculation it  
9       necessarily flows out through distributions.

10              CHAIR LUMPE:   Then Mr. Pendergast, can I ask  
11      you, I think you said something about it can't be half  
12      in and half out.   What did you mean by that?   Because  
13      I was interpreting that perhaps incorrectly that if  
14      it's part of the revenue it must be part of the  
15      refund.   It can't be half in and half out.   Would you  
16      explain your term?

17              MR. PENDERGAST:   Yeah.   What I meant by  
18      that, Chair Lumpe, is I think that you really have  
19      protected features embodied in both the Commission  
20      statute that controls how the Commission can make  
21      assessments and what those assessments need to be  
22      based on.

23              We've gone over those in some detail today  
24      about how it has to be reasonably related to its  
25      regulation of public utilities.   And I think that's a



1       safeguard the Legislature established to make sure  
2       that those assessments were reasonable, that they were  
3       actually directed towards the purpose for which the  
4       fund was established.

5               On the other hand, for other types of funds,  
6       other types of revenues you have the Hancock  
7       Amendment, which basically puts an overall cap on what  
8       the State may spend and what the State may collect in  
9       revenue, and if that's exceeded, then there's a refund  
10      that's required.

11             And I think the difficulty you run into is  
12      when you try and mesh the two together, which is I  
13      think what's happened here. And if you think about it  
14      a little bit, I think that the way the process has  
15      unfolded here, if it's an appropriate process it's  
16      really a road map for eventually circumventing the  
17      Hancock Amendment in its entirety.

18             I don't see why there would be any barrier  
19      if this is an appropriate approach to take to having  
20      the Legislature decide that, well, if we've got an  
21      assessment fund for the Commission, how about an  
22      assessment fund for those that regulate nursing homes,  
23      how about an assessment fund for those that supervise  
24      any number of State functions.

25             And we can establish those funds. We can go

1 ahead and give those agencies specific authority to  
2 assess. And when it comes time to determine whether  
3 or not we've exceeded the Hancock limitation, we will  
4 go ahead and withdraw moneys from those funds on the  
5 understanding that those agencies will make up for  
6 them by reassessing the people that they regulate and  
7 will use those to effectuate the refund.

8 And I think that if you do that eventually  
9 you can get to a place where you've had a very  
10 significant exceeding of what that cap is supposed to  
11 be just by the way you structured it.

12 And, in fact, I'm not sure if it was  
13 appropriate for what the Legislature did this time,  
14 why couldn't it have passed a house bill that said why  
15 don't we go ahead and proportionally take double from  
16 these funds that we're taking from every other state  
17 agency? We know they can get it back someplace else.  
18 Let's go ahead and do that, and we'll use that to help  
19 effectuate the refunds so we don't have to take as  
20 much from other State agencies.

21 I think that's kind of a slippery slope that  
22 you start going down to if you're kind of half in and  
23 half out of the Hancock Amendment. If you have to go  
24 ahead and assume that it is included in the Hancock  
25 Amendment, I think -- and it counts towards general

1 revenues and it's used for purposes of making refunds,  
2 then I think you have to go ahead and also assume the  
3 protective features of the Hancock Amendment which  
4 would suggest you don't recoup those excess revenues  
5 once refunded also applies.

6 On the other hand, if they're completely  
7 separate, which I think they should be, then you don't  
8 have to confront that problem.

9 CHAIR LUMPE: If the Commission had  
10 determined the amount of revenue it needed to carry  
11 out its function and then simply subtracted the  
12 reserve that was there and came up with that  
13 assessment, would that have satisfied this concern,  
14 that we said, well, we had to pay that out to Hancock,  
15 so now we're going to recoup it.

16 If we had not done it that way, if we said  
17 here's the amount of revenue we need for function,  
18 subtracted what reserve was there and then did the  
19 assessment, would that have -- would that have  
20 alleviated this item?

21 MR. PENDERGAST: You're saying that -- if  
22 you assume that there had been a transfer but there  
23 had been nothing explicitly stated by the  
24 Commission --

25 CHAIR LUMPE: Just clearly said, okay, this

1 is what we need for the next fiscal year to operate.

2 MR. PENDERGAST: Right. Right. Right.

3 CHAIR LUMPE: Subtract from that whatever  
4 the reserve was less the 600,000 we paid, the 300,000  
5 maybe that was left, I don't know, and then said,  
6 here's the bottom line and here's how we apportion it,  
7 would that have alleviated this item?

8 MR. PENDERGAST: I'd like to answer that, I  
9 guess, with a couple of points. First of all, I  
10 appreciate the fact the Commission didn't do that. I  
11 appreciate the fact that the Commission was up front  
12 with the industry. When it sent out its assessment  
13 letters to everybody, you let us know what the  
14 increase was due to, that it was substantially driven  
15 by the Article X transfers, and that it was driven by  
16 the move to the Hotel Governor.

17 And I think, you know, you're to be  
18 commended for having done that, and that's why -- one  
19 of the main reasons we have this proceeding today.

20 If you hadn't notified us of that and I  
21 suppose we'd discovered that the reason the  
22 Commission's assessment had gone up was because these  
23 transfers have taken place, I think we probably would  
24 have been at the same point we are today.

25 But that, I think, is an excellent reason

1     why the separation that I talked about before is  
2     entirely appropriate. You know, dollars are pretty  
3     fungible when you get right down to it. I'm not sure  
4     that other agencies confronted with the same situation  
5     necessarily have an obligation to set out or a desire  
6     what the makeup of their particular assessment is.

7             And I think that's why a court might be very  
8     sympathetic to the idea that we want to keep this  
9     statutory funding mechanism separate from the Hancock  
10    process because that's precisely the kind of problems  
11    you would run into if you didn't.

12            CHAIR LUMPE: Mr. Keevil, could you cite for  
13    me where the statute says prohibits the method of a  
14    five-year rolling average? I think you said it was in  
15    violation of the statute, and I wondered if you'd cite  
16    that for me.

17            MR. KEEVIL: Chair, that is the -- that  
18    would be Section 386.370 subsection 2, as I've got it  
19    in my Memorandum of Law there.

20            CHAIR LUMPE: Okay. Thank you. And I have  
21    a couple questions for the Staff.

22            Mr. Haas, the argument that the  
23    appropriations bills in some sense or indirectly  
24    repeal or take precedence over the 386.370 or those  
25    parts there, does that not go -- violate the, at least

1 my understanding that you cannot appropriate -- I mean  
2 you cannot legislate in an appropriations bill, so  
3 that you cannot repeal and you cannot establish new  
4 law, you can only appropriate.

5 Now, I know it's done frequently, but I  
6 think there are Attorney General's Opinions --  
7 Attorney General's opinions and I think there may be  
8 some court cases saying that you cannot do that. Are  
9 you aware of any of that, that in effect you can't  
10 repeal a law in an appropriation bill?

11 MR. HAAS: I'm not aware of those cases, but  
12 it sounds reasonable that -- what you're suggesting.  
13 But here the Legislature has done just that. They  
14 have implicitly repealed a section through an  
15 appropriations bill. Now, it would be up to a court  
16 to decide whether that was proper or not.

17 CHAIR LUMPE: Right. And that's -- I agree.  
18 The court is going to have the final say on this, I'm  
19 sure.

20 The other question I had, it seemed to me it  
21 was your -- the Staff's contention that indeed they  
22 did have the authority to do a five-year rolling  
23 average, that methodology was fairly open on how the  
24 method of assessment, et cetera.

25 What part of the statute did you quote for

1       that authority?  Would it be the same Section 2,  
2       subsection 2?

3               MR. HAAS:  Well, subsection 1 directs the  
4       Commission to estimate the amount of the expenses  
5       attributable to the regulation of each of the groups,  
6       but that subsection does not instruct the Commission  
7       on how to make that estimate.

8               So it's my argument and my position that the  
9       Commission may use an estimating procedure as long as  
10      that procedure is reasonable.

11              CHAIR LUMPE:  Okay.  And I think I heard  
12      someone comment that you were limited to expenses to  
13      be incurred.  But actually, does it not say expenses  
14      incurred, or doesn't it?

15              MR. HAAS:  Subsection 1 says that when the  
16      Commission is doing its estimate, it will be for  
17      the -- of the expenses to be incurred by it during the  
18      next fiscal year.  But subsection 4 of that statute  
19      says that any amount remaining in the fund shall not  
20      revert to general revenue but shall be used as an  
21      offset in that coming year.

22              CHAIR LUMPE:  And that leads me to the last  
23      question I have.  Has it been over the years a  
24      determination of the Staff that there is a certain  
25      amount of reserve that should be left over for

1     whatever purposes to continue operating until money  
2     comes in or whatever, has there been a determination  
3     that to begin the fiscal year there should be X amount  
4     of dollars in reserve, and has that been a fairly  
5     standard number over a period of years?

6             MR. HAAS: Chair Lumpe, I'd like to  
7     communicate with staff first.

8             Let me try to answer your question. The  
9     Staff does not budget for a reserve. They do not try  
10    to achieve an amount remaining in the budget at the  
11    end of the year.

12            CHAIR LUMPE: Okay. Thank you.

13            JUDGE ROBERTS: Vice Chair Drainer?

14            COMMISSIONER DRAINER: Thank you. Good  
15    morning. I just have a very few questions.

16            I'll ask Mr. Boudreau, since you started  
17    this, why didn't you start it in 1996?

18            MR. BOUDREAU: I guess this is the first --  
19    I don't know that it's ever been challenged. I don't  
20    know that the Commission's assessments have ever been  
21    challenged before, to be honest with you. I'd be  
22    surprised if they had been.

23            I think the reason it came to our attention  
24    is that the two items, the Hotel Governor and the  
25    Article X transfers together resulted in a fairly



1 significant increase, not for all utilities, but it  
2 showed up.

3 I mean, some of the numbers I saw were  
4 anywhere from 30 percent increase to 100 percent  
5 increase, and a lot of that's driven by what type of  
6 utility it was. Some of them didn't have much of an  
7 increase at all.

8 But it was significant enough to catch  
9 people's attention, and we were asked about it and  
10 took a look at it, and in part of doing that analysis  
11 determined that the Hotel Governor portion of it was  
12 properly appropriate, given the legislative authority  
13 that the Commission has in terms of budgeting.

14 But the Article X issue just couldn't easily  
15 go away. I mean, it was kind of hard to figure out a  
16 way that that fit into the assessment process.

17 And so it just kind of -- it just kind of  
18 happened. We weren't out looking for trouble, but the  
19 numbers just kind of -- you know, it just raised the  
20 question about what's going on here.

21 COMMISSIONER DRAINER: But that question  
22 wasn't raised back in 1996?

23 MR. BOUDREAU: Well, as I understand it --  
24 and actually, I think I know where you're going with  
25 this. The question that I had is, how come this year?

1           Well, the reason is, and correct me if I'm  
2   wrong, the -- if you look at the Stipulation of Facts,  
3   the transfers, the actual transfers for all three of  
4   those tax years really just took place just recently.  
5   Two of them attributable to 1995 and 1996 took place  
6   in June, I believe, of 1998. And the other one is  
7   budgeted or is anticipated to take place in, I think  
8   it's now shortly after the first of the year.

9           So they all -- they're all here now. That's  
10   what -- they're all rolled in there. And so if you  
11   add up all three years, that's where you come up with  
12   the \$1.2 million figure. So they haven't been in  
13   there before is why it hasn't been flagged before.

14           COMMISSIONER DRAINER: Okay. Now, I want to  
15   understand what you're asking us to do. So let me  
16   just kind of --

17           MR. BOUDREAU: Good question.

18           COMMISSIONER DRAINER: So you can supply me  
19   a good answer.

20           MR. BOUDREAU: I have to have one of those,  
21   huh?

22           COMMISSIONER DRAINER: Let's talk about the  
23   stay first.

24           MR. BOUDREAU: Yes.

25           COMMISSIONER DRAINER: You're asking at this

1 point that we stay the part of the companies'  
2 assessment this year that can be attributed to the  
3 Article X dollars?

4 MR. BOUDREAU: Yes. The amount that's been  
5 identified as being attributable. I think it's an  
6 estimate, but I think everybody's accepting the  
7 estimate as reasonably good.

8 And we're asking the Commission to stay the  
9 effectiveness of the Assessment Order to the extent of  
10 that amount attributable to the Article X transfers.

11 And now that I said that, you might want to  
12 direct that question to Mr. Keevil as well because I'm  
13 not sure if that's totally consistent with his  
14 position. But from my company's perspective, that's  
15 what I have just recently requested.

16 COMMISSIONER DRAINER: Until there's final  
17 resolution?

18 MR. BOUDREAU: Until there's a resolution,  
19 yes.

20 COMMISSIONER DRAINER: Now, in your opening  
21 statement you very briefly said what you thought the  
22 Commission needed to do. So now if you would please  
23 expand on that for me.

24 MR. BOUDREAU: Well, actually, the thing  
25 that I'm asking the Commission to do can be taken care

1 of just really by its determination as to what I  
2 consider the issue that's most appropriately before  
3 the Commission, and that is whether or not the  
4 Article X transfers that are included in the 1999 --  
5 or the calculation of the 1999 fiscal year assessment,  
6 whether it was appropriate to include in there the  
7 \$1.2 million approximately attributable to Article X  
8 transfers out of the fund.

9 I'm asking the Commission to make a  
10 determination that that -- including that amount was  
11 not authorized by statute. A finding that can easily  
12 be made in connection with that is that -- well, maybe  
13 it is an additional. Let me strike that.

14 As far as the first part of the analysis  
15 about the Hancock Amendment, whether or not it was  
16 appropriate to transfer these moneys out in the first  
17 place, I don't think, and I agree with Mr. Pendergast,  
18 it probably is not even particularly helpful for the  
19 Commission to attempt to determine whether or not the  
20 transfers out of the fund were authorized by law. I'm  
21 not sure that you can, No. 1. I'm not sure that  
22 that's part of the Commission's powers.

23 And I'll be honest with you, I think that  
24 good arguments can be made both ways. Mr. Haas has  
25 made a good argument on behalf of the Staff, and I

1 think the companies have, you know, identified some  
2 issues that I think -- but I don't -- I can't tell you  
3 that I think it's a lead pipe cinch one way or the  
4 other.

5 So it's a questionable scope of jurisdiction  
6 of the Commission in the first place and the  
7 legitimate good faith debate about it on the other  
8 hand.

9 All I think the Commission needs to do with  
10 respect to that is just simply make a factual finding  
11 that the moneys transferred out pursuant to the  
12 Article X transfers were not reasonably related to the  
13 regulation of public utilities. Just make a finding  
14 that they were just transferred out of the fund into  
15 the general revenue's fund to facilitate revenue  
16 distributions pursuant to Hancock.

17 I don't think that that's really in dispute,  
18 and that's all you'd have to find. And then to the  
19 extent that anybody wants to take it up to the court  
20 and explore whether or not the Legislature, what it  
21 did was right or wrong or good or bad public policy, I  
22 mean, that's what -- we have that fact and that's all  
23 that you need to do.

24 COMMISSIONER DRAINER: Okay. Now, I have  
25 one final question for you, and it just relates to

1 your opening remarks. You said that first you would  
2 be filing your Findings of Fact and Conclusions of Law  
3 draft?

4 MR. BOUDREAU: I'd like an opportunity to do  
5 so. I kind of technically missed the deadline for  
6 doing it, but I would like an opportunity to do that,  
7 yes.

8 COMMISSIONER DRAINER: Okay. Now, and you  
9 stated that your firm has felt that was something that  
10 should be done for years. Were you basically stating  
11 that in cases before us besides briefs and reply  
12 briefs you think companies should be given the  
13 opportunity to file their own Suggested Findings of  
14 Fact and Conclusions of Law?

15 MR. BOUDREAU: Yes. Yes. I think it's a  
16 good idea. It's a fairly customary practice with  
17 courts. In fact, Judge -- I mean, the local court, in  
18 the circuit court that's a requirement. You file your  
19 brief and you file your Proposed Findings of Fact and  
20 Conclusions of Law. I'm not saying it's mandatory  
21 everywhere.

22 But I think it's a good idea because it  
23 gives you something to look at. Whether you like what  
24 you see or not is up to you, or whether your ALJs like  
25 it or not, it's up to them. But I think it helps

1 everybody kind of focus, because in the end you have  
2 to get around to the question of what are you asking  
3 for, and that's where the rubber really meets the road  
4 is when you draft that.

5 And I think they can be helpful. They're  
6 helpful to me to focus my attentions, and I think they  
7 can be helpful to the Commission as well.

8 COMMISSIONER DRAINER: Okay. Thank you.  
9 Then, Mr. Keevil, with respect to this five-year  
10 average that was used this year and that you believe  
11 was an inappropriate calculation to use, what is it  
12 that you're asking us to do to remedy that?

13 MR. KEEVIL: If you look at Exhibit A to the  
14 Stipulation, for example, page 6 of 15 on Exhibit A,  
15 on that page -- and I was not sure of this previously  
16 until speaking with someone from the internal  
17 accounting department, and like Mr. Pendergast said  
18 earlier, I would like to congratulate them on their  
19 forthcomingness or willingness to work with us on  
20 this.

21 That page, I believe, shows the way -- the  
22 allocation of the costs in accordance with the  
23 statute, the way that I have it set forth in my  
24 Memorandum of Law.

25 If you'll look at the top of that column or

1 the top of the chart, the first approximately half of  
2 the chart deals with the direct cost. The total, for  
3 example, in the heating area was \$7,747. Then the  
4 bottom half of the chart is the allocation of the  
5 common costs, and allocation of common, again using  
6 heating as an example, \$14,026.

7 You add them up. You take out the carry-  
8 over balance. You come up with the bottom line number  
9 of \$20,917. Now, that, I believe, was done according  
10 to the statute. Now, before then -- before the staff  
11 assessed it out to each company within the groups,  
12 then, they inserted this five-year average procedure.

13 And if you turn over to page 11 of 15 on  
14 Exhibit A, you'll see that by using this five-year  
15 average procedure that -- and again, they use the  
16 \$20,917 as one of the five-year -- one of the five  
17 years in the average, but by doing the five-year  
18 average the 20,917 went to \$29,554.

19 And it was that figure which was used as a  
20 group allocation upon which each company within the  
21 group was assessed their assessment.

22 What am I asking you to do? I frankly think  
23 that what should be done is that you issue a new  
24 assessment order and base it on the, like, the page 6  
25 of 15 there that has each utility group calculated



1 according to the way I believe the statute says it  
2 should be done.

