LACLEDE GAS COMPANY
720 OLIVE STREET
ST. LOUIS, MISSOURI 63101

AREA CODE 314
342-0532

MICHAEL C. PENDERGAST
ASSOCIATE GENERAL COUNSEL

November 2, 1998

VIA FACSIMILE

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Judge
Missouri Public Service Commission
Harry S Truman Building
301 W. High Street, 5th Floor
Jefferson City, MO 65101

RE: Case No. OO-99-44

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case, please find the original and fourteen copies of the Brief of Laclede Gas Company in the above-referenced case. Please see that this filing is brought to the attention of the appropriate Commission personnel.

Laclede notes that it is filing copies of a facsimile transmission of its Brief pursuant to 4 CSR 240-2.080(3). In accordance with that rule, the original of this Brief and this letter are being sent to the Commission by next-day mail.

Thank you for your consideration in this matter.

Sincerely,

Michael C. Pendergast

Michael C. Pendergast
Associate General Counsel

MCP:jaa

cc: All parties of record

Enclosure

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

BRIEF OF LACLEDE GAS COMPANY

Pursuant to the briefing schedule established in this proceeding, Laclede Gas Company ("Laclede") hereby submits the following brief for the Commission's consideration.

I. INTRODUCTION

This proceeding was initiated by the Commission to consider various issues which had been raised by a number of utilities regarding the lawfulness and reasonableness of the public utility assessment order issued by the Commission for the fiscal year commencing July 1, 1998. See Supplemental Order No. 52, Case No. 11,110 (Issued June 29, 1998). At the outset, Laclede wishes to commend both the Commission and its Staff for the highly professional way in which this proceeding has been conducted. In particular, as a utility which experienced a more than 30% increase in its assessment charges this year, Laclede appreciates the Commission's forthright identification of the factors underlying the increase in its assessment and its efforts to give all interested parties an opportunity to present their positions on the issues raised in connection with that assessment.

Laclede also appreciates the Staff's efforts to cooperate with the utilities in developing an accurate and comprehensive factual record for this proceeding.

As a result of these efforts, the parties have been able to resolve any potential factual disputes in this case and devote their resources instead toward addressing the important legal and policy issues raised in this docket. As discussed below, Laclede believes that a proper application of those legal and policy considerations to the undisputed facts in this case warrants a finding that the Commission cannot and should not assess utilities for amounts used to effectuate tax refunds under the Hancock provisions of the Missouri Constitution. (See Article X, §§16-24). Based on the record in this proceeding, Laclede also believes that the Commission should eliminate the use of a five year average assessment percentage for purposes of determining how assessment amounts should be allocated between utilities.

II.
ARGUMENT

A. Both the Hancock Provisions of the Missouri Constitution and Section 386.370 of the Public Service Commission Law prohibit utility assessments from being increased in order to recoup amounts used to effectuate Hancock-related refunds.

Throughout this proceeding, there has been extensive discussion over the issues of: (1) whether amounts included in the Commission's assessment fund may be considered for purposes of determining total state revenues under the

Hancock Amendment; (2) whether such amounts may be used to effectuate tax refund distributions mandated by the Hancock Amendment; and (3) whether such amounts, once used for such a purpose, may then be recouped through increased assessments on utilities. As a general rule, the utilities participating in this case have asserted that the answer to the first two questions is no; that the restrictive language in Section 386.370 (RSMo. Supp. 1997), as well as the relevant case law, precludes any use of Commission assessment funds to effectuate Hancock refund distributions. The Staff, on the other hand, asserts that the answer to the first two questions is yes, relying principally on the fact that the General Assembly or the Office of Administration explicitly authorized the "Article X transfers" from the Commission's assessment fund that were used to effectuate the Hancock refund distributions at issue in this case. See Staff's Memorandum of Law and Argument (hereinafter "Staff's Memorandum"), pp. 2-3, 6-10.