3 Now, one cautionary note I would throw in  
4 there, I believe those numbers include the Article X  
5 transfer amounts. So you would need to also back  
6 those out, assuming that you agree with the utility  
7 attorneys that the Article X transfers were improperly  
8 included. Back those numbers out first and then --

9 COMMISSIONER DRAINER: So you're staying  
10 those numbers and not collecting them? Just stay the  
11 number, not collecting?

12 MR. KEEVIL: Yeah.

13 COMMISSIONER DRAINER: You wouldn't hold  
14 them in escrow? You wouldn't collect them and hold  
15 them in escrow?

16 MR. KEEVIL: You could do that.

17 COMMISSIONER DRAINER: What were you  
18 suggesting, Mr. Boudreau, with the Article X funds,  
19 that they not be collected at all or that they be  
20 collected and held?

21 MR. BOUDREAU: Well, if you were to stay --  
22 if the Commission were to stay the Order to the extent  
23 of the increase -- let me think about this before I  
24 say something I can't back up.

25 The amount of the Article X transfer in the

1     assessment's been identified, and I would suggest that  
2     what I'm proposing is that you issue a Stay Order  
3     saying we're staying the effectiveness of the Order to  
4     that extent, and then back that amount out on some  
5     reasonable basis. I think they can work with Staff on  
6     how best to mechanically handle it, and pay what I'll  
7     call the undisputed amount, which is most of it.  
8     That's a minimally disruptive way of doing it.

9             COMMISSIONER DRAINER: Right. You're  
10    basically saying it wouldn't be paid in?

11            MR. BOUDREAU: Wouldn't be paid in, but it  
12    would be paid in -- excuse me. I interrupted you.

13            COMMISSIONER DRAINER: That's all right.

14            MR. BOUDREAU: It would be paid in  
15    ultimately if the Commission were to determine, if it  
16    weren't appealed or if the court were to agree that it  
17    was appropriate, then that additional would be paid  
18    in.

19            COMMISSIONER DRAINER: Okay. Thank you.  
20    And then finally, with respect to what Mr. Boudreau  
21    said about parties filing Findings of Fact and  
22    Conclusions of Law, do you think that's a good idea,  
23    Mr. Pendergast?

24            MR. PENDERGAST: I think in the right case,  
25    Commissioner, it can be helpful. I think it gives the

1 Commission another source of -- I mean, I think the  
2 Regulatory Law Judges do a fine job, but I think it  
3 provides them as well as the Commission another source  
4 of information of how the parties, if they had their  
5 druthers, would like to see the Order.

6 COMMISSIONER DRAINER: That's a good answer,  
7 but you said in the right case, and I'm not sure how I  
8 would guess what is the right case. So --

9 MR. PENDERGAST: I'd say probably in any  
10 case where you have a significant amount of  
11 complexity, like you do with this one, where  
12 particularly you have perhaps issues that are novel,  
13 you haven't seen before, and I think this certainly  
14 qualifies, that under those circumstances it could be  
15 helpful.

16 COMMISSIONER DRAINER: Mr. Bub?

17 MR. BUB: I think I may go a little further  
18 than Mr. Pendergast. I think where the Commission  
19 would find it helpful it would be appropriate. We'll  
20 certainly file one. As Mr. Boudreau pointed out, a  
21 lot of courts have that requirement. So you file your  
22 Memorandums with the proposed Findings of Fact, and  
23 the judge uses that as a first draft comparison with  
24 the other side.

25 The Commission could do the same thing, or

1 Administrative Law Judges could do the same thing. If  
2 they would find it appropriate and helpful, I think it  
3 would be within your authority to ask us to file them.

4 COMMISSIONER DRAINER: Mr. Fischer?

5 MR. FISCHER: I thought over the years, your  
6 Honor, that it might be most helpful in actually less  
7 complex, uncontested cases where it's really a matter  
8 of getting the Regulatory Law Judge to write an Order  
9 and so the process gets -- comes to a completion.

10 For example, in an uncontested financing  
11 case it might be very helpful for the parties to  
12 submit a Proposed Finding of Fact just to move the  
13 process along.

14 In a very complex case, it's difficult to  
15 really write a good order anticipating all the  
16 argument of all the other parties and then coming to a  
17 conclusion based on what you think it should be. But  
18 in an uncontested matter, one that's not so complex,  
19 it's really just a matter of getting the process,  
20 those might be very helpful.

21 COMMISSIONER DRAINER: Do you think that  
22 would be a burden to the parties to do that?

23 MR. FISCHER: I think in a very complex  
24 case, that would be a significant job to write  
25 basically a Report and Order. In an uncontested

1 matter, I think they've probably already done a lot of  
2 the work in drafting their application.

3 COMMISSIONER DRAINER: Thank you.

4 Mr. Coffman, you shook your head yes.

5 MR. COFFMAN: Yes. I think I'd agree at  
6 least that the option of filing these would be a good  
7 idea, especially in complex issues. I think sometimes  
8 the Commission's Regulatory Law Judges might  
9 inadvertently miss a point that all the other parties  
10 have been assuming, a lot of the technical way that  
11 something should be described. That kind of  
12 information could be helpful to the Commission.

13 I don't know that the Commission needs to  
14 require it. To some extent I suppose the way that a  
15 party wishes the Commission to word its decision could  
16 be included in the brief. But I don't think I have a  
17 problem with the Commission encouraging that or  
18 allowing parties to file Proposed Findings of Fact and  
19 Conclusions of Law.

20 COMMISSIONER DRAINER: Okay. Well, in order  
21 to move this along, unless any other attorney would  
22 like to add to that -- Mr. Hack would like to add to  
23 that.

24 MR. HACK: Might I briefly?

25 COMMISSIONER DRAINER: Sure.

1           MR. HACK: I think it's a great idea, but  
2     from my perspective, particularly in large cases with  
3     multiple issues, you're inundated with material now  
4     that you might have difficulty getting through, and  
5     this just adds to that burden. I know it would add to  
6     my burden in terms of getting a brief prepared in  
7     time, getting everything else together.

8           And I think parties have the option of doing  
9     so if they'd like to right now, but I'd certainly hate  
10    to agree to do something that I might not be  
11    physically capable of doing or that would unduly  
12    increase the cost of the proceedings.

13           COMMISSIONER DRAINER: When it's a case that  
14    may have 70 issues to it?

15           MR. HACK: It's possible. Those have  
16    happened.

17           COMMISSIONER DRAINER: Yeah. I know. Thank  
18    you. Mr. Boudreau?

19           MR. BOUDREAU: Just one quick observation.  
20    I wasn't suggesting that the Commission make it  
21    mandatory. I'm suggesting that in the proper case, if  
22    you think it would be helpful, give the parties an  
23    opportunity to do so.

24           I agree with Mr. Hack. There are times  
25    that, you know, the attorneys will have their hands

1 full just trying to meet the deadline for getting  
2 briefs and other things done.

3 COMMISSIONER DRAINER: Sure.

4 MR. BOUDREAU: There are times when I do  
5 have the luxury of doing so. I'd just make it an  
6 option.

7 COMMISSIONER DRAINER: Okay. I appreciate  
8 that. Thank you. I have no other questions.

9 JUDGE ROBERTS: Commissioner Crumpton?

10 COMMISSIONER CRUMPTON: Thank you.

11 In continuing this line of questioning just  
12 for a brief moment, should the Commission allow the  
13 RLJs to file their orders for public comments before  
14 voting the orders out, Mr. Hack?

15 MR. HACK: Again, that's what's done in our  
16 other jurisdiction in Texas. Personally, I think the  
17 Commission ought to be the ones making public  
18 pronouncements on cases. You-all are the ones who  
19 ultimately have to bear the political pressure, and I  
20 think if you do that, what happens, at least in Texas,  
21 is the ALJ comes out with a Proposed Order.

22 Then after you've already written briefs,  
23 you write exceptions to the Proposed Order, and the  
24 Commission has another layer of material, actually two  
25 other layers of material to consider in making its

1 decision. To me, it adds complexity without a lot of  
2 benefit.

3 COMMISSIONER CRUMPTON: Any others want to  
4 comment on that?

5 MR. FISCHER: The Commission in one case  
6 that I'm aware of, your Honor, Case No. 18-309, did  
7 put out an Order basically that was subject to comment  
8 by the parties. This was a major rate design order on  
9 the telephone industry.

10 And I recall that it worked fairly well, but  
11 it did add some complexity and delay in getting the  
12 final order out. But the parties were permitted to  
13 comment on it. I think it was not just the Regulatory  
14 Law Judge's order but actually a Commission draft  
15 order.

16 COMMISSIONER CRUMPTON: Okay. Thank you.

17 Mr. Boudreau, how would the General Assembly  
18 view a finding from the Commission that the transfers  
19 were not for an authorized purpose?

20 MR. BOUDREAU: Probably not well. I mean,  
21 it -- and I think it kind of comes back to the point  
22 that I'm not sure that I can make a compelling  
23 argument that the Commission has the authority to make  
24 such a finding, and that's why I think I'm here today  
25 suggesting to you that it's probably not the



1 appropriate thing to do on that particular issue.

2 COMMISSIONER CRUMPTON: Okay.

3 MR. BOUDREAU: I mean, I think it's all  
4 right to make a factual finding that the funds were  
5 used or the moneys out of the fund were used for a  
6 purpose other than contemplated by your assessment  
7 statute, and I think that's a perfectly fair  
8 statement.

9 But I'm not sure that I'd encourage the  
10 Commission to come in and say the Legislature did the  
11 wrong thing.

12 COMMISSIONER CRUMPTON: Okay. Continuing  
13 that line of questioning, how do you think the General  
14 Assembly would view a stay of the Order?

15 MR. BOUDREAU: I doubt if the General  
16 Assembly cares on that particular topic. It's one  
17 that goes really to the moneys that are being paid  
18 into the fund. I think the Commission has the  
19 discretion to make that, and I think it's -- in this  
20 case, what I'm recommending is so minimally  
21 disruptive, I just don't think it amounts to much.

22 To me, it's an issue for the Commission to  
23 determine. I doubt if the General Assembly, for lack  
24 of a better phrase, has a dog in the fight. I don't  
25 think they really care.

1 COMMISSIONER CRUMPTON: Okay. Can the  
2 General Assembly levy an assessment on the utilities  
3 through its agent, the Commission?

4 MR. BOUDREAU: Oh, yes. I believe so.

5 COMMISSIONER CRUMPTON: Would it be lawful?

6 MR. BOUDREAU: Yes. I'm not -- we are not  
7 challenging the lawfulness of the assessment statute.  
8 We're not challenging --

9 COMMISSIONER CRUMPTON: You're not  
10 challenging the lawfulness of the act?

11 MR. BOUDREAU: No. I'm not challenging the  
12 lawfulness of the act. I think the assessment  
13 statute -- I have no basis to come before you and tell  
14 you that the Legislature didn't have the authority to  
15 empower the Commission to impose assessments. I think  
16 for purposes of this discussion I'll concede that's  
17 the point.

18 What I am challenging is the statute tells  
19 you what you can do in terms of making those  
20 assessments, and that with respect to the Article X  
21 transfers, I don't think it's consistent with that  
22 language.

23 COMMISSIONER CRUMPTON: But can the General  
24 Assembly order the Commission to perform this or  
25 provide the funding for this transfer?

1           MR. BOUDREAU: That kind of gets to some of  
2     the -- let me think about this. I think there's good  
3     arguments can be made both ways. I mean, let's face  
4     it, the PSC assessment statute says that the funds  
5     will be paid into -- or the assessments will be paid  
6     into the fund and be used only for a specific purpose.

7           On the other hand, you have a series of  
8     recent bills saying we're going to take some money out  
9     of there and use it over here for this particular  
10    purpose, something that's not contemplated by the  
11    statute.

12           The bottom line question, can the  
13    Legislature do that? Like I said earlier, I think  
14    very good arguments can be made both ways.

15           COMMISSIONER CRUMPTON: But assuming that  
16    they can and they do, what recourse does the  
17    Commission have but to follow?

18           MR. BOUDREAU: Well, other than to discuss  
19    the issues? I do think it's a serious issue for the  
20    Commission.

21           COMMISSIONER CRUMPTON: It is.

22           MR. BOUDREAU: And I think that the thing to  
23    do is -- maybe there's several things to do -- is  
24    discuss the issues. I'm not sure that the General  
25    Assembly understands that -- what the source of these

1 funds are and that once they're taken away, I mean,  
2 you're without them, is the bottom line. I'm not sure  
3 that they understand it.

4 So the trouble is, that particular horse is  
5 out of the barn. I mean, saying that it's time to go  
6 lobby the Legislature, the bills have been passed and  
7 that task has been done.

8 Legal challenges are a possibility. But  
9 then again you have to struggle with the difficult  
10 question of determining whether or not there's some  
11 basis for challenging what the General Assembly did.  
12 Like I said, that's a close call as far as I'm  
13 concerned. There's some very good arguments both  
14 ways.

15 COMMISSIONER CRUMPTON: Would it be prudent  
16 for the Commission to take on the General Assembly in  
17 this manner, or should the Commission allow the  
18 reviewing court, the next level --

19 MR. BOUDREAU: I don't think it's -- I'm  
20 sorry.

21 COMMISSIONER CRUMPTON: -- to perform the  
22 stay and deal with these other issues?

23 MR. BOUDREAU: I don't think it's unusual.  
24 I mean, some of you may have more experience with this  
25 obviously than I do. But I don't think it's unusual

1       for various state agencies to go before the  
2       Legislature and to visit with them about issues that  
3       are important to them, be it budget issues, be it  
4       regulatory issues. I know that they come up from time  
5       to time. There's been recent telecommunications  
6       legislation.

7                So I don't think it's inappropriate, nor do  
8       I think it would be unwelcome for representatives of  
9       the Commission to visit with the Legislature on issues  
10      of importance to them, including the use of the fund.

11               COMMISSIONER CRUMPTON: Okay. Thank you.  
12      Mr. Pendergast.

13               MR. PENDERGAST: Yes.

14               COMMISSIONER CRUMPTON: I've been here about  
15      a little over five years, and for that entire period  
16      the Commission has had about a 10 percent reserve at  
17      the end of each fiscal year. And, of course, the  
18      Commission always took that reserve and made it a part  
19      of its next year's budget requirement or revenue  
20      requirement.

21               Should the Commission maintain some type of  
22      reasonable reserve for operating purposes?

23               MR. PENDERGAST: Well, I guess my own view  
24      on that, Commissioner, would be that, as you're  
25      estimating the expenses you'll incur in connection

1 with regulating public utilities, I don't think it's  
2 out of the mainstream to go ahead and assume that you  
3 can't do that with mathematical precision. Things may  
4 change. You may have somebody file a big case that  
5 you weren't anticipating or there can be something  
6 else that might drive up your expenses.

7 And I don't think personally it's totally  
8 inappropriate to go ahead and factor that into your  
9 estimation process. I don't know if you want to go so  
10 far as to say, well, let's have a 10 percent reserve  
11 or something of that nature, but I don't think you  
12 need to be completely --

13 COMMISSIONER CRUMPTON: So would it be your  
14 recommendation to, after developing the budget, add a  
15 5 percent additional charge for reserve now that our  
16 reserve fund has been theoretically depleted until we  
17 got it to the point where -- or just gradually build  
18 it up?

19 MR. PENDERGAST: Well, I think -- and  
20 actually, I thought about this a little bit because I  
21 know that in the past you've had anywhere from a  
22 million, I think, to a million-five --

23 COMMISSIONER CRUMPTON: Yes.

24 MR. PENDERGAST: -- left over at the end of  
25 the year, and I assume that that was primarily due to

1 the fact that when most of us budget we, you know,  
2 assume that all staff positions will be filled and,  
3 like most organizations, you do have some turnover.

4 But whether or not you should specifically  
5 put a 5 percent in or a 10 percent as opposed to doing  
6 it the way you've done it where you seem to have gone  
7 ahead and without, I think, any challenge by the  
8 industry wound up with some money at the end, perhaps  
9 the process you've already used is the one you ought  
10 to follow.

11 COMMISSIONER CRUMPTON: But you would take  
12 issue with attempting to recover those funds in one  
13 period?

14 MR. PENDERGAST: I think -- I think that's  
15 one of the primary issues that we've raised, that once  
16 you start explicitly or perhaps even implicitly, I  
17 guess, recouping those refunds, that's when you become  
18 inconsistent with the overall purpose and intent of  
19 Hancock.

20 I mean, I don't think you should be in a  
21 position where you had to recoup them in the first  
22 place. But if you are in that position and that's  
23 found lawful that you should be in that position, then  
24 I think, if that's the way Hancock's supposed to work,  
25 it would suggest that that's not supposed to be

1       recouped.

2               COMMISSIONER CRUMPTON: Well, what emergency  
3       funding mechanism does the Commission have to meet  
4       those unforeseen contingencies that you mentioned  
5       earlier? For instance, several major rate cases that  
6       require us to go outside the agency to get additional  
7       help. How would we all of a sudden get that emergency  
8       funding?

9               MR. PENDERGAST: Yeah. I -- quite frankly,  
10      I guess, depending on what time of the year it is, I  
11      suppose the Legislature can always make an emergency  
12      appropriation if it needs to. I don't recall whether  
13      the Legislature's ever done that in the context of  
14      perhaps the Wolf Creek or the Callaway nuclear cases.  
15      I may just be -- may just be hallucinating. I'm not  
16      sure whether they did or not.

17              COMMISSIONER CRUMPTON: Okay. Would any of  
18      the other parties like to respond to that question?

19              MR. FISCHER: Your Honor, I recall a time  
20      whenever there were supplemental appropriations that  
21      routinely came through each year, but it wasn't  
22      necessarily related to a specific item in the  
23      Commission's budget. Chair Lumpe probably recalls  
24      other supplemental appropriations that may have  
25      happened for different agencies.



1           But I recall whenever I was around that we  
2    did have -- I recall that they were called emergency,  
3    but they may have been supplemental.

4           COMMISSIONER CRUMPTON: But weren't they  
5    requested at the beginning of the legislative session?  
6    So, for instance, let's say we're running out of money  
7    in April and --

8           MR. FISCHER: I think I recall, and my  
9    memory's foggy, that it was at a time where often the  
10   Legislature asked that you set aside a certain portion  
11   of your budget because of the revenue problems the  
12   State was having at the time, and then later on an  
13   additional supplemental appropriation was basically  
14   given, and it may have taken or offset some of that  
15   off of the revenue offset that you had initially.

16          COMMISSIONER CRUMPTON: I have one or two  
17    questions for Mr. Coffman. The parties have -- I mean  
18    other Commissioners have asked many of my questions.  
19    Mr. Coffman.

20          MR. COFFMAN: Yes.

21          COMMISSIONER CRUMPTON: You mentioned the  
22    fact that MGE has included, I guess, this Article X  
23    assessment in their rates. Did I understand you  
24    correctly?

25          MR. COFFMAN: I didn't participate in that

1 case, but it's my understanding that the entire test  
2 period amounts were included in the ratemaking  
3 calculation as requested by the company. I believe  
4 there were other recommendations, including our  
5 office's recommendation to normalize or allow a lesser  
6 amount of that.

7 I was simply saying that if the -- you know,  
8 if there's a court finding that finds the Article X  
9 portion of the assessment to be unauthorized, then our  
10 office would probably seek some method to make the  
11 ratepayers whole, to make sure that they would not  
12 have to be paying that in rates and that the company  
13 did not receive a windfall for something that they  
14 would get back.

15 COMMISSIONER CRUMPTON: Isn't that one of  
16 the risks of using a test year as a going-forward  
17 mechanism, that something may change in the future  
18 that would cause either party to suffer harm?

19 MR. COFFMAN: Well, up to a point. I mean,  
20 I understand the retroactive ratemaking prohibition,  
21 but perhaps there are other remedies, and I'm not sure  
22 exactly what route it would take. It may depend on  
23 what was actually done in the case. The Commission  
24 has recognized ways to keep certain funds separate,  
25 accounting authority orders for instance, to recognize

1 amounts and preserve them for the future.

2 COMMISSIONER CRUMPTON: For future  
3 consideration?

4 MR. COFFMAN: And that might be one way that  
5 can be done.

6 COMMISSIONER CRUMPTON: So you're not  
7 thinking of some type of single-issue ratemaking  
8 procedure?

9 MR. COFFMAN: I'm not sure exactly what we  
10 would seek, but we'd be very interested that the  
11 utilities not be allowed to -- any utility that had  
12 this in their rates not receive a windfall.

13 And we haven't determined how we would do  
14 that, but we're concerned about that, that ratepayers  
15 not be paying something that utilities wouldn't have  
16 to be assessed ultimately.

17 COMMISSIONER CRUMPTON: Thank you. That was  
18 my last question.

19 JUDGE ROBERTS: Thank you, Commissioner.

20 In light of the time and the fact that we  
21 still have two Commissioners left and possibly some  
22 rebuttal statements and we've kept the court reporter  
23 going for some time and concern about protecting the  
24 record and making sure that she gets a break, I think  
25 it's probably an appropriate time to stop for lunch.

1 I'd like to go back on the record at one  
2 o'clock. We can get back and get finished this  
3 afternoon.

4 Off the record, please.

5 (A recess was taken.)

6 JUDGE ROBERTS: On the record, please.

7 We're back on the record from our lunch  
8 break. I believe the questions next go to  
9 Commissioner Murray.

10 COMMISSIONER MURRAY: Thank you.

11 Mr. Boudreau, I'll start with you. It seems  
12 to me that the Commission has three choices. One is  
13 that we can just affirm our assessment and go ahead as  
14 we have already assessed the companies.

15 The second would be that we can recalculate  
16 and reissue an assessment minus the Title X transfer  
17 amounts. That would leave us approximately  
18 \$1.2 million short of our calculated expenses  
19 necessary to regulate the utilities.

20 And the third alternative would be something  
21 that you recommended here today, which was to stay the  
22 assessments relating to the Title X portion pending  
23 final determination. And what I'd like to ask you is,  
24 who are you suggesting that final determination would  
25 be made by?

1           MR. BOUDREAU: Before I get -- I'll answer  
2     the question, but let me just step back a minute  
3     because I just want to make sure there's no  
4     misunderstanding.

5           I'm not suggesting that the stay is an  
6     alternative. I see the two alternatives as the first  
7     two that you've listed, which is the Commission could  
8     rule that it's going to keep the public -- the  
9     assessments the way they were, just affirm its prior  
10    decision and move on. The other one is to, as you  
11    point out, recalculate the assessment leaving out the  
12    Article X transfers.

13           The stay to me is an independent issue. It  
14    tracks along with this. And I'm suggesting that the  
15    Commission stay the effectiveness of its decision  
16    pending the resolution of those issues, what the  
17    Commission's going to do.

18           COMMISSIONER MURRAY: By the Commission?

19           MR. BOUDREAU: Right. Now, the question,  
20    the specific question you asked is that initially the  
21    Commission needs to rule.

22           I'd say my request would be that you stay it  
23    at least until that time. Then we need to make a  
24    determination based on how the Commission decides on  
25    the merits of the case about how, you know, if we're

1 going to take the case up to the Circuit Court for  
2 some sort of judicial review.

3 At that point we may ask again that you  
4 continue the stay until we have a chance to resolve  
5 that before the courts, and, if not, then it would be  
6 an issue we'd bring up in front of the court.

7 But initially just stay it at least until  
8 you've ruled on -- at a minimum until you've ruled on  
9 the merits of the case.

10 COMMISSIONER MURRAY: All right. And  
11 that's -- I wanted to make sure that that's what you  
12 were talking about because if, in fact, we affirm our  
13 decision, then I assume if you took it to court you'd  
14 ask the court to stay it?

15 MR. BOUDREAU: Well, I'd do two things.  
16 First thing I'd do is I'd come back and I'd ask you  
17 guys to continue your stay until we've had a chance to  
18 take it to court and get a resolution. Then if you  
19 denied that, I'd go to the court and ask the court to  
20 stay it. So it depends.

21 COMMISSIONER MURRAY: And if we were to --  
22 our final determination would be that we recalculated  
23 and reissued an assessment omitting the Title X  
24 transfer amounts, where do you see the Commission  
25 going from there? What do you see as the Commission's

1 remedy?

2 MR. BOUDREAU: I'm not -- I'm not sure that  
3 there's much of a remedy. It kind of gets back to the  
4 point that the Legislature's already issued its  
5 directive that the funds have been transferred, and  
6 I'm not sure that there's a way to undo that is the  
7 conundrum here.

8 Initially I went into this thinking that  
9 there may be some opportunity here to take this issue  
10 up to a reviewing court and have them determine  
11 whether or not what the General Assembly did was right  
12 or wrong, because, from our perspective, from my  
13 clients' perspective, they don't think it's right that  
14 the transfers -- that these moneys be transferred out  
15 of the fund. They were paid into the fund by all the  
16 public utilities for the benefit of the Commission, to  
17 defray its expenses.

18 But the more I've gotten into this, I'm not  
19 sure that there's a mechanism at this point for  
20 changing that. I don't know that there's a way to  
21 rewrite history in terms of the transfers. They're a  
22 fact. The money has either been transferred or has  
23 been directed to be transferred by a date certain.

24 And other than the Commission pursuing some  
25 legal action in court, which is similar to what is

1       being done now in connection with the Conservation  
2       Federation litigation, perhaps litigation is the  
3       remedy, is to take a court action in there and get a  
4       determination from the court about whether or not the  
5       transfer is right. One of them at least has not  
6       happened yet.

7               COMMISSIONER MURRAY: And if we reissued our  
8       assessment and did as you had asked in your  
9       Memorandum, would that settle the issue for the  
10      utilities and they would -- would we assume, then,  
11      that you'd be satisfied? You wouldn't appeal the  
12      decision? You wouldn't try to determine whether the  
13      Legislature acted appropriately?

14             MR. BOUDREAU: Probably not. I probably  
15      wouldn't pursue the issue of the Hancock Amendment.  
16      I'm not -- I'm still not certain enough about the  
17      legal issues to be honest with you.

18             In diving into this, I'm reminded of an  
19      old -- on the issue of Hancock with the transfers that  
20      the Legislature ordered, I remember when I was taking  
21      one of my introductory courses in economics. My  
22      economics professor said that if you took all the  
23      economists and lined them up end to end, you'd never  
24      reach a conclusion.

25             And I feel the same thing about the Hancock



1 Amendment and all the expository case law. I mean, I  
2 dove into that, and I'm no wiser now than when I  
3 started. And I think part of that is the courts don't  
4 quite know what to do with it.

5 One thing I haven't had a chance to do is  
6 follow the line of cases that Chairman Lumpe mentioned  
7 about appropriations bills modifying other  
8 legislation, and there's some other things rattling  
9 around out there. And I'm not comfortable enough with  
10 my state of knowledge of the law at this point to tell  
11 you that I would -- or that my clients would pursue  
12 it.

13 I suspect that if the Commission ordered a  
14 recalculation of its assessment leaving out the  
15 Article X transfers, they'd probably be satisfied.  
16 They're not happy with what the Legislature did, but  
17 I'm not sure that they -- that I can tell them there's  
18 anything they can do about it.

19 COMMISSIONER MURRAY: There actually  
20 wouldn't be any harm to your clients if we didn't try  
21 to reassess you for it, I assume?

22 MR. BOUDREAU: Well, actually, one issue I  
23 have thought about. I mean, the fact of the matter  
24 is, these moneys are paid into the Public Service  
25 Commission fund, sort of not only for the Commission's

1 benefit, but for the benefit of the regulated  
2 companies, too, that you're able to do what you need  
3 to do to carry out your responsibilities under the  
4 law.

5 Some of those responsibilities are basically  
6 services in a manner, in a sense, to the utilities.  
7 You look at the financing applications. You do things  
8 for the utilities.

9 So you could -- you might be able to frame  
10 up an argument that the public utilities are some sort  
11 of third-party beneficiary in this fund and they do  
12 have a claim. After all, they're paying the money in.  
13 But once it's paid in, you know, it's kind of hard to  
14 claim that it's the utilities' money anymore. Once  
15 it's paid into the fund, it's supposed to be paid out  
16 in warrants to cover the cost of the Commission.

17 So I don't know exactly what standing we'd  
18 have. We may under some sort of third-party  
19 beneficiary concept. I don't want to rule that out,  
20 but I don't know for sure at this point.

21 COMMISSIONER MURRAY: If we affirm our prior  
22 decision, prior assessment, I would assume that the  
23 issue would get decided by a court?

24 MR. BOUDREAU: I think the probabilities are  
25 pretty high. I'm not telling you that -- I have

1 not -- I will tell you this much. I have not been  
2 given the authority by my clients to pursue it any  
3 further than I've pursued it so far, and they may  
4 ultimately decide for whatever reason that they don't  
5 want to pursue it, but --

6 COMMISSIONER MURRAY: So this is not just an  
7 attempt to exhaust administrative remedies?

8 MR. BOUDREAU: Well, no. I'm here because I  
9 think that this question is properly before the  
10 Commission. I think it's -- the assessment statute is  
11 part of your enabling legislation. You have the  
12 responsibility and the right under that particular  
13 statute to issue public utility company assessments.

14 And I'm not here just going through the  
15 motions. You know, I think that this is one that I  
16 felt that we ought to bring to you, and I'm not -- I'm  
17 not just going through the motions setting myself up  
18 for a court challenge. I mean, I'm here because I  
19 think this is the proper place to be.

20 COMMISSIONER MURRAY: Okay. Did you know  
21 that the Legislature was proposing the transfer in the  
22 various years we're talking about here?

23 MR. BOUDREAU: Me personally? Me, no. To  
24 my knowledge, my clients weren't aware. I think it  
25 was kind of a surprise. I'll tell you when I first

1 found out that it was legislation was at the  
2 prehearing conference when Mr. Haas brought in copies  
3 of the bills, which was a big surprise to me. It was  
4 the first that I'd heard about it.

5 And based on the surprised reaction of the  
6 representatives of the companies who I represented who  
7 were there at the time, I think it was a surprise to  
8 them, too. I didn't ask them that particular  
9 question, but I think everybody was a little bit  
10 surprised. I mean, surprised is the proper word, I  
11 think.

12 COMMISSIONER MURRAY: The appropriations  
13 process is kind of difficult to follow on a day-to-day  
14 basis, but I guess after the first year it would have  
15 been more -- people would have been more easily  
16 alerted to the fact that that's the way the Hancock  
17 refunds were being treated?

18 MR. BOUDREAU: Well, it happened over a  
19 three-year period. The actual transfers didn't take  
20 place until just this past June, but yeah.

21 COMMISSIONER MURRAY: They were directed to  
22 be taken from the various funds, though?

23 MR. BOUDREAU: Oh, yeah. There's no  
24 question it was part of the legislative process. I  
25 have no reason to believe it was any more secret than

1     any other manner of pursuing legislation. I don't  
2     know that any affirmative effort was made to alert the  
3     Commission or the public utilities that this was  
4     taking place. I mean, I honestly don't know.

5             But I'm not saying that it was some sort of  
6     super-secret process where there was some affirmative  
7     effort to keep everybody out of the loop. Yeah, it  
8     was a legislative process, and presumably it's been as  
9     open as it ever has been in the past.

10            COMMISSIONER MURRAY: I just have another  
11     question related to Trigen's issue here. Do you or do  
12     your clients have any problem with the five-year  
13     averaging?

14            MR. BOUDREAU: We haven't taken issue with  
15     the five-year average. We're not taking a position on  
16     that issue one way or the other. Other than the  
17     Article -- let me put it this way. The Article X  
18     transfers are the only component of the assessment  
19     that we're taking issue with in this case.

20            COMMISSIONER MURRAY: All right. Thank you.  
21     I think that's all my questions for you.

22            Could I just ask generally, is there any  
23     other party that is taking issue with the five-year  
24     averaging?

25            MR. PENDERGAST: Commissioner, if I could,

1 on behalf of Laclede Gas, at the beginning of my  
2 opening statement I directed your attention to that.  
3 And I guess from our position I think there was a, if  
4 you will, a utility-wide increase of about 20 percent.

5 And the gas industry, I think, at least some  
6 of us took a bigger hit than that. I think we had  
7 about a 30 percent increase, and I think a part of  
8 that was attributable to the use of the five-year  
9 average, which was, I think, the first time that had  
10 been done.

11 And I can understand Staff's argument about  
12 fluctuating expenses, and that may be a technique that  
13 you can use to try and come up with some normalized  
14 amount.

15 But it did hit the gas industry, I think, a  
16 little bit harder than it did some of the others, and  
17 we were already taking a fairly sizable increase, you  
18 know. We think that's an issue the Commission should  
19 at least look at.

20 COMMISSIONER MURRAY: Thank you. Are there  
21 any other parties that are taking issue with that?

22 MR. HACK: Certainly we've just had the  
23 opportunity to look at it the other day and would ask  
24 that the Commission look at the issue, and we  
25 certainly wouldn't at this point be -- I'm not

1 authorized to say we waive any arguments with respect  
2 to a five-year average.

3 COMMISSIONER MURRAY: Anyone else? Okay.

4 Mr. Pendergast, just a couple of questions for you.

5 MR. PENDERGAST: Yes.

6 COMMISSIONER MURRAY: I'm trying to find my  
7 notes that I made when you were giving your opening  
8 statement. Okay. Here it is.

9 You said that if there's a strong enough  
10 nexus to call the transfers made from our funds  
11 total -- or the public service assessments total state  
12 revenue and then use those assessments to help refund  
13 the excess that was collected, that there's a strong  
14 enough nexus to bar us reassessing the utilities to  
15 replace it.

16 And I think -- correct me if I'm wrong, but  
17 I think what you're saying there is if, in fact, the  
18 assessments collected through the Public Service  
19 Commission assessments contributed to the excess of  
20 total state revenue, then they should be a part of  
21 what was refunded. And if that is the case, we're  
22 going in a circle if we go back and reassess something  
23 that was already over-collected?

24 MR. PENDERGAST: Exactly. And that's just  
25 kind of part and parcel. You really ought to keep

1     these separate, and if you don't keep them separate  
2     you run into the problem of how can you go ahead and  
3     say Hancock's applicable for these purposes but not  
4     for these purposes?

5             I mean, if it is under the Hancock Amendment  
6     a part of general revenues and if it is under the  
7     Hancock Amendment something that can legitimately be  
8     used to effectuate refunds when revenues exceed the  
9     revenue limit under Hancock and you buy into that  
10    particular argument, it's kind of difficult then to  
11    kind of reverse course and say but Hancock really  
12    doesn't count, though, when it comes to whether you  
13    recoup those from the utilities we assess, that if  
14    it's viewed as excess state revenue, then you can't go  
15    ahead and say we'll give that excess state revenue  
16    back by simply raising the assessment. That's why I  
17    think they ought to be kept separate.

18            COMMISSIONER MURRAY: And you asked us to  
19    make a finding about the use of those funds, and what  
20    is the purpose of us making such a finding?

21            MR. PENDERGAST: Well, I think and -- I  
22    think first it reflects what everybody, I think, has  
23    agreed to in the Stipulation of Facts, that these  
24    transfers really weren't related to the regulation of  
25    public utilities.



1           And I think that if you have that particular  
2     finding by the Commission, then you have a fairly good  
3     basis for going forward and, I think, making the  
4     arguments that we've made about, you know, the two  
5     salient issues, whether or not you ought to go ahead  
6     and include this in the Hancock process which we think  
7     you shouldn't, and secondly, if you do, then what's  
8     that implication as far as your ability to recover?

9           COMMISSIONER MURRAY: Are you asking that  
10    that finding be made so that your clients can go  
11    forward and take this to the courts for a decision?

12          MR. PENDERGAST: I think that unless you're  
13    inclined to go ahead and make a finding and say we're  
14    going to issue new orders, a new assessment order that  
15    reduces by the article transfer amounts, that's what  
16    we would go ahead and use it for.

17          And as I said, our first line of argument  
18    would be that I don't think the Legislature should  
19    have done this in the first place.

20          COMMISSIONER MURRAY: Okay. Just so I  
21    understand you, are you asking us first to recalculate  
22    and reassess and omit the Title X transfer amounts  
23    from your assessment?

24          MR. PENDERGAST: I think that would be the  
25    preferred result, yes.

1           COMMISSIONER MURRAY:  And barring -- and  
2     assuming we don't do that and we reaffirm our  
3     assessments, including the Title X transfer amounts,  
4     are you asking that we make a finding that the Public  
5     Service Commission funds should not be included in the  
6     calculation of total state revenue for the purpose of  
7     Title X refunds?

8           MR. PENDERGAST:  At the very least, I would  
9     ask you not to make a finding that they should have  
10    been, that the Hancock Amendment does apply, and that  
11    they need to be included in that, because I think if  
12    you do that, then, you know, you're limiting the  
13    Commission's options, too, to be able to go ahead and  
14    argue this isn't part of the Hancock process.  It  
15    should have been -- those transfers were  
16    inappropriate, and they shouldn't have been collected  
17    from the Commission.