For the reasons addressed by the parties in their previous pleadings in this case, Laclede believes that the utilities have the better argument on these first two questions. Laclede also believes that it is in the Commission's institutional interest to reach the same conclusion. For if the Staff is indeed correct that the Commission's assessment fund is subject to the provisions of the Hancock Amendment, then it necessarily follows that any

portion of those funds used to effectuate Hancock refunds cannot be subsequently recouped from utilities through increased assessments.[1]

To conclude otherwise would be to sanction an approach to state funding that is wholly inconsistent with both the letter and intent of the Hancock Amendment. As the Missouri Supreme Court has held, the purpose of the Hancock Amendment is "to rein in increases in governmental revenue and expenditures." Roberts v. McNary, 636 S.W.2d 332, 336 (Mo. banc. 1982). To achieve this purpose, the Hancock Amendment "establishes an annual revenue limit for state government and requires the state to disgorge the excess when its revenues exceed the constitutional revenue ceiling." Missourians for Tax Justice Education Project v. Holden, 959 S.W.2d 100, 102 (Mo. 1997).

This fundamental purpose is clearly frustrated by a process, such as the one followed in this case, under which amounts are deemed to be part of excess revenues for purposes

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[1]The primary difficulty with Staff's approach to the Article X transfer issue is that it assumes that the Commission's assessment fund falls within the ambit of Hancock for some purposes but not others. Staff has not explained, however, how the nexus between the Commission's assessment fund and Hancock can possibly be strong enough to justify both the inclusion of these funds in the calculation of excess state revenues and their use in making any required refund of such revenues, but not strong enough to bar any subsequent attempt to recapture these excess revenues through an increase in assessments.

of Hancock, are "disgorged" back to the taxpayers as required by Hancock, and then are subsequently recouped through increased assessments, as if these very same Hancock requirements were no longer applicable. Obviously, the very act of recoupment simply negates the effect and the intended purpose of the first two steps of the Hancock process. Moreover, if carried to its logical extreme, such a process could be used to circumvent the constitutional requirements of Hancock in their entirety. By simply establishing assessment funds for the various functions performed by state government, the General Assembly could theoretically recoup from those assessed all of the excess revenues which the state was required to refund in any given year. Under such circumstances, the very concept of an annual revenue limit and refund obligation as a means of "rein[ing] in increases in governmental revenue and expenditures" would be rendered meaningless.[2]

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[2]In evaluating whether the assessment process followed in this case can be reconciled with the requirements of Hancock, the Commission should take note of the fact that, under the Commission's assessment order, some of the utilities have actually paid as much or more in assessment charges to cover the Hancock-related transfers as they have received back from the state in the way of Hancock refunds. Compare Exhibit H of Exh. No. 1 with Appendix A of the Responsive Statement of Joint Applicants. It is difficult to understand how the purposes of Hancock are served by a process which not only deprives utilities and their customers of the value of their Hancock refunds but has the potential

(Footnote Continued)

Laclede believes it is highly unlikely that a Missouri court would sanction the use of any assessment fund to effectuate such a direct and obvious circumvention of Hancock requirements. Such a result is even less likely in this case, however, given the clear statutory prohibition on using the Commission's assessment fund for any purpose other than "the payment of expenditures actually incurred by the Commission and attributable to the regulation of ... public utilities." Section 386.370.4; Exh. No. 1, ¶21 at pp. 5-6. By specifying that the Commission's assessment fund must be "devoted solely" to this purpose and by explicitly providing that any amount remaining in this fund at the end of a fiscal year "shall not revert to the general revenue fund", Section 386.370.4 affirmatively precludes utilities from being assessed for purposes that are not directly related to their regulation.

No party to this proceeding has even suggested that the transfer and subsequent use of amounts from the Commission's assessment fund to effectuate Hancock refunds was, in any way, related or attributable to the regulation of public utilities. To the contrary, the Staff itself has candidly acknowledged that these "Article X transfers are not

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(Footnote Continued)
to make them pay more in state mandated payments than they would if Hancock did not exist.

reasonably attributable to the regulation of public utilities." See Staff Memorandum, p. 8. In view of this undisputed fact, there should be no question that any effort to recoup these amounts through increased assessments on public utilities was unauthorized by statute.