18          COMMISSIONER MURRAY:  So at the very least  
19    you're asking us to be silent?

20          MR. PENDERGAST:  Yes.  Yeah.  I think that  
21    would be where we're coming from.

22          COMMISSIONER MURRAY:  Okay.  Thank you.

23                 Are there any of the other attorneys for any  
24    other parties that wish to answer any of the questions  
25    I've asked the previous two attorneys?

1           MR. KEEVIL: I would simply ask that when  
2   you recalculate, if you recalculate your assessments,  
3   that you do so not using the five-year average  
4   process, but do so according to that -- the way the  
5   page 6 of 15 where the group allocations have been  
6   done without the five-year average and also back out  
7   the Article X transfers from this.

8           COMMISSIONER MURRAY: Mr. Fischer?

9           MR. FISCHER: In answer to one of the  
10   questions Mr. Boudreau indicated or he was asked why  
11   didn't utilities raise this in previous years.

12           It's my understanding this is the first time  
13   Hancock Amendment rebates have showed up in the public  
14   utility assessments, and actually there are three  
15   years of Hancock refunds that are showing up in this  
16   year's assessment, and that's when we became aware of  
17   it.

18           COMMISSIONER MURRAY: And you were not aware  
19   of it when the Legislature was proposing to take it  
20   from --

21           MR. FISCHER: No. I certainly wasn't, and  
22   my clients did not inform me they ever had been aware  
23   of it until we received the assessment letter.

24           MR. PENDERGAST: Commissioner Murray, if I  
25   might, along those same lines, you asked a number of

1 questions about, well, if you simply recalculate the  
2 assessments and knock out the Article X transfers,  
3 maybe do something about the five-year average, where  
4 does that put the utilities as far as perceiving some  
5 of these broader issues that we've raised.

6 And, you know, quite frankly, I don't think  
7 we've gotten to the point of really looking at that.  
8 We do have some pieces of legislation that indicated  
9 that these transfers should be made, and we have some  
10 concerns about whether that was constitutional or  
11 statutorily authorized.

12 And I don't know, quite frankly, what our  
13 rights, absent a showing of no direct harm because  
14 you've recalculated your orders, would be to pursue  
15 that. But if we do have a right to pursue that for  
16 prior legislation, I think we'd be interested in doing  
17 that even if we don't have a direct bond because I  
18 think it's something that's fully capable of happening  
19 again and probably will happen again.

20 And secondly, I think from our perspective  
21 at least we'll certainly be keeping a close eye on the  
22 appropriations process in the upcoming legislative  
23 session to see whether those transfers happen again,  
24 and if they are, at least express our opinion to the  
25 General Assembly that that's not appropriate in our

1 view.

2 COMMISSIONER MURRAY: Mr. Hack?

3 MR. HACK: From MGE's perspective, and I  
4 probably won't answer your questions specifically  
5 because I can't remember them precisely, but in my  
6 history the transfer of PSC funds to general revenues  
7 is unprecedented.

8 And we're interested in making sure that  
9 you, the Commissioners, examine the process,  
10 understand the process, and have the opportunity to  
11 voice your opinions about the transfers and then the  
12 subsequent recoupment of those transfers through  
13 succeeding years' PSC assessments.

14 That's part of just due diligence of seeing  
15 to it that you pay only those bills that are  
16 appropriate to be paid. I think Mike makes a good  
17 point that some way -- that the issue has to be  
18 surfaced to the General Assembly in one way, shape or  
19 form.

20 So that, you know, a simple recalculation of  
21 this year's PSC assessment to back out the \$1.2  
22 million, it may cover up the issue for this year, but  
23 that doesn't mean the issue goes away for subsequent  
24 years.

25 You know, we're not dying for a court battle

1 by any means, but I think that there needs to be an  
2 authoritative pronouncement on the issue.

3 COMMISSIONER MURRAY: Do you think that the  
4 easiest way for that to occur would be for the  
5 companies to appeal our assessment?

6 MR. HACK: I really -- in my heart, even  
7 though it's a sticky political position, I'd really  
8 like to know, and that's one of the reasons we're  
9 here, how the Commission as a body feels about that  
10 process.

11 And maybe it is the easiest way given the  
12 jurisdictional limitations of the Commission and the  
13 tax questions that are presented here, and that may be  
14 the easiest way. Ultimately everybody's looking for  
15 what their remedy is.

16 I don't want to recommend to my client that  
17 when we get down to the fourth quarter payment, that  
18 we withhold \$78,000 that is due to the Commission  
19 under its assessments, but that may be a decision we  
20 have to come to to make if you just decide to affirm  
21 your prior Order and let us appeal.

22 I mean, we haven't thought through all the  
23 permutations of what our remedies are, but everybody's  
24 sort of between a rock and a hard place. What do you  
25 do if you pay the dollars? What do you do if you

1       don't pay the dollars? Where does the Commission get  
2       the money if it says, okay, we'll back this \$1.2  
3       million out?

4               COMMISSIONER MURRAY: It's not an easy thing  
5       to answer, is it?

6               MR. HACK: No, it's not.

7               COMMISSIONER MURRAY: Does anybody else want  
8       to respond to any of the previous questions without  
9       trying to go through them with each person?

10              MR. KEEVIL: At the risk of being  
11       duplicative here, we may very well have a different  
12       answer to the question what can the Commission do  
13       about this in regard to the money which hasn't yet  
14       been drawn out versus the two years that have, in my  
15       opinion.

16              Like Mr. Boudreau, I haven't really done the  
17       research on that to give you specifically what cause  
18       of action, if any, the Commission might have. But it  
19       seems to me that the money that you haven't yet turned  
20       over you have different possible remedies regarding  
21       than you do the money that has been turned over.

22              COMMISSIONER MURRAY: Including refusing  
23       to --

24              MR. KEEVIL: Well, as for that money, since  
25       you haven't paid it, I mean, I realize this would be a

1 sticky political situation for the Commission, but, I  
2 mean, someone mentioned the Conservation.

3 I mean, there is -- there is that avenue of  
4 litigation for the Commission, declaratory, something  
5 along the nature of extraordinary remedies,  
6 declaratory judgments, prohibition, something. Again,  
7 I haven't researched it, but something along that line  
8 since you still have that particular money.

9 COMMISSIONER MURRAY: Okay. Thank you. I  
10 just have a couple of questions for Staff and then I'm  
11 finished.

12 Mr. Haas, you said that we are charged with  
13 carrying out the legislative policy. In that -- well,  
14 first of all, would you explain the rationale for  
15 considering the Title X transfer amounts attributable  
16 to the regulation of public utilities?

17 MR. HAAS: It was my opinion that those  
18 transfers are not related to regulation of public  
19 utilities, but that that wasn't dispositive of the  
20 issue because the Legislature had implicitly repealed  
21 the prohibitions on the use of funds in Public Service  
22 Commission funds.

23 COMMISSIONER MURRAY: So you're saying they  
24 do not have to be attributable to the regulation of  
25 public utilities based upon the latter statute



1 requiring the transfer?

2 MR. HAAS: Yes. That's correct.

3 COMMISSIONER MURRAY: Do you think it's the  
4 Legislature's intent to circumvent the Hancock  
5 Amendment?

6 MR. HAAS: I don't know what the  
7 Legislature's intent was. I don't know if the members  
8 of the Legislature were aware of how the Public  
9 Service Commission's funded or not.

10 COMMISSIONER MURRAY: Then just one last  
11 question. How would you respond to the public policy  
12 argument, that if we -- if the Public Service  
13 Commission funds are a part of total state revenues  
14 requiring a refund to the taxpayers, that to reassess  
15 the utilities to replenish those same funds that we're  
16 having to refund becomes a circular argument that the  
17 purpose of Hancock Amendment is being defeated? How  
18 do you address that public policy issue?

19 MR. HAAS: I do see the circularity that  
20 you're talking about, but I think that the Legislature  
21 has addressed that policy and has provided for that  
22 circularity, perhaps inadvertently, but I think the  
23 Legislature's the one that set that policy.

24 COMMISSIONER MURRAY: Thank you. I have no  
25 further questions.

1 JUDGE ROBERTS: Commissioner Schemenauer?

2 COMMISSIONER SCHEMENAUER: Thank you.

3 Mr. Boudreau, I'd like to start, and I read  
4 through your Memorandum of Law which you filed. I  
5 have some questions on that. You say on page 4 that  
6 moneys paid into the fund by public utilities are to  
7 go specifically to the payment of expenditures  
8 actually incurred by the Commission and attributed to  
9 regulation of public utilities.

10 When the Legislature appropriates money to  
11 us to pay our bills, is that a legitimate use of the  
12 money in that fund?

13 MR. BOUDREAU: Yeah. If the draw against  
14 the fund is based on expenditures incurred by the  
15 Commission in connection with its regulation of public  
16 utilities, yes.

17 COMMISSIONER SCHEMENAUER: In reality, they  
18 only appropriate money to the Commission that we are  
19 authorized by law to spend. Is that a correct  
20 statement? We cannot spend anything unless it's  
21 appropriated.

22 MR. BOUDREAU: I think that's a fair  
23 statement, yes.

24 COMMISSIONER SCHEMENAUER: If the  
25 appropriation to recycle some of that money into the

1 Article X refund account is not -- is an expense,  
2 then, I mean, does your argument fail?

3 MR. BOUDREAU: No. No. My argument is that  
4 the moneys -- whether or not the transfer out of the  
5 fund was appropriate, that's what the General Assembly  
6 directed.

7 COMMISSIONER SCHEMENAUER: I mean, was it  
8 appropriate by what standard? I mean, whose standard  
9 are you applying, appropriateness? Is it your  
10 standard? Is it the Supreme Court's standard? Is it  
11 the Legislature's standard? I mean, who determines  
12 the appropriateness of appropriations?

13 MR. BOUDREAU: As I understand the process,  
14 and I don't claim to be an expert on the  
15 appropriations process, the Commission -- the moneys  
16 are paid by the public utilities to the State  
17 Treasurer, puts them in the fund. Every year the  
18 Public Service Commission or any state agency -- well,  
19 let's just stick with the Public Service Commission.

20 The Public Service Commission makes through  
21 the Department of Economic Development its  
22 appropriations request, here's what we expect our  
23 expenses to be, and we'd like you to authorize us to  
24 spend this money and we want you to appropriate those  
25 moneys out of the fund to defray those costs.

1           So I guess you make the recommendation to  
2     it. Ultimately the General Assembly decides whether  
3     or not the appropriations request is appropriate. I  
4     mean, the amount is okay, but the Commission makes the  
5     initial determination about what is -- what should or  
6     should not be included in calculation of its budget.  
7     So both parties have a role in that.

8           COMMISSIONER SCHEMENAUER: But the  
9     Commission could not spend any money unless it is  
10    appropriated for that purpose by the Legislature?

11          MR. BOUDREAU: I'm not sure that I have any  
12    grounds to dispute that statement.

13          COMMISSIONER SCHEMENAUER: And when the  
14    Legislature says we're transferring X number of  
15    dollars from your fund to refund Article X  
16    liabilities, I mean, that's passed by both houses,  
17    signed by the Governor, and it in effect becomes law  
18    and we comply with it.

19          What would you suggest that we would have  
20    done, I mean, if we have -- should we have told the  
21    Legislature no, you can't have our money?

22          MR. BOUDREAU: I would suggest it can happen  
23    on a number of fronts. If the issue were -- had been  
24    known about ahead of time, and I don't know whether or  
25    not it was, perhaps an effort to educate the

1       Legislature about the uniqueness of the  
2       appropriations -- not appropriations -- the assessment  
3       process.

4               The source of the funds, the source of the  
5       moneys that are paid into the Public Service  
6       Commission may have been something that the General  
7       Assembly was not consciously aware of when they  
8       drafted up the appropriations. Various legal  
9       challenges would be mentioned as other state agencies  
10      have done from time to time.

11              COMMISSIONER SCHEMENAUER: Do you know how  
12      many funds were tapped for --

13              MR. BOUDREAU: A lot.

14              COMMISSIONER SCHEMENAUER: -- refund for  
15      Article X?

16              MR. BOUDREAU: A lot.

17              COMMISSIONER SCHEMENAUER: 233. You know  
18      some of them are -- and I'll -- there's the Veterans  
19      Trust Fund, Childrens Services Fund, Board of  
20      Accountancy, Board of Chiropractic, Board of  
21      Cosmetology, Board of Embalmers, Board of Registration  
22      for Healing Arts, Board of Nursing. I don't see the  
23      Missouri Bar in here.

24              MR. BOUDREAU: The Missouri Bar isn't a  
25      state agency.

1           COMMISSIONER SCHEMENAUER: The Missouri Bar  
2 doesn't pay into the State Treasury and is not subject  
3 to appropriations?

4           MR. BOUDREAU: Missouri Bar, I think, is an  
5 agency of the judicial branch of government.

6           COMMISSIONER SCHEMENAUER: Am I correct,  
7 it's not paid into the State Treasury and it's not  
8 appropriated by the General Assembly?

9           MR. BOUDREAU: I don't know that. I don't  
10 know how that's handled.

11           COMMISSIONER SCHEMENAUER: Well, it's not.  
12 And the reason it's not in there is because it fails  
13 the two-part test of total state revenues that the  
14 Supreme Court outlined in two cases, *Missourians for*  
15 *Tax Justice vs. Holden*, which is 79708, and *Margaret*  
16 *Kelly vs. Richard Hanson*, which is 80251.

17           In both those cases they define total state  
18 revenue, and total state revenue has a two-part test.  
19 It's paid into the State Treasury. It's appropriated  
20 by the General Assembly. And it even went on further  
21 to say that the court's interpretation of total state  
22 revenue in *Vichner* is consistent with time-honored  
23 principals of constitutional construction. It  
24 resolves all accounting controversy surrounding the  
25 meaning of total state revenues. It also renders the

1 meaning of total state revenues sufficiently precise  
2 to permit enforcement.

3 Of course, you know that the definition said  
4 it included "or other source of income" after it  
5 spelled out taxes, excise, custom or duty or other  
6 source of income. That seems all-encompassing. And  
7 I'm just trying to find a basis for your argument that  
8 this fund is not part of total state revenue defined  
9 by the courts.

10 MR. BOUDREAU: It may be. I'm not sure that  
11 the test is as firm as you said it was because when  
12 the court articulated that, I think it was the Holden,  
13 or maybe it was the Kelly case, they said that  
14 particular revenues would not be in the calculation of  
15 total state revenues unless they were paid into the  
16 State Treasury and taken out through the  
17 appropriations process.

18 I'm not sure that I conclude from that that  
19 that's all of the analysis. I mean, those are two  
20 things I think that have to be met. I don't think  
21 either of those decisions indicated that that was the  
22 totality of the analysis.

23 But even if it is, I mean, I guess my point  
24 is, even if I were to concede for purposes of argument  
25 that it's part of total state revenue, and I'll even

1 go further that it's an appropriate source for  
2 distributing excess revenues to the income tax payers  
3 of the state, that doesn't get you past the real  
4 question, which is, if that's right, if the idea is to  
5 put a revenue lid on what the State gets, what's the  
6 rationale for recovering it after it's been disbursed?

7 I mean, even if I concede that argument,  
8 then you come square up against what the purpose of  
9 Hancock is, which is to give this money back to its  
10 rightful owners. And if you've given it back to its  
11 rightful owners, what's the constitutional or legal  
12 basis for grabbing it again?

13 COMMISSIONER SCHEMENAUER: I'm not following  
14 you on the legal basis for grabbing it again. The  
15 statute says the Commission makes their assessments  
16 based on their expenditures for the year.

17 MR. BOUDREAU: That's right.

18 COMMISSIONER SCHEMENAUER: And which we went  
19 through the process and determined our expenditures  
20 and made the assessments based on our expenditures.  
21 And how can that be an illegal operation? I mean,  
22 what's that got to do with Article X, Section 18E of  
23 the Constitution?

24 MR. BOUDREAU: Well, the statute says that  
25 the Commission calculates its budget based on expenses



1 to be incurred by it reasonably attributable to the  
2 regulation of public utilities. My argument would be  
3 it's not an expense.

4 COMMISSIONER SCHEMENAUER: Why is it not an  
5 expense?

6 MR. BOUDREAU: It's not an expense. I mean,  
7 what bill was paid? What service was rendered? It  
8 was just movement of moneys from one account to  
9 another in the State Treasury.

10 COMMISSIONER SCHEMENAUER: It was done under  
11 House Bill 1004, which is a binding law on this  
12 Commission. How could you say that's not an expense  
13 to the fund? I mean, it's an expense that the fund  
14 was given and the fund had to pay.

15 MR. BOUDREAU: I don't think it was a cost  
16 incurred by the Commission. So I don't -- my argument  
17 is, my contention is it's not an expense. And even if  
18 it is an expense, much of it was not to be incurred in  
19 the coming fiscal year. \$690,000 of it was paid in  
20 the prior fiscal year.

21 COMMISSIONER SCHEMENAUER: Now, wait a  
22 minute. Wait a minute. It was paid in the prior  
23 fiscal year?

24 MR. BOUDREAU: Yes. Well, 690,000 of it  
25 was.

1 COMMISSIONER SCHEMENAUER: It was paid in  
2 the prior fiscal year out of the funds available?

3 MR. BOUDREAU: Uh-huh.

4 COMMISSIONER SCHEMENAUER: Any funds  
5 available at the end of the year are used to reduce  
6 the next year's assessment?

7 MR. BOUDREAU: That's correct.

8 COMMISSIONER SCHEMENAUER: So when that  
9 expenditure is removed from the fund balance, that  
10 means less of the amount could be subtracted from the  
11 next year's assessment. So I fail to see where we're  
12 recovering something that we shouldn't have recovered.

13 It looks to me like it was an expenditure,  
14 duly appropriated. It was expensed. The Commission  
15 reduced that amount from the balance left over, which  
16 would be applied to the next year's assessment. There  
17 was less money left over. So the assessment increased  
18 from the prior year.

19 MR. BOUDREAU: Well, I guess we're kind of  
20 getting into the area about whether the Commission  
21 should be budgeting to have a surplus, and I would --

22 COMMISSIONER SCHEMENAUER: The Commission  
23 doesn't budget to have a surplus. The Commission  
24 budgets its expected expenditures. If there's any  
25 balance left at the end of the year, that balance is

1 reduced from the next year's budget.

2 MR. BOUDREAU: I understand that.

3 COMMISSIONER SCHEMENAUER: We do not budget  
4 for a surplus. I mean, I looked at this thing pretty  
5 closely, and they don't budget for a surplus. The  
6 surplus occurs because --

7 MR. BOUDREAU: The budget includes at least  
8 two line items for Article X transfers, and I guess I  
9 can -- we can go around and around about this, but I  
10 guess my argument is, my contention is it's not an  
11 expense which can be properly budgeted for under the  
12 language of 386.370.

13 COMMISSIONER SCHEMENAUER: Well, and I guess  
14 that's one of the things we'll have to decide.

15 You also state that the companies contend  
16 that this can be done, and we're talking about  
17 resolving whether an assessment can be included in  
18 calculation of TSR must be reconciled. You say it  
19 should not, and the Supreme Court says it should. I  
20 mean, how do you -- what's your contention, how this  
21 can be resolved?

22 MR. BOUDREAU: I think the resolution is  
23 that if you were -- if you're correct that the Supreme  
24 Court's decided that it's just a two-part test -- and  
25 I don't concede that. After having read it fairly

1       closely, I'm not sure that's what they're saying.

2               But even if I were to concede the point that  
3       it's part of total state revenue for part of the  
4       calculation to come up with total state revenue,  
5       there's nothing in the Hancock Amendment, there's  
6       nothing in any case law that says that because it's  
7       over here to calculate total state revenue that it's  
8       an appropriate source of funds for the refund.  
9       There's absolutely nothing that makes a connection and  
10      nothing that necessarily leads to that conclusion.

11              COMMISSIONER SCHEMENAUER:  So you would  
12      think that the law should carve out the PSC funds from  
13      all the other 233 funds as an exception to being hit  
14      for the refunds?

15              MR. BOUDREAU:  My contention is it shouldn't  
16      be part of total state revenue in the first place.  
17      Second of all, even if it is, yes.

18              COMMISSIONER SCHEMENAUER:  The Supreme Court  
19      has already said it is.  You can argue that it's not  
20      and take it up to rehearing if you like, but we have  
21      to operate under the judicial interpretation handed  
22      down by the Supreme Court.

23              Now, on page 7, you say no provision of the  
24      Hancock Amendment expressly or by necessary  
25      implication authorizes the Missouri General Assembly

1 to ignore the express prohibition contained in 386.370  
2 that the moneys in the fund shall only be used by the  
3 Commission to pay for regulatory expenditures and  
4 shall not revert to the general fund for general state  
5 governmental use.

6 How has this occurred? How has it reverted  
7 back to the fund? How have any of the moneys in the  
8 PSC fund reverted back to the general fund?

9 MR. BOUDREAU: The three House Bills that  
10 are mentioned in the Stipulation of Facts.

11 COMMISSIONER SCHEMENAUER: That was an  
12 appropriation. That wasn't a reversion.

13 MR. BOUDREAU: Maybe I misunderstand the  
14 question. Could you rephrase it for me, please?

15 COMMISSIONER SCHEMENAUER: It says, and  
16 shall not revert to the general revenue fund for  
17 general state governmental use.

18 MR. BOUDREAU: The moneys left over in the  
19 fund at the end of any particular fiscal year. Now,  
20 what's the question?

21 COMMISSIONER SCHEMENAUER: That's what the  
22 statute says. Now, you're stating that this has  
23 occurred. I'm asking how this has occurred. Are you  
24 saying because they appropriated the money for the  
25 Hancock refunds, that this has occurred?

1           MR. BOUDREAU: I would -- believe me, I want  
2     to answer your question, but I don't think I  
3     understand it. Can you kind of start from the  
4     beginning, and if you could rephrase it, I'll do my  
5     best to try and answer it.

6           COMMISSIONER SCHEMENAUER: I mean, these are  
7     your words, and I'm just trying to -- trying to decide  
8     how you arrived at this.

9           MR. BOUDREAU: Direct me to that. Where are  
10    you looking?

11          COMMISSIONER SCHEMENAUER: It's on page 7,  
12    the second paragraph.

13          MR. BOUDREAU: The last sentence of the --  
14    or wait a minute. No court decision is held, is that  
15    the language you're looking at?

16          COMMISSIONER SCHEMENAUER: No provision in  
17    the Hancock Amendment.

18          MR. BOUDREAU: Okay. I'm with you.

19          COMMISSIONER SCHEMENAUER: And you're  
20    implying that some of these moneys in the fund has  
21    reverted to the general fund for general state  
22    governmental use, and I'm asking you how -- what you  
23    base that on and how did this occur?

24          MR. BOUDREAU: Well, I'm not sure that I  
25    agree with your characterization of what I'm saying.

1       What I'm saying there --

2                   COMMISSIONER SCHEMENAUER:   Tell me what  
3       you're saying.

4                   MR. BOUDREAU:   Excuse me?

5                   COMMISSIONER SCHEMENAUER:   Tell me what you  
6       mean if you mean something different than what you  
7       said.

8                   MR. BOUDREAU:   The point I'm making is that  
9       the law, 386.370 says what it says, and it says in  
10      essence, if I can paraphrase it here, that any moneys  
11      at the end of any particular fiscal year that haven't  
12      been used by the Commission out of the fund shall not  
13      revert to general revenue but be carried over to  
14      reduce the following year's assessment.

15                  And all I'm saying is that's a limitation,  
16      that's a statutory limitation on the use of those  
17      funds, and that nothing that I've seen that's been  
18      done by the General Assembly specifically repeals that  
19      limited purpose in that statute, and the Hancock  
20      Amendment doesn't either.

21                  I mean, there's no language in the Hancock  
22      Amendment that says regardless of what any state law  
23      says about the use of the funds, we're going to use  
24      them to make these distributions.   That's what I'm  
25      saying.

1                   COMMISSIONER SCHEMENAUER: Your last  
2 sentence in that paragraph states your conclusion.  
3 Accordingly, Article X transfers are not authorized by  
4 law.

5                   MR. BOUDREAU: Yes.

6                   COMMISSIONER SCHEMENAUER: I mean,  
7 appropriations bill, House Bill 1004.

8                   MR. BOUDREAU: That I think raises the  
9 question that Chairman Lumpe raised, which is whether  
10 or not an appropriations bill can change other laws by  
11 implication. Now, I haven't had a chance to research  
12 it, but if that's the state of the law, then I think  
13 that statement's still a correct one.

14                  COMMISSIONER SCHEMENAUER: Well, there are a  
15 lot of other issues involved in that besides whether  
16 or not the appropriation can change the definition of  
17 the law.

18                  MR. BOUDREAU: Well, there may be, and  
19 that's why I'm quick to add I haven't had a chance to  
20 look into it to answer it in any detail.

21                  COMMISSIONER SCHEMENAUER: In the next  
22 paragraph you also imply that the Commission for the  
23 benefit of the court may make a factual finding that  
24 the Article X transfers at issue in this case were not  
25 for an authorized purpose, and such a determination



1 will enable interested parties to pursue a court  
2 judicial remedy.

3 I mean, why would the Commission pick a  
4 fight with the General Assembly and the Supreme Court  
5 decisions and Office of Administration?

6 MR. BOUDREAU: Well, I think that if --  
7 throughout the day I've been, I think, somewhat  
8 backing away from that. On looking at some of the law  
9 in particular that Mr. Haas has cited, and not having  
10 had an opportunity to look at some of the law that  
11 Chairman Lumpe has referred to, I am less comfortable  
12 making that recommendation to the Commission than I  
13 was when I wrote this memo of law, which was drafted  
14 some several weeks ago.

15 I do think it would be appropriate for the  
16 Commission to make a fact -- rather than making a  
17 conclusion that it's inconsistent with the statute,  
18 just make a factual finding, which I don't think  
19 really has been disputed by anybody here, that the  
20 Article X transfers are not reasonably attributable to  
21 the regulation of public utilities. That's a factual  
22 determination.

23 And then to the extent that I or anybody  
24 else wants to take it to court and say, look, I mean,  
25 the statute says what it says. The factual finding's

1       been made by the Commission that the moneys have been  
2       used for a purpose other than specified in the  
3       statute. That leaves us free to make our legal  
4       arguments about whether or not what the General  
5       Assembly did was right or not.

6               COMMISSIONER SCHEMENAUER: So then are you  
7       implying that the Legislature through House Bill 1004  
8       in those specific years erred when they appropriated  
9       these funds from the Public Service funds, and I guess  
10      the 233 other funds?

11             MR. BOUDREAU: I'm not sure that I'm in a  
12      position to tell you that I know after reviewing the  
13      law that I'm certain that that's the correct  
14      conclusion. I'm frankly concerned about it. I know  
15      my clients are, and I think the Commission ought to be  
16      concerned about it, too.

17             I mean, I don't think this is just something  
18      that is a pet complaint of mine. I mean, this is  
19      disturbing. It's disturbing to my clients as public  
20      utilities. It ought to be disturbing to the  
21      Commission who is the beneficiary of -- the primary  
22      beneficiary of the fund.

23             But I can't tell you that I'm comfortable  
24      enough with the law at this point to encourage the  
25      Commission to take a step into concluding that the

1 legislative appropriations process was inconsistent  
2 with the law. I think you can make the factual  
3 finding and leave it to somebody else to argue that.

4 COMMISSIONER SCHEMENAUER: I know you just  
5 said utility companies pay the assessments, and they  
6 do. The Commission allows them to recover it in the  
7 rate base, is that not right, so the ratepayers  
8 effectively end up paying it?

9 MR. BOUDREAU: My understanding is it's been  
10 customary for the Commission to allow a certain amount  
11 in rates to recover the cost of the assessments. I  
12 think that's a correct statement.

13 COMMISSIONER SCHEMENAUER: And the  
14 beneficiaries of the assessment you said were the PSC,  
15 and I think probably the beneficiaries of the  
16 assessments are the utility companies and the  
17 ratepayers, and we are the mechanism that operates to  
18 make that -- to provide those benefits to both utility  
19 companies and ratepayers. So I don't think we are the  
20 beneficiaries of the fund.

21 Then I do take another -- some of your  
22 statements really bothered me. On page 12 you say --  
23 you're talking about the Article X transfers, and  
24 these transfers from a fiscal year assessed on a  
25 lawful basis. Including this amount in calculation is

1 clearly an attempt to recover an amount outside the  
2 fiscal year.

3 I mean, can you explain how you arrived at  
4 that?

5 MR. BOUDREAU: Well, they are transfers. I  
6 mean, if you accept your argument that the transfers  
7 were an expense to the Commission, they were an  
8 expense that was incurred in the prior fiscal year.  
9 The issue in Supplemental Order 52, which is the one  
10 that we're rehearing, is the budget for the 1999  
11 fiscal year.

12 COMMISSIONER SCHEMENAUER: Yes.

13 MR. BOUDREAU: So that's what I'm saying is  
14 that this is an expense in a prior fiscal year that  
15 you're trying to recover in a budget for the current  
16 fiscal year.

17 COMMISSIONER SCHEMENAUER: That Supplemental  
18 Order was a disclosure to the utility companies why  
19 the balance in the fund was reduced at the end of  
20 fiscal year 1998. That's all that was. There was  
21 less amount left at the -- in the balance of the fund  
22 at the end of fiscal '98 to apply to reduce the  
23 expenses in fiscal 1999. I don't care how you  
24 interpret it, that's the purpose of that.

25 MR. BOUDREAU: Well, I'm looking at the

1       Assessment Order that was issued, and there are line  
2       items in the calculation for Article X transfers.

3               COMMISSIONER SCHEMENAUER:   They could have  
4       been left out.

5               MR. BOUDREAU:   I suppose they could have.

6               COMMISSIONER SCHEMENAUER:   On page 13, you  
7       make a statement about legislative raids on the  
8       Commission's coffers are not events reasonably  
9       attributed to the regulation of public utilities.  
10      What do you mean by that?

11              MR. BOUDREAU:   I meant what I said, that the  
12      Legislature went in and took moneys out of the fund  
13      for Article X distributions.

14              COMMISSIONER SCHEMENAUER:   So the  
15      Legislature -- by saying raid, you mean  
16      illegitimately, illegally raided the fund?

17              MR. BOUDREAU:   I'm not sure there -- I'm not  
18      sure -- I'm less sure now, let me put it that way,  
19      that the action was unauthorized than I was when I  
20      wrote that.   I'm not sure that I'm --

21              COMMISSIONER SCHEMENAUER:   What do --

22              MR. BOUDREAU:   -- walking away from it, but  
23      at that point my sense of it was that the transfers  
24      were not authorized by law.   I'm somewhat less sure of  
25      that conclusion at this point.

1                   COMMISSIONER SCHEMENAUER: What do you mean  
2 by the Commission's coffers? Slush fund that we're  
3 building up? I mean, I don't understand. Does that  
4 have some derogatory connotation, or what does that  
5 mean?

6                   MR. BOUDREAU: Coffers in my understanding  
7 is a repository of funds. I suppose you could look up  
8 the term in the dictionary. I haven't done that. It  
9 was not meant in a derogatory fashion.

10                  COMMISSIONER SCHEMENAUER: Okay. That's all  
11 the questions I have for you right now. Thank you.

12                  Mr. Fischer.

13                  MR. FISCHER: Yes.

14                  COMMISSIONER SCHEMENAUER: Just a few  
15 questions. On page 3 of your Memorandum of Law, the  
16 small LDCs feel the Commission lacks the jurisdiction  
17 and statutory authority to assess public utilities for  
18 transfers of funds to fund Article X refunds to  
19 taxpayers.

20                  And then you go on to say that Section 386  
21 clearly states all funds deposited in the PSC fund are  
22 to be used as payment of expenditures actually  
23 incurred by the Commission and attributable to  
24 regulation of utilities.

25                  Are you implying that the Commission did

1 something illegal, against the statutes?

2 MR. FISCHER: Well, your Honor, what I'm  
3 suggesting there is that I think you have two issues.  
4 You have the question of the transfer that the General  
5 Assembly did out of our -- out of the Public Service  
6 Commission funds. You didn't have any control over  
7 that. And that is a question, I think, an issue we  
8 have with the General Assembly or the appropriations  
9 committee or whatever.

10 The issue that I think is before us today is  
11 the next step, whether this Commission has the  
12 statutory authority to assess utilities for Hancock  
13 Amendment under the theory that that is somehow  
14 attributable to regulation.

15 COMMISSIONER SCHEMENAUER: Do you agree or  
16 disagree that the statute allows the Commission to  
17 base their assessments on the expenditures that they  
18 expect to have during the next fiscal year?

19 MR. FISCHER: That and that those  
20 expenditures that are directly attributable to  
21 regulation of public utilities. It's that second test  
22 that I think we fail.

23 COMMISSIONER SCHEMENAUER: Well, what I  
24 don't understand is, I mean, if this is a lawful  
25 expenditure, and I assume if the Legislature passed

1 the bill, the Governor signed it and the money went in  
2 those funds, that was a lawful expenditure, and  
3 whether or not it's connected to the regulation of  
4 public utilities is a debatable problem.

5 But why would -- why couldn't the Commission  
6 in the subsequent year assess the utilities for a  
7 budget that's going to require funding for the next  
8 year?

9 MR. FISCHER: I think for your budget  
10 there's no problem there. It's if you had an  
11 additional amount for Hancock refunds. And, I mean,  
12 in theory I guess the utilities could fund all of the  
13 Hancock refund.

14 But that's directly attributable to  
15 regulation of public utilities, and that's the part of  
16 the test which I think the Hancock Amendment transfers  
17 fails to meet.

18 COMMISSIONER SCHEMENAUER: But wouldn't  
19 there be a hole in the budget if the fund had this  
20 happen for those refunds and then there's no way to  
21 fund the next year's operations?

22 MR. FISCHER: I assumed, perhaps  
23 incorrectly, that that 1.2 million was taken out of  
24 excess reserves of the Commission or a contingency  
25 fund.



1 COMMISSIONER SCHEMENAUER: There is no fund.

2 MR. FISCHER: And that you were able to pay  
3 your public utility related employees, and that to the  
4 extent that the Commission took the amount that was  
5 appropriated for the next year for your salaries and  
6 all the expenditures with the exception of Hancock and  
7 said this shall be your assessment, and then we're  
8 going to add on an additional amount for Hancock  
9 because we think we're going to be tapped again in the  
10 next year. It's that second step that would cause the  
11 problem under the statute, in my opinion.

12 COMMISSIONER SCHEMENAUER: And I would  
13 think -- I would agree with you. I mean, I don't  
14 think the Commission has the contingency fund or  
15 surplus because every year whatever's left balance in  
16 the fund is used to reduce the subsequent year's  
17 assessment.

18 However, the Legislature by withdrawing  
19 money out of this fund reduced the balance in the fund  
20 at the end of the year to a level 600 some thousand  
21 dollars less than what it was -- what it would have  
22 been. So then the assessment is going to be higher.  
23 And I think the letter that went out maybe wasn't as  
24 clear as it should have been.

25 Certainly I don't believe after reviewing

1     this whole thing that there was an assessment just to  
2     replace that money.  Certainly there was an assessment  
3     to fund our activities for the next year because the  
4     balance in the fund was reduced by the Legislature's  
5     appropriations.

6             MR. FISCHER:  To the extent that the  
7     appropriation that comes to fund the direct activities  
8     related to regulation of the public utilities is  
9     included in your assessment, I believe that's totally  
10    lawful and appropriate.  That's been done for 75 years  
11    or whatever, how long the assessments has been there.

12            But to the extent that we are saying we are  
13    anticipating that our reserves are going to be tapped  
14    for Hancock transfers and, therefore, the public  
15    utilities should be asked to fund up front our  
16    expected transfers to the Hancock refund, I think that  
17    goes beyond the statute.

18            And then the other point, of course, the  
19    Legislature could have amended subsection 4 that says  
20    it shall not revert to general revenues and shall be  
21    used only for public utility regulation.  I suppose  
22    the Legislature could have explicitly repealed that or  
23    modified that to say it shall also be used for Hancock  
24    refunds.

25            It didn't do that.  It did apparently pass

1 three appropriations bills that did take the excess  
2 funds out of the PSC fund and they used that for that  
3 purpose.

4 But that doesn't then get you back to the  
5 authority that is in subsection 2 that says the only  
6 thing you shall be permitted to assess the utilities  
7 for is funds that are to be incurred for the  
8 expenditures of public regulation that are directly  
9 attributable to public utility regulation.

10 COMMISSIONER SCHEMENAUER: I mean, there's a  
11 case pending on the highway taxes on the same thing.  
12 These 232 other funds, many of them have the same  
13 language. So, I mean, the Legislature would have had  
14 to amend all the laws pertaining to all the funds to  
15 allow Hancock refunds. I'm not saying they shouldn't  
16 or couldn't. I'm just saying they didn't and we were  
17 one of the many.

18 But I don't want anybody here to think that  
19 our assessment was for our operating expenses plus  
20 refurnish a slush fund for the Article X withdrawals  
21 because, I mean, that is not what happened. And if  
22 that was transmitted to the utilities through the  
23 letter or the assessment letter that went out, I think  
24 it's a misunderstanding.

25 MR. FISCHER: I think it would be helpful

1     probably to the utilities to know if what is included  
2     in the assessment is only the salaries and the actual  
3     expenses associated with the Commission and nothing  
4     more.  If that's the case, we may have a  
5     misunderstanding of what was included.

6             COMMISSIONER SCHEMENAUER:  That is all  
7     that's in the assessment.  The assessment normally is  
8     reduced by the balance in the fund at the end of the  
9     year.  The balance in the fund at the end of the year  
10    was reduced because of the '95-'96 refund.

11            The balance in our budget since the  
12    Legislature has passed a bill that said the '97 refund  
13    come out of the PSC fund plus these other funds in an  
14    amount -- I can't remember whether it's 534,000 -- in  
15    an amount in the next fiscal year.

16            It's only prudent to include that in our  
17    budget request because they are going to take it out.  
18    If we put in a budget request that was going to be a  
19    half million dollars short, that wouldn't be good  
20    government, good management.

21            MR. FISCHER:  So it does assume that there  
22    will be another Hancock Amendment transfer in the  
23    future?

24            COMMISSIONER SCHEMENAUER:  It doesn't assume  
25    it.  The appropriations bill for fiscal '99 has taken

1     it out of the fund. I mean, it's passed, signed into  
2     law. So it's out of the fund. And, I mean, what I  
3     don't understand is how we can reconcile this.

4             But nevertheless, I want to make sure there  
5     wasn't a misunderstanding there. I think that was all  
6     my questions for you. Thank you.

7             MR. FISCHER: Thank you.

8             COMMISSIONER SCHEMENAUER: Southwestern  
9     Bell, Mr. Bub.

10            MR. BUB: Yes, Commissioner.

11            COMMISSIONER SCHEMENAUER: The same -- I  
12     mean, you make the same argument about using proceeds  
13     for purposes other than expenses the Commission incurs  
14     regulating public utilities. Are you saying that the  
15     Article X expense that the Legislature withdrew from  
16     the fund is not an expense to the fund?

17            MR. BUB: I imagine where our -- it may be a  
18     matter of terms, just from listening to your  
19     discussions with Mr. Boudreau and Mr. Fischer,  
20     reviewing the assessments for the refund against the  
21     fund as an expense of the fund, and maybe I'm coming  
22     at it from a different perspective.

23            It was my understanding that an assessment  
24     is something that a state agency's permitted by law to  
25     render for services that agency performs for the

1 parties being assessed. And we've never questioned  
2 any of the assessments that you've directed to our  
3 company. We've never questioned them. We've paid  
4 them.

5 And when -- I don't have an accounting  
6 background. So if I'm off base, it's my mistake. But  
7 looking at Exhibit A to the Stipulation of Facts,  
8 page 5 of 15, it looked to me like there was an  
9 Article X transfer of \$534,114 that was budgeted and  
10 included in our assessment.

11 And that Article X transfer to me doesn't  
12 seem like it's an appropriate item for an assessment  
13 because it's not something that the Commission needs  
14 to fund its operation and regulate the utilities.  
15 It's not something that you would need to pay your  
16 staff salaries or to pay your heat or your electric  
17 bills.

18 COMMISSIONER SCHEMENAUER: What page were  
19 you looking at?

20 MR. BUB: It's Exhibit A, page 5 of 15.  
21 Stipulation of Facts, Tab A.

22 COMMISSIONER SCHEMENAUER: If the Article X  
23 transfer, the 534,000 --

24 MR. BUB: Yes, sir.

25 COMMISSIONER SCHEMENAUER: -- were down to

1 less estimated cash balance PSC fund, which is  
2 negative 348,000, would have showed a positive 200,000  
3 roughly, it would have increased -- if it wasn't up  
4 there, it would have increased it by the same amount.

5 It's just the place that it's shown. And I  
6 guess the reason it's shown up there is not to hide it  
7 down there in the estimated cash balance of the PSC  
8 fund. It doesn't make any difference whether it's up  
9 there or down there. I mean --

10 MR. BUB: I'm not suggesting that there's an  
11 intent on the part of the Commission to hide it.

12 COMMISSIONER SCHEMENAUER: No. I mean it  
13 was up there so everybody would be aware of it.  
14 Whether we like to or not, I mean, that's how the  
15 Supreme Court has interpreted the law and how the  
16 Legislature has interpreted it. And I'm not saying  
17 that's the final authority, but it's the authority we  
18 have to live under right now.

19 I think that was all I had for you. Thank  
20 you.

21 MR. BUB: Thank you.

22 COMMISSIONER SCHEMENAUER: Let's see.  
23 Kansas City Power & Light, I have one question for  
24 you. It's the same one. On page 5 you say KCP&L  
25 reviews such transfers, talking about Article X

1 transfers, obviously do not represent expenses to be  
2 incurred by the Commission that are reasonably  
3 attributed to the regulation of public utilities.

4 And then my question would be, if they're  
5 not expenses, what are they?

6 MR. KOEGEL: I think I would go along with  
7 Mr. Fischer in saying they may be expenses but I'm not  
8 sure that they're for the regulation of public  
9 utilities.

10 COMMISSIONER SCHEMENAUER: Well, if they  
11 come out of our fund and we can't operate without  
12 them, I guess, then they're related in some way.

13 MR. KOEGEL: I think that's true. But I  
14 think any expenditure then you would make you could  
15 make the same argument, that whatever expenditure  
16 comes out of your fund and you're reduced by that  
17 amount, and I'm not sure you can make that argument  
18 for any expenditure.

19 COMMISSIONER SCHEMENAUER: Well, I don't  
20 make the argument. The Legislature does when they  
21 passed the appropriations bill. If they appropriate  
22 the money, then they've made that argument. It's not  
23 up to the Commission to argue with the Legislature.  
24 The courts will interpret what they -- what they  
25 decide. Jurisdictionally we don't have jurisdiction



1 over those matters.

2 That's all my questions for you. Thank you.

3 MR. KOEGEL: Thank you.

4 COMMISSIONER SCHEMENAUER: Trigen.

5 MR. KEEVIL: Yes.

6 COMMISSIONER SCHEMENAUER: Do you have  
7 anything to add? I mean, is it just a blanket  
8 statement that these Article X transfers are illegal  
9 because they don't pertain to the regulation of  
10 utilities?

11 MR. KEEVIL: Well, that would be the  
12 first -- I think that would be the first prong. And  
13 then you have the second aspect of it that even if  
14 they should be included in the calculation of total  
15 state revenue and were properly refunded, then you get  
16 to the question, I think, of both the purpose of the  
17 Hancock Amendment, which Commissioner Murray was  
18 discussing earlier, is not -- you're assuming that  
19 once you get to that point that the State had too much  
20 revenue and included in that revenue was the Public  
21 Service Commission fund and, therefore, they were  
22 required to give money back from all of their funds,  
23 including the Public Service Commission fund.

24 And if you are to that point, it seems to me  
25 to be circular to then, like Commissioner Murray said,

1       then to come back later and say, okay, we had too much  
2       money because we took this money from you last year so  
3       we had to refund it, and now we're coming back to get  
4       that money back.

5               So, I mean, you're running into the Hancock  
6       question. If it comes under Hancock, it's under, you  
7       know, Hancock. So I think that's kind of a two-prong  
8       step you have to -- you wind up getting.

9               COMMISSIONER SCHEMENAUER: The argument I  
10      think that is before us, is the Commission isn't  
11      recovering an excess amount through assessments  
12      because of the Article X transfers. The only  
13      assessments that are going on are those that are  
14      required for us to operate during the year.

15              If there are expenditures legislated by the  
16      Legislature that transfer money out, I mean, we are  
17      still the Public Service Commission and we function  
18      for the utility companies, the ratepayers and general  
19      interested parties.

20              That money goes out. I mean, there is a  
21      connection, whether we like it or not. I don't -- you  
22      know, I would like to interpret Hancock myself, but --  
23      I'm sure everybody would, but the Supreme Court's  
24      interpretation is the one we have to live with.

25              And how it's implemented for the Legislature

1 and the Office of Administration is subject to  
2 question, and I assume your question how that's done.  
3 I guess I don't know how you're -- how you're  
4 proposing the Commission operate with the big holes in  
5 the budget.

6 MR. KEEVIL: Well, with all due respect,  
7 like I said, once you get to the point that there is a  
8 need for a refund, the theory underlying that is that  
9 there were excess revenues, and that's not my theory.  
10 I didn't come up with it. That's the theory.

11 And if that's the theory, then, they take  
12 money from all the branches of government under the  
13 theory that government had too much money. And in  
14 that situation, the theory is that the budget was --  
15 there was too much money there to begin with.

16 So there should be -- in a future basis you  
17 should operate -- or you can receive less. I forget  
18 which case it is. One of the cases talks about the  
19 purpose of the Hancock Amendment being to reign in  
20 government expenditure and revenue or something along  
21 that line.

22 And I mean, to that extent, yeah, you come  
23 to that point where you have to have less in your  
24 budget, assuming that it all falls under Hancock in  
25 the first place, which I don't necessarily agree with.

1 But yeah, you get to that point where the things are  
2 reduced because of Hancock.

3 COMMISSIONER SCHEMENAUER: So then your  
4 proposal would be we reduce our budget by what amount  
5 of money?

6 MR. KEEVIL: Well, again, assuming you get  
7 to that point, but I'm not sure you have to get to  
8 that point, but your hypothetical has gotten us to  
9 that.

10 COMMISSIONER SCHEMENAUER: Okay. The  
11 five-year average assessment I think you indicated  
12 wasn't in compliance with the statute 386.370?

13 MR. KEEVIL: Correct.

14 COMMISSIONER SCHEMENAUER: Does the statute  
15 specifically say how to compute those assessments? I  
16 mean, does it say you can't use a two-year average or  
17 five-year average or a three-year average or you can't  
18 use some other method to smooth out the peaks and  
19 valleys that some of the utility companies encounter  
20 each year?

21 MR. KEEVIL: What the statute says is that  
22 the Commission shall allocate to each group of public  
23 utilities the estimated -- and there's where the Staff  
24 is hanging there. There are the estimated expenses  
25 directly attributable to regulating that group and an

1 amount equal to the proportion of the estimated  
2 expenses not directly attributable to that group.

3 Okay. So those are the first two steps.

4 Once you do those two steps, the statute then goes on  
5 to say the Commission shall then assess among each  
6 company in that utility group, and it tells you how to  
7 do that.

8 COMMISSIONER SCHEMENAUER: But within those  
9 two steps is there a prohibition against using an  
10 average or a mean?

11 MR. KEEVIL: Within those two steps is there  
12 a prohibition against using? What I understand the  
13 internal accounting department has done here is to  
14 calculate the direct costs and to allocate the common  
15 costs. I referred earlier to, I think it's -- yeah,  
16 page 6 of Exhibit A where they've done that.

17 And once you've done that, you can't --  
18 under the statute, it's my contention, you can't add  
19 another step in there. I mean, they've done what I  
20 consider to be A and B. It shows up on page 6 of  
21 Exhibit A.

22 And then before they went on to step C,  
23 which is the mandatory next step, they did something  
24 else, which I would contend they cannot do under the  
25 language of the third -- what I referred to as the

1 third step.

2 COMMISSIONER SCHEMENAUER: Your client would  
3 be \$9,000 better off?

4 MR. KEEVIL: Actually, they would be 56.87  
5 percent of \$9,000, yeah, roughly.

6 COMMISSIONER SCHEMENAUER: And I think I  
7 looked and Southwestern Bell would be a million  
8 dollars poorer; is that right?

9 MR. KEEVIL: I don't think it would be a  
10 million, but the telephone companies take a hit. The  
11 gas and the heating get a benefit.

12 COMMISSIONER SCHEMENAUER: So you think  
13 there is a prohibition against using any kind of  
14 averaging to smooth out the peaks and valleys from  
15 year to year?

16 MR. KEEVIL: Yes. I think you have to make  
17 the calculations as the statute says to make them. I  
18 mean, there could be -- I think when you estimate the  
19 expenses directly attributable to a group of  
20 utilities, which the statute says to do, there is  
21 obviously some leeway there.

22 But, I mean, they have shown that they're  
23 capable of doing that, you know, allocating that,  
24 making that calculation. Once they do that, they're  
25 prescribed -- or prohibited, I mean, from --

1                   COMMISSIONER SCHEMENAUER: Do they have to  
2 do that by hand or can they use a computer model?

3                   MR. KEEVIL: They probably could use  
4 computers if they get an allocation for it.

5                   COMMISSIONER SCHEMENAUER: Okay. Thank you.  
6 Staff, I had one question, Mr. Haas.

7                   On page 7 of your Memorandum you quote the  
8 House Bill 4 and you give the numbers. In House  
9 Bill 4 there's an E behind those numbers, and can you  
10 tell me what that E means?

11                  MR. HAAS: No, sir. I don't know what that  
12 is.

13                  COMMISSIONER SCHEMENAUER: That's an  
14 estimated amount. It can be more or less than the  
15 amount appropriated. And while those were the exact  
16 amounts appropriated, it could change depending on  
17 information from the Office of Administration  
18 regarding any new court decisions that would say maybe  
19 more state revenues go into it, et cetera, et cetera.

20                  So that's why the E is there so that OA can  
21 go back and make the adjustment without having to go  
22 back to the General Assembly for another  
23 appropriation. I just want to make sure that was  
24 done.

25                  That's all the questions I have. I would

1     like to make a little editorial off the record. Can I  
2     do that?

3             JUDGE ROBERTS: We can't really go off the  
4     record. I mean, you can make any comments you'd like.

5             COMMISSIONER SCHEMENAUER: Some of this  
6     testimony in the written pleadings that I went  
7     through, I found the tone to be somewhat combative and  
8     maybe even condescending in some cases.

9             And what I wanted to put forth is that I  
10    don't think -- you know, I don't think those pleadings  
11    should be written in a condescending, disrespectful or  
12    flippant manner, whether it's directed toward the  
13    Commission or the Legislature.

14            I think your arguments are good arguments,  
15    and they don't need all this verbal gymnastics. You  
16    want to achieve the goal of due process for your  
17    clients, and I think it can be done with a little less  
18    combateness.

19            This Commission is a jurisdictional venue  
20    for utility regulatory law, and the Commissioners are  
21    appointed by the Governor and confirmed by the Senate.  
22    So I would hope that in the future you would construct  
23    pleadings to this jurisdiction using the same  
24    professional standards you do when you submit  
25    pleadings to other courts.



1           And that's all I wanted to add to my  
2       comments.

3           JUDGE ROBERTS: Mr. Keevil, I wanted to ask  
4       you a quick question about the five-year average. The  
5       amount that was contributed either to your clients or  
6       your group, your utility group for '96 was about  
7       47,000, in '97 was about 10,000, in '99 it's  
8       approximately \$20,000. Does it not serve your client  
9       or clients to have that amount averaged out so that  
10      they don't pay 10,000 this year and 47 the next and  
11      have those wild swings?

12           MR. KEEVIL: They don't believe it does.  
13      Obviously, I mean, frankly, I don't know how one year  
14      '96, 47,326. When I saw that, I was amazed at that.  
15      I was here at the Commission, and I don't recall a  
16      bevy of steam heating cases being hoisted among the  
17      Commission during that time period.

18           So I was quite shocked to see that number  
19      frankly. If you'll notice, all the other numbers are  
20      much more in line with the 20,917. You know, we're  
21      just asking that what we see as the proper  
22      interpretation of the statute be followed.

23           JUDGE ROBERTS: If they're sort of asking --  
24      would it be improper for me to characterize this as  
25      saying they want to pay for what they get or get what

1       they pay for?

2               MR. KEEVIL:  Yeah.  At the time, yes, rather  
3       than paying for something that happened four year ago  
4       or whatever.

5               JUDGE ROBERTS:  We had had staff witnesses  
6       available.  It hasn't been necessary to call them, and  
7       I don't know if this issue has come out during the  
8       discovery negotiation process.

9               But do your clients believe that if they pay  
10      29,000 and they, in fact, can measure that they used  
11      \$20,000 worth of services for the year, do they  
12      believe they'll be credited that \$9,000 toward their  
13      group's assessment next year or do they think it may  
14      be consumed by phone cases or electric cases or has  
15      that issue come up?

16              MR. KEEVIL:  You mean the difference between  
17      the average and the nonaverage?

18              JUDGE ROBERTS:  Yes, sir.

19              MR. KEEVIL:  That really  hasn't been  
20      discussed.  Keep in mind, too, those numbers we're  
21      using there are the group numbers, not just my single  
22      client.  So that as far as what you're actually asking  
23      there, no, we haven't even gotten to that.

24              JUDGE ROBERTS:  Mr. Haas, do you know the  
25      answer to that question in your dealings with the

1 subject matter experts that have come up, whether by  
2 averaging, which they allege causes them to pay 29  
3 instead of 20 perhaps, are they -- do they lose that  
4 extra \$9,000, does it credit their group in the next  
5 year's assessment or has that issue come out?

6 MR. HAAS: That issue has not been  
7 discussed.

8 MR. KEEVIL: It certainly wouldn't be an  
9 overt credit in assessment process. Now, I suppose  
10 you could argue part of it be captured simply in the  
11 averaging process, but --

12 JUDGE ROBERTS: So then are you --

13 MR. KEEVIL: This may be the first year that  
14 this has been done.

15 JUDGE ROBERTS: Mr. Haas, is this the first  
16 year this has been done?

17 MR. HAAS: Mr. Raddel was shaking his head  
18 no, that there wasn't any kind of credit for the next  
19 year. Do you want me to try answering the question or  
20 do you want Mr. Raddel?

21 JUDGE ROBERTS: Well, you've stated this is  
22 the first year that the five-year average has been  
23 done.

24 MR. HAAS: No, sir. This is the first year  
25 that a strict five-year average has been followed.

1 Other years there were five-year averages but then  
2 there were some adjustments made to that five-year  
3 average.

4 JUDGE ROBERTS: Okay. Mr. Keevil, it's  
5 your -- is the concern of your clients, then, that  
6 that excess will somehow subsidize some other utility,  
7 that your client is going to pay more than some other  
8 utility group, telephones or somebody is going to pay  
9 less so your clients are somehow cross-subsidizing the  
10 regulation of telecommunications or some other group?

11 MR. KEEVIL: That is certainly a concern.  
12 The bottom -- like I say, that 47,326 is going to be  
13 with us -- using a five-year average is going to be  
14 with us for a while. And each year that that is  
15 included in there arguably the assessment to the  
16 heating will be higher than it otherwise would be.

17 And to that extent, yes, they will be --  
18 that group, again not just my client but that group  
19 will be subsidizing partially other groups.

20 JUDGE ROBERTS: But the low years, I think  
21 there was one for 10,000 or more or less, will be with  
22 you for four or five years as well? If it averages  
23 out, you're being either burdened or benefited by the  
24 highs, both the highs and the lows.

25 Were you aware that there was some averaging

1 process taking place? Do you know if your clients and  
2 the members of that group were aware that there was  
3 some averaging process taking place in the past?

4 MR. KEEVIL: I am fairly confident that they  
5 did not know that there was any averaging process  
6 taking place.

7 JUDGE ROBERTS: Okay. This could go to just  
8 about anybody. I may direct it to Mr. Boudreau since  
9 he's had a chance to rest for a few minutes.

10 The issue of 386.370 and whether or not  
11 funds are used to pay expenses reasonably attributable  
12 to the regulation, whatever the technical language is,  
13 it sounds to me like you're all saying that sort of  
14 theoretically we could go through the budget line by  
15 line and for each expense, Dale Robert's salary, the  
16 Commission goes we couldn't regulate utilities without  
17 him, and the cost of the switchboard equipment, we  
18 couldn't regulate utilities without that piece of  
19 equipment.

20 And when we get to the Hancock Amendment,  
21 theoretically we could say, you know, we could have  
22 gotten through the year and heard all of our cases and  
23 issued orders without that. Is that what the status  
24 of that line is, you believe?

25 MR. BOUDREAU: Let my try to answer. I may

1 be misunderstanding where you're going. If I am, just  
2 redirect me and I'll try again.

3 It would be hard for me -- the Article X  
4 transfers really stand out as an event that just  
5 simply doesn't fit into the basket that the Commission  
6 in my view can legitimately budget for. All the other  
7 things that are in there, salaries, benefits,  
8 overhead, rent, consulting fees, I mean, those all go  
9 directly to what the Commission does.

10 Those are expenses you incur. You either  
11 get a bill or an invoice or you pay the salaries.  
12 It's paying of expenses in the normal course that  
13 everybody understands the concept of paying expenses.

14 But the Article X transfers are a different  
15 animal altogether. There are transfer from one fund  
16 to another. They're done pursuant to a constitutional  
17 amendment which carries with it all of the concepts of  
18 excess revenues, spending lids and all the rest of it.  
19 I mean, to me it's a horse of a completely different  
20 color.

21 JUDGE ROBERTS: And the other half of it --  
22 maybe I've misheard this -- not only whether it's a  
23 payment of an expense versus a transfer if you want to  
24 talk about that issue, but also that it's not -- it's  
25 like the law school but for test. But for that

1       \$500,000 for Article X, would we be unable to regulate  
2       the utility industry this year?

3               MR. BOUDREAU: Okay.

4               JUDGE ROBERTS: Is that the 386.370 article  
5       where that statute says you need to collect the moneys  
6       which you need which are reasonably attributable to  
7       the regulation of utility companies?

8               Mr. Fischer, you had addressed this also. I  
9       mean, is that the line of reasoning that you-all are  
10      following, saying that, you know, in order to be  
11      appropriate you'd have to be able to pass the but for  
12      test and say but for that \$500,000 for Article X, you  
13      couldn't have properly regulated utilities this year?

14              MR. FISCHER: I would say the answer to that  
15      is yes. We feel that that's not directly attributable  
16      to regulation of public utilities. I think it's also  
17      an interesting question, if you didn't have the money  
18      at the end of the budget year, could the Legislature  
19      appropriate \$500,000 to fund Hancock Amendment  
20      refunds?

21              JUDGE ROBERTS: And I guess --

22              MR. BOUDREAU: I think somebody else touched  
23      on it, if I may. I understand -- now I think I  
24      understand what the question is. I apologize because  
25      I missed it the first time around.

1           I don't think that that's the proper  
2       analysis because then the problem you run into is, as  
3       somebody else points out, you can make that argument  
4       with any kind of expense that's made if the money is  
5       used for any purpose than the regulation of public  
6       utilities.

7           I'm trying to think of an example, but any  
8       sort of non-customary expense you could still come  
9       back the following year and say, but for -- it's gone,  
10      and if we don't have that money we can't do what we're  
11      supposed to do or what we think we're supposed to do  
12      for the coming year.

13          The trouble is, where is the end of that  
14      argument? At what point -- I mean, where are the  
15      parameters then? You might as well not have that  
16      language in the statute, I guess would be my response  
17      to it.

18          JUDGE ROBERTS: And whoever -- it might have  
19      been your response to Commissioner Crumpton about the  
20      kinds of conclusions or findings that we may or may  
21      not make and how well those may be received by the  
22      Legislature.

23          In light of that -- well, I'm not sure  
24      that -- it seems to me -- it seems to me these are two  
25      different questions or two different statements. One,



1       whether or not the transfer was appropriate, I mean,  
2       and two, whether it was necessary for us to have that  
3       particular \$500,000 in order for this agency to  
4       regulate utility companies.

5               MR. BOUDREAU: I see them as two different  
6       questions. I mean, they're connected because the  
7       events are all connected, but I do think they're two  
8       separate questions.

9               And like I said, you can argue either way on  
10      whether or not the transfers were right or wrong, but  
11      if you go along with the conclusion that it's clearly  
12      part of total state revenue, yes, it ought to be a  
13      source for revenues, then you've bought into the  
14      Hancock tax rationale, which is that these represented  
15      excess revenues to which the State wasn't entitled in  
16      the first place.

17              You know, you can't get past that. I'm not  
18      saying I'm buying into that first part of the  
19      argument. I'm still troubled by it. It may end up  
20      that after a further analysis of the law that I  
21      reluctantly conclude that the General Assembly  
22      certainly had the authority to do what it did, whether  
23      I think it was wise or not.

24              But if you buy into the argument, then  
25      you're stuck with that rationale. These are moneys

1     that, you know, the Legislature's determined ought to  
2     be given back. And I'm just saying if that's right,  
3     then they ought to say that, and that was the  
4     constitutional purpose of it. It was a revenue and  
5     spending limit.

6             JUDGE ROBERTS: Mr.Coffman, let me ask you,  
7     I know that Office of the Public Counsel, at least I  
8     don't believe you-all filed a Memorandum of Law, but  
9     on a sort of public policy issue, and I think one of  
10    the Commissioners touched on this, if, in fact, your  
11    utility -- if, in fact, the utility assessments are  
12    recouped from the ratepayers, then if my utility  
13    company pays a hundred dollars in assessments, can't  
14    they recover that from me plus their rate of return?

15            I mean, won't I end up paying my utility  
16    company \$110 to reimburse -- through rates to  
17    reimburse the \$100 which they paid the Commission,  
18    which the Commission gave to the Legislature, which  
19    the Legislature sent back to me if I'm taxable?  
20    Doesn't that make --

21            MR. COFFMAN: I don't think I disagree with  
22    anything you've said, and maybe I don't get --

23            JUDGE ROBERTS: Well, let me ask Public  
24    Counsel, do you-all view this as a -- from the  
25    consumers' point of view, because if you look -- you

1 know, one point of view may be if you look at this  
2 whole scenario, at the end of the day, who gets hurt?  
3 Aren't all of your clients able to recover this money  
4 from their clients, from their customers, which are  
5 your clients?

6 MR. COFFMAN: My clients are the consumers.

7 JUDGE ROBERTS: Right. I mean, where does  
8 the utility company get the money which it pays the  
9 Commission in assessment?

10 MR. COFFMAN: Well, from its revenue, I  
11 assume.

12 JUDGE ROBERTS: Right.

13 MR. COFFMAN: I assume it's a -- I guess you  
14 can make circular arguments the same way you can make  
15 about the entire assessment process, I mean.

16 And there I think is one of the most  
17 difficult parts of this because the whole assessment  
18 process is kind of a replenishing cycle from one year  
19 to the next, and it really doesn't fit the general  
20 revenue model that the Hancock transfers are really  
21 based on, and that's the problem that just doesn't  
22 quite fit.

23 JUDGE ROBERTS: I know Mr. Hack wants to  
24 respond to this. I just wondered if OPC had looked at  
25 this as, you know, who bears the ultimate burden here

1 and does it come out to be the ratepayer?

2 MR. COFFMAN: Well, again, it depends on  
3 when or if any of these utilities come in for a rate  
4 case, if that particular year was calculated in the --  
5 and the Commission's taken different approaches on  
6 assessments and sometimes normalizing them, sometimes  
7 accepting what's in the bigger part of the test  
8 period.

9 So it's -- I don't think it's always been a  
10 hard and fast rule that what's in the test year or the  
11 test adjusted period is put in the rates, but so far  
12 Missouri Gas Energy is the only utility I'm aware of  
13 that has had these assessments calculated into rates  
14 that are currently being charged. There may be some  
15 small water and sewer utilities.

16 I know that's a recent change. I deal with  
17 a lot of water and sewer utilities, and because of the  
18 new way that the Staff is calculating the assessments,  
19 I'm very aware of the impact that this is having on  
20 them.

21 I think that in the past the calculation of  
22 the assessments has been done in a way to kind of  
23 recognize the burden on these very small companies and  
24 try to alleviate the impact on water and sewer and now  
25 that's not being done. And so there's been even a

1 greater impact more recently on some of the small  
2 companies.

3 JUDGE ROBERTS: Mr. Hack?

4 MR. HACK: If I could just offer a couple  
5 items. First of all, PSC assessment is expense, cost  
6 of service. So there is no rate of return applied to  
7 so. So a dollar is a dollar is a dollar.

8 JUDGE ROBERTS: Okay.

9 MR. HACK: Two, every item in a utility  
10 company's revenue when it goes to a rate proceeding is  
11 based on an estimate of what the future may hold.  
12 Ultimately, all concerned, the customers, the company,  
13 the shareholders, bear the risk that either expenses  
14 are going to be higher, lower, revenues are going to  
15 be greater or less.

16 And that's a part of the process of setting  
17 rates prospectively based on historical test year.  
18 That's not unusual. That's not new. It's well  
19 established.

20 JUDGE ROBERTS: Mr. Pendergast?

21 MR. PENDERGAST: I guess kind of an example  
22 of how the thing might be viewed from ratepayers'  
23 perspective and how it might operate. You requested  
24 that we provide some figures on what kind of Hancock  
25 refunds the utilities got back as a result of the same

1 process that led to the transfers that led to the  
2 increased assessment amount.

3 And I don't know about everybody else, I  
4 didn't evaluate everybody else's, but I know that the  
5 incremental amount of the assessment associated with  
6 the Hancock transfers is greater than the amount that  
7 we got back from Hancock, at least up to this point.

8 And I guess if you assume that everything  
9 was timed perfectly and rate cases were just perfect  
10 and all that flowed through the ratepayers, I think  
11 what you would say from the ratepayers' perspective,  
12 it's not a significant amount, but it is an amount,  
13 but that by virtue of the fact we have a Hancock  
14 Amendment the ratepayer has wound up paying more  
15 rather than less than he would have if there'd been no  
16 Hancock at all.

17 And I think, you know, it's kind of a  
18 curious result where you have an amendment that was  
19 designed to protect Missouri taxpayers from those kind  
20 of increases operating in a way that makes them pay  
21 more than they would have otherwise.

22 JUDGE ROBERTS: Mr.Coffman?

23 MR. COFFMAN: Yes. I just wanted to add a  
24 couple comments, I guess in response to Mr. Hack. Of  
25 course, I wasn't involved in the Missouri Gas Energy

1 rate case most recently completed, but there are items  
2 that sometimes are adjusted outside of the test year,  
3 isolated adjustments which are typically -- and I'm  
4 not sure if this was one of those isolated  
5 adjustments, but they're considered to be things that  
6 are almost certain to occur.

7 And I've just been thinking, well, if there  
8 is a recalculation and some way the Title X transfers  
9 are deemed not to have been appropriate, Public  
10 Counsel might want to revisit that issue.

11 And I'm keenly aware of the important  
12 prohibitions against retroactive ratemaking and single  
13 issue ratemaking, but the Commission has made --  
14 either made exceptions or there have been policies  
15 that have been distinguished from those prohibitions  
16 that have been so far upheld in the courts and usually  
17 to the benefit of the utility company.

18 And I'm thinking that it might be  
19 appropriate, assuming that those principles would go  
20 both ways and applying equally to the benefit of the  
21 consumers, some type of revenue in the nature of an  
22 AAO might be applicable at least to preserve these  
23 moneys and maybe correct that adjustment for the  
24 benefit or preserve those moneys into the future.

25 JUDGE ROBERTS: The last thing I wanted to

1 ask about is the issue that was raised in the initial  
2 application, and I think it's the last thing I want to  
3 raise, is whether Order 52 is void or invalid or  
4 improper, that Order 52 being an order that notified  
5 the utility companies of the assessment that was  
6 effective on the date that it was issued.

7 And some of the parties have not -- well,  
8 had to be the initial application certainly --  
9 addressed that issue, and I'm not sure if that was  
10 a -- if you were concerned about the Commission coming  
11 back and saying, well, it was effective. You didn't  
12 ask for a rehearing prior to the effective date. Go  
13 fish, you know, take it up the street. If you're  
14 trying to secure an argument to get jurisdiction here  
15 or if you really think that order is void because it  
16 was --

17 MR. BOUDREAU: I'd sure like to keep my  
18 powder dry on this one. What I wanted was a  
19 rehearing, and that's what I've got. I've gotten a  
20 chance to present my case to the Commission. That's  
21 what I was looking for. So it's hard for me to  
22 complain about.

23 I'm still somewhat troubled, and I would  
24 like the Commission to pay some attention to our  
25 request for stay because in good faith we're trying to



1 do what we're supposed to be doing and try not to  
2 interrupt the operations of the Commission unduly.

3 I don't want to abandon the argument. At  
4 some point I may want to assert that because we're  
5 faced with the problem that if we pay these disputed  
6 amounts, I'm not sure what our legal remedies are.  
7 And in good faith we've been trying to make the  
8 payments when due and in the amounts consistent with  
9 the Commission's order.

10 So I don't want to say I'm going to abandon  
11 that argument, but principally what I wanted to do is  
12 get an opportunity for a rehearing, hopefully a quick  
13 disposition of the case, and it's not my plan to try  
14 and make that into an issue for the sake of making it  
15 an issue.

16 JUDGE ROBERTS: And I understand. I mean,  
17 that's sort of what I suspected, and I understand the  
18 box that you're sort of placed in when an order is  
19 effective, issued and effective on the same day,  
20 although the way we've read the recent mail that we've  
21 gotten from the court and the way we read the statute,  
22 that's not inappropriate on an uncontested matter. It  
23 just turned out to be, a surprise to us, a contested  
24 matter.

25 So did anybody else have any concerns about

1 Order 52? I mean, if that's an issue, we'll pursue  
2 it. If not, I think we're straight.

3 Other than talking about briefing and  
4 proposed findings and conclusions and all those kinds  
5 of things, I don't have anything else. Chair Lumpe,  
6 anything else?

7 CHAIR LUMPE: I have one, I think, just to  
8 clarify. I thought I might use Mr. Coffman's agency.  
9 Let's assume you had an appropriation for the year for  
10 a million dollars, and you have a Hancock refund also  
11 that you have to do that has to come out of that  
12 appropriation, correct?

13 MR. COFFMAN: Yes. They took it. They  
14 certainly did.

15 CHAIR LUMPE: So that does not prohibit you  
16 the next year when you come in for your appropriation  
17 saying I really need 1,010,000 next year, not  
18 necessarily because you lost it for the Hancock  
19 refund, but because you have additional duties or  
20 there's salary increases.

21 And I think what maybe has gotten confused  
22 here is because it looked like a dollar for dollar  
23 Hancock refund amount set over into what do we need  
24 for our full appropriation for the next year. And had  
25 that been a different number from the Hancock refund

1       number, I'm wondering if we would be discussing this.

2       And I listen to Commissioner Schemenauer.

3               I'm not really posing the question to you.

4       I'm sort of posing it as a query to maybe anyone that  
5       wants to respond. Had it not looked like a dollar for  
6       dollar Hancock refund to need this amount next year  
7       having come in say for an additional 500,000 because  
8       that's what we need to operate next year instead of  
9       650, you know, \$9,000, whatever, whether this  
10      discussion would be the same.

11             JUDGE ROBERTS: Mr. Hack?

12             MR. HACK: I wish I could tell the future or  
13      the past based on changed circumstances, but I don't  
14      know.

15             From my perspective, the Commission itself  
16      is the trustee as a body of the fund and in the first  
17      instance needs to assess whether anything that goes  
18      into that budget that is going to be recovered from  
19      utilities and from the customers we serve is  
20      appropriate.

21             Many times -- I was here in 1996 during the  
22      legislative process. I don't recall ever being aware  
23      of the appropriations that have been made. I wasn't  
24      intimately involved in the appropriation process.

25             But, you know, to me, you're the first line

1 of defense, and I know it's a touchy situation and  
2 your relationship with the Legislature, but mistakes  
3 are made. They occur with unfailing regularity, it  
4 seems. Sometimes when they're brought to people's  
5 attention on a timely basis they can get corrected.

6 CHAIR LUMPE: But the question I'm trying to  
7 pose is, the fact that we need additional revenues to  
8 operate, had it not looked like a dollar for dollar  
9 transfer, well, we had to pay that out there, so we  
10 want that exact amount back in, had we just gone  
11 through, we need this for salaries, we need this for  
12 new programs, we need this for regulation and put it  
13 that way and it came out to some figure, would we then  
14 be having this what you should do is take this cut  
15 because that reduces revenue?

16 MR. HACK: That probably depends on the  
17 degree to which the dollars showed up in assessments.  
18 But the conundrum or the complicating factor is that  
19 when you make disbursements or when the Legislature  
20 makes appropriations that are carried out by removing  
21 dollars from the fund, that automatically affects next  
22 year's assessment by reducing the dollars available  
23 for the next year.

24 CHAIR LUMPE: It would be kind of strange if  
25 the exact number of dollars that we had to pay for

1 Hancock was the exact number of dollars that we needed  
2 additionally for the next year, and that's what I'm  
3 posing.

4 And that, I think, is where part of the  
5 question is, that it perhaps shouldn't have been an  
6 identical dollar for dollar number, and then we could  
7 get away from, well, you're doing this because you  
8 lost it there so you just added it on here, and I  
9 think what I heard Commissioner Schemenauer say is  
10 that's not the case, and I think perhaps it's  
11 perception then more than reality.

12 MR. HACK: I guess I respectfully disagree,  
13 because I think the fact of the matter is, when the  
14 disbursements occur, the fund is depleted, and the  
15 fund carries over, so it has an impact. I'm not  
16 implying in any way that there's a slush fund or that  
17 there's illegal activity. I just think that --

18 CHAIR LUMPE: Simply because you pay a  
19 Hancock refund does not mean that you cannot come back  
20 and ask for additional revenue to pay salary increases  
21 or the new mandates the Legislature has given. You  
22 may ask for those.

23 MR. HACK: Absolutely.

24 CHAIR LUMPE: So it isn't that we have to  
25 come in with an assessment that is precisely 690,000

1 less than we had the year before because they told us  
2 we must spend less by that amount.

3 MR. HACK: And I think conceptually I agree  
4 with you. The difficulty I have is I don't think it's  
5 a perception issue at all. I think it's a real issue.

6 CHAIR LUMPE: Thank you.

7 MR. KOEGEL: If I can speak to that, I think  
8 that probably no one would have noticed it had you not  
9 put down specifically for the Title X -- maybe I'm  
10 wrong -- for the Article X transfers. I think the  
11 question still would have been raised why was there  
12 such a large assessment.

13 But I think you have to go with the  
14 hypothetical on the other side, and what if there had  
15 been no extra funds in the fund at the end of the year  
16 and, in fact, you had to assess for it, because that's  
17 really the question we're asking here it seems to me.  
18 And then you would be asking for specific on  
19 assessment to pay those.

20 It just is fortuitous that there was extra  
21 money in the fund, and I think that's the legal effect  
22 on what we're talking about here is the fact that,  
23 yeah, there may have been money there and, yeah, maybe  
24 you need money for your expenses this year, but, in  
25 fact, that was funded from a prior year. If it had

1       been zero, then you'd have to ask us for that money  
2       under the same --

3               CHAIR LUMPE:  Or we would have to cut  
4       expenses or services or people or something?

5               MR. KOEGEL:  Exactly.  And I think that's  
6       what this issue is here.  I think it's been maybe  
7       mischaracterized or misunderstood.  I certainly didn't  
8       understand it until I kind of stepped away and said,  
9       what are we looking at?  It's just fortuitous there  
10       was money left over at the end of the year.

11              CHAIR LUMPE:  I'd like to think that the  
12       Commission knew both of those years that money had  
13       been appropriated and was preparing for the day the  
14       court made a decision and said pay.

15              MR. KOEGEL:  I understand that.

16              CHAIR LUMPE:  So I'd like to look at it that  
17       way.

18              JUDGE ROBERTS:  Commissioner Murray?

19              COMMISSIONER MURRAY:  I just wanted to  
20       follow up a little bit on the five-year averaging, and  
21       this would be for Mr. Haas.  What were the adjustments  
22       that were made in prior years after the five-year  
23       averaging was done that were not made this year?

24              MR. HAAS:  Someone will correct me if I'm  
25       wrong, but it's my understanding that the amount which

1 would otherwise have been charged to the sewer  
2 utilities as a group was reduced because it is such a  
3 significant amount compared to their total revenues as  
4 companies.

5 COMMISSIONER MURRAY: And was that -- did  
6 that have anything to do with the Title X transfers?

7 MR. HAAS: No. That was not based on  
8 Title X transfers.

9 COMMISSIONER MURRAY: So none of the five-  
10 year averaging issue is related to Title X transfers?

11 MR. HAAS: I believe that's correct.

12 COMMISSIONER MURRAY: Okay. And just to  
13 follow up on what you said the adjustment was that was  
14 made, if I'm reading page 11 of 15 of Exhibit 8  
15 correctly, it looks to me like sewer companies would  
16 have had 1.8 percent under the FY'99 assessment, but  
17 then with the five-year average they had 2.17 percent.

18 MR. HAAS: The 1.8 percent amount is lower  
19 than in previous years because of lower activity in  
20 the most recent year.

21 COMMISSIONER MURRAY: But you said in recent  
22 years there was -- okay. There was an adjustment made  
23 in prior years that was not made this year?

24 MR. HAAS: If you look across that line on  
25 fiscal year 1998, it shows that the sewer percent was



1 2.76 percent.

2 COMMISSIONER MURRAY: For '98, yes.

3 MR. HAAS: But if you drop to the bottom of  
4 that column, you will see that they were only assessed  
5 1.14 percent.

6 COMMISSIONER MURRAY: In '98?

7 MR. HAAS: In '98.

8 COMMISSIONER MURRAY: That was the  
9 adjustment made in the prior year?

10 MR. HAAS: Yes.

11 COMMISSIONER MURRAY: That's why the sewer  
12 companies have a higher percentage that they're  
13 actually being assessed this year, because that  
14 adjustment was not made?

15 MR. HAAS: Yes. And there was also reduced  
16 activity during the past year.

17 COMMISSIONER MURRAY: Thank you.

18 JUDGE ROBERTS: Commissioner Schemenauer?

19 COMMISSIONER SCHEMENAUER: No questions.

20 JUDGE ROBERTS: Anything else?

21 That concludes the questions from the Bench  
22 on the issues you presented today. I want to both  
23 thank the Staff and apologize to the Staff. The  
24 Commission had asked that they make their witnesses  
25 available. It turns out that we didn't need to call

1 your witnesses, but I appreciate the fact that they  
2 were available here in the event that we'd had direct  
3 questions for them.

4 In just a minute I'm going to take a short  
5 break, and then we'll come back and talk about  
6 briefing schedule and some of the mechanics and  
7 ministerial things we have to talk about.

8 Mr. Boudreau, anything else?

9 MR. BOUDREAU: There's at least one  
10 housekeeping matter. I don't know if we need to take  
11 care of it now or after the break. But the  
12 Stipulation of Facts, I thought we might want to go  
13 ahead and mark that as an exhibit and offer it as is  
14 customary to do.

15 JUDGE ROBERTS: We can do that when we come  
16 back. Anything else before we go off the record?  
17 Take about a ten-minute break.

18 (A recess was taken.)

19 (EXHIBIT NO. 1 WAS MARKED FOR  
20 IDENTIFICATION.)

21 JUDGE ROBERTS: Back on the record, please.

22 We're back on the record after a brief  
23 recess. The parties took a break. It appears that  
24 Mr. Fischer, Mr. Coffman and Mr. Bub are not available  
25 at this time. I think all the other parties are here.

1 We've waited for those individuals to appear. I think  
2 we can proceed for what we have to do for the  
3 remainder of the day, and that is purely ministerial  
4 tying up loose ends here.

5 I believe I can ask for the transcript to be  
6 back in approximately five days, and I plan to do  
7 that, and I'll be sure and ask for a copy of the  
8 transcript on disc. You-all know that you have that  
9 option available to you.

10 Under the ordinary course, the way our ten  
11 days runs to apply to pleadings generally, I think any  
12 reply to the Amended Request for Stay shall be filed  
13 not later than October 26th, and I don't know that  
14 anybody's going to reply to that other than perhaps  
15 the Staff. Certainly if anybody wants to reply to it,  
16 that needs to be done by October 26th.

17 Let me ask you a question. Who actually put  
18 the document together that is labeled Stipulation of  
19 Facts and Statement of Issues Presented? Did Staff?  
20 Brydon, Swearngen & England?

21 MR. BOUDREAU: Primarily it was us. That  
22 work was already under way by the time that the Order  
23 issued, and it just seemed like the more logical  
24 thing. Many of the documents were supplied by Staff,  
25 but I actually assembled it.

1 JUDGE ROBERTS: And I asked for two reasons.  
2 One is that -- well, before we went back on the record  
3 we marked it as Exhibit 1. So I assume, Mr. Boudreau,  
4 that you're going to offer Exhibit 1 for admission?

5 MR. BOUDREAU: I'll be pleased to do so.  
6 Would you entertain that motion at this point?

7 JUDGE ROBERTS: Yes.

8 MR. BOUDREAU: At this point I'd offer  
9 what's been marked as Exhibit 1 into the record.

10 JUDGE ROBERTS: And that is the Stipulation  
11 of Facts and Statement of Issues Presented, which was  
12 actually filed with the Commission on October 6th, but  
13 I think it's appropriate to have this as an exhibit.  
14 Is there any objection to the admission of that item?

15 (No response.)

16 JUDGE ROBERTS: Hearing none, Exhibit No. 1  
17 will be admitted on the record.

18 (EXHIBIT NO. 1 WAS RECEIVED INTO EVIDENCE.)

19 JUDGE ROBERTS: And the other reason I ask  
20 is that -- and I want to make sure I do this on the  
21 record in case anybody's uncomfortable about me doing  
22 this. But the portion at least that appears before  
23 Tab A and anything else is fine, but is it possible  
24 for the -- for me, for the Commission to acquire that  
25 on disc?

1           MR. BOUDREAU: It shouldn't be any problem  
2 with that. I think I can supply that to you.

3           JUDGE ROBERTS: If that's available, I'd  
4 like to have it if no party objects. In the event  
5 that the Commission chooses to lift any of those  
6 stipulated facts out of there and physically put them  
7 in an Order, it will certainly facilitate that.

8           MR. BOUDREAU: I'll be glad to supply it to  
9 you.

10          JUDGE ROBERTS: As often as possible I'm  
11 trying to move us towards accepting documents  
12 electronically.

13          As for the briefing, if the transcript's  
14 back in five or six days, I would anticipate -- I  
15 would suggest that the only thing necessary is one  
16 round of briefs. I don't know whether you're going to  
17 have need or that we have a need for reply briefs.  
18 And I would propose November 2nd, which I think is a  
19 Monday, as a due date for those.

20          And that should be -- if the transcript --  
21 well, actually, I don't know how much -- this is  
22 really legal issues as opposed to talking about  
23 witness testimony. But in any event, the transcript  
24 should be back around the 19th or 20th, I think, and  
25 that gives you about two weeks to do your brief.

1           And in your brief -- we had discussed in the  
2           order the potential for closing argument, and we  
3           didn't arrive at that necessity, but this brief may  
4           sort of be your closing arguments, tying up loose  
5           ends, responding to questions from the Bench. Anybody  
6           have anything to say about that, any questions,  
7           requests?

8           MR. BOUDREAU: My only thought is, I may end  
9           up doing not as much in terms of briefing it post  
10          hearing. I may just refer to some of the arguments  
11          made in the Memorandum of Law. It does occur to me  
12          there may be some things in there that I want to  
13          update given my argument and presentation to the  
14          Commission today, but it may -- I may simply cross-  
15          reference some or substantial portions of my  
16          Memorandum of Law.

17          JUDGE ROBERTS: Sure. I mean, I'm not --  
18          we're not expecting big briefs, we're not asking for  
19          lengthy briefs. But I will renew the request for  
20          Proposed Findings of Fact and Proposed Conclusions of  
21          Law. You're certainly welcome to file those. You're  
22          certainly not required to do so. We will be pleased  
23          to have them.

24          And I don't think I should necessarily  
25          require this, but there is some lingering question

1 about the significance of paid under protest, and we  
2 had discussed that at the prehearing conference. And  
3 if you have any authority at all on the significance  
4 of sending a check to the Missouri Public Service  
5 Commission and stating that it's paid under protest,  
6 please cite your authority for that.

7 MR. PENDERGAST: Your Honor, that raises a  
8 very timely point. I think the next round of  
9 payments, if I'm not wrong, are due tomorrow. So I  
10 think we've already written our paid under protest  
11 letter, and I don't know if it's necessary to repeat  
12 it for every quarterly payment that you make.

13 But I guess I'd just like to note for the  
14 record that to the extent it does have some  
15 significance, we've indicated that on our first  
16 payment and that, you know, that would at least be our  
17 position that that applies to additional payments we  
18 make until we get this item resolved.

19 JUDGE ROBERTS: In the event -- we were  
20 struggling with whether there's any legal authority at  
21 the prehearing conference. We were struggling with  
22 that issue as to whether you can pay the Public  
23 Service Commission, whether you can pay an assessment  
24 under protest and what, if any, significance that has.

25 But in the event that it does have any legal

1     significance or offers you any protection, I would  
2     suggest that 90 days from now, if this case is not  
3     finally resolved, and that may be, that 90 days from  
4     now when you send your next check, if you want to note  
5     that that's paid under protest. If you fail to do so,  
6     I'm not sure that that's like a continuing objection.

7             MR. PENDERGAST: Yeah.

8             JUDGE ROBERTS: It may be moot, and I'm not  
9     sure if that has significance, and if we get a court  
10    order that may resolve this one way or the other no  
11    matter what you wrote on your cover letter or on your  
12    check.

13            But if you have anything on that, I'd  
14    certainly be happy to see it. And I don't know if  
15    there's -- if we need to explore -- it seemed like  
16    maybe it was semantics, the discussion that went on  
17    about whether a payment reverts to the general revenue  
18    or whether it is transferred from our fund to theirs.

19            And I'm not sure if there's a, you know,  
20    words and phrases, if you look in words and phrases,  
21    I'm not sure, or somewhere else, I'm not sure if  
22    there's a different definition for revert versus  
23    transfer.

24            Oh, yes. And the other -- this one I will  
25    ask, that you try to address the issue of the implicit



1       repeal by Legislature, and the issues which I believe  
2       Chair Lumpe raised that she seemed to think that there  
3       was a line of cases out there that suggests that you  
4       cannot legislate through appropriations bill. And  
5       obviously if you find anything along those lines, that  
6       would be helpful.

7               Then with that, are there any issues, any  
8       requests? Yes, Mr. Haas?

9               MR. HAAS: Yes, Judge Roberts. On behalf of  
10       all the parties, I would request leave to amend one  
11       page that's in the Stipulation and Agreement,  
12       Exhibit 1. In Exhibit H, the calculation shown for  
13       Kansas City Power & Light Company are those for a gas  
14       corporation instead of an electric corporation, and I  
15       would ask leave to amend or substitute that page when  
16       we get the corrected calculation.

17              JUDGE ROBERTS: You actually have the  
18       documents here?

19              MR. HAAS: Yes, your Honor, we do have the  
20       documents here.

21              JUDGE ROBERTS: Okay. Do you want to mark  
22       those? I think -- let's go off the record and mark it  
23       as Exhibit 2, please.

24              (Discussion off the record.)

25              (EXHIBIT NO. 2 WAS MARKED FOR

1 IDENTIFICATION.)

2 JUDGE ROBERTS: Back on the record, please.

3 While we were off the record, we marked as  
4 Exhibit 2 a document which in the top left-hand corner  
5 says Kansas City Power & Light Company, electric, and  
6 then it's the Article X, or Article Roman Numeral X.  
7 And this is a page which appeared behind Tab H in  
8 Exhibit 1, which is the Stipulation of Facts and  
9 Statement of Issues Presented. Those pages aren't  
10 numbered, but I believe it's the only page in there  
11 what says Kansas City Power & Light Company in the top  
12 left-hand corner.

13 Is there any objection to the admission of  
14 Exhibit 2?

15 MR. BOUDREAU: None.

16 JUDGE ROBERTS: I assume it's being offered  
17 by Staff or Kansas City Power & Light jointly.  
18 Mr. Koegel, is this exhibit accurate before we admit  
19 it?

20 MR. KOEGEL: I'm not sure of that.

21 MR. HACK: Why don't we reserve a late-filed  
22 exhibit and send it in when we're sure.

23 JUDGE ROBERTS: If there's any doubt about  
24 the accuracy of the exhibit, I don't want to admit it  
25 and then substitute again.

1           MR. HAAS: Could we take a brief recess to  
2 discuss it, five minutes or less?

3           JUDGE ROBERTS: Are you saying that you two  
4 can figure out whether this is accurate or you need to  
5 go upstairs and talk to Mr. Raddel?

6           MR. HAAS: I was hoping maybe we could clear  
7 it up with Mr. Raddel.

8           JUDGE ROBERTS: Okay. Hold that thought,  
9 then. Is there anything else that needs to be  
10 addressed, any other requests?

11          MR. BOUDREAU: I don't believe so.

12          JUDGE ROBERTS: We've got the briefing  
13 schedule, the dates for the briefs.

14          MR. KEEVIL: You're just having the one  
15 round of briefs, right?

16          JUDGE ROBERTS: Yes. And I suppose if  
17 you -- at the risk of starting a paper war, if you  
18 really felt compelled to respond to somebody's brief,  
19 I don't think we'd reject it, you know. I just don't  
20 anticipate that reply briefs are necessary.

21                 And I will say this, I'm hoping that once  
22 the first round -- once the briefs get here, the  
23 Commission can start to consider this issue, and the  
24 briefs that come in beyond that may be too late.  
25 Obviously if they get here and it's still on the

1 table, they would be considered.

2 So we've stalled about as much as we can.

3 Is this a new document from Kansas City Power & Light?

4 MR. HAAS: It's the document that we just  
5 marked earlier.

6 JUDGE ROBERTS: And you ascertained or you  
7 determined that it's accurate?

8 MR. HAAS: Yes, sir.

9 JUDGE ROBERTS: Is there any -- and you're  
10 offering it, Mr. Koegel?

11 MR. KOEGEL: Jointly, I believe.

12 JUDGE ROBERTS: All right. It's Staff and  
13 Kansas City Power & Light both offering Exhibit 2. Is  
14 there any objection to the admission of Exhibit No. 2?

15 MR. BOUDREAU: None.

16 JUDGE ROBERTS: Hearing none, that exhibit  
17 will be admitted on the record.

18 (EXHIBIT NO. 2 WAS RECEIVED INTO EVIDENCE.)

19 JUDGE ROBERTS: Is there anything else on  
20 briefing schedule or resolving this issue in any way?

21 I would anticipate that the Commission will  
22 address -- well, the Commission may be able to address  
23 the stay separately and prior to resolving the case in  
24 entirety. I'm just not sure. It just kind of depends  
25 on what scheduling constraints are. But the responses

1 are coming in earlier, which gives us a little time, a  
2 little time.

3 Last call, anything else? Hearing nothing,  
4 thank you very much for coming. I appreciate your  
5 presentations. This package, Exhibit No. 1, was  
6 extremely helpful. I appreciate the way that was put  
7 together for my benefit and for the Commissioners.  
8 Thank you very much.

9 We're off the record.

10 WHEREUPON, the oral argument of this case  
11 was concluded.

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