Staff nevertheless attempts to create such authority by pointing to the fact that the Article X transfers at issue in this proceeding were authorized, either directly or indirectly, by several appropriations bills passed in 1996, 1997 and 1998. Staff Memorandum, pp. 6-8. According to Staff, these authorizations implicitly "repealed" or established an "exception" to the express language of Section 386.370.4. As Chair Lumpe seemed to recognize during the course of the oral argument in this case, however, appropriations bills cannot be used, even with express language, to enact substantive changes in statutory provisions. Tr. 86-87; State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. banc 1934); Rolla 31 School Dist. v. State, 837 S.W.2d 1, 4 (Mo. banc 1992). Obviously, these same cases also foreclose the use of appropriations bills to "implicitly" repeal or otherwise modify a statute such as Section 386.370.

Moreover, even if one assumes, arguendo, that the General Assembly was somehow empowered to transfer amounts out of the Commission's assessment fund to pay for Hancock refunds, that by no means signifies that it was lawful for

the Commission to subsequently recoup those amounts through increased assessments. By passing these appropriations bills, the General Assembly may very well have intended that all state agencies, including those funded through assessments, bear the same relative share of expense reductions required to finance the mandated level of Hancock refunds. While the act of transferring money out of assessment funds to accomplish this goal may have been inconsistent with the specific statutory language governing those funds, it would not necessarily be inconsistent with the constitutional requirements of the Hancock Amendment, so long as the agencies did not seek to subsequently recoup those transferred amounts through increased assessments.

Accordingly, if the actions of the General Assembly in passing these appropriations bills are to be reconciled with the constitutional requirements of the Hancock Amendment, they can, at best, be construed as authorizing only the transfer of these funds -- and not their subsequent recoupment through increased assessment. Indeed, such a construction is entirely consistent with the fact that, at the time these appropriations bills were being enacted, there was "no line item or other indication [in the Commission's appropriations bills] showing that the moneys relating to Article X transfers were intended to be recouped or returned to the [Commission's Assessment] Fund by means of an

appropriation by the General Assembly or through assessment." Exh. No. 1, ¶50.

In view of these considerations, Laclede believes that any attempt to increase utility assessments in order to recoup funds used to make Hancock refunds is plainly prohibited by both the Hancock Amendment itself as well as the clear language of Section 386.370. The Commission's Supplemental Order No. 52 should accordingly be revised to remove these amounts from the assessments calculated therein. At the same time, however, Laclede recognizes that it was the General Assembly which created this issue in the first instance by transferring amounts out of the Commission's assessment fund for purposes that were never contemplated or authorized by the express language set forth in Section 386.370. Laclede therefore wishes to advise the Commission that in the event it grants the relief requested herein, Laclede will cooperate with the Commission in pursuing whatever judicial or legislative avenues are available to restore these amounts to the Commission's assessment fund.

B. <u>The Commission should eliminate the use of a five year average assessment percentage for purposes of determining how assessment amounts should be allocated among utility groups</u>.

One of the issues raised in this proceeding relates to the Commission's use of a five year average assessment

percentage for purposes of allocating assessment amounts among the various utility groups. In its Memorandum of Law, Trigen-Kansas City Energy Corporation ("Trigen") challenged the use of this average on the grounds that it was inconsistent with the allocation methodology mandated by Section 386.370(2). See Trigen's Memorandum of Law, pp. 5-6. During the oral argument in this proceeding, Laclede also recommended that the Commission consider this issue.

Based on a review of the record in this proceeding, Laclede believes that the Commission should, in fact, eliminate the use of the five year average and recalculate the assessments set forth in Supplemental Order No. 52 to reflect such elimination. It is clear from a review of page 3 of Exhibit A to the Stipulation of Facts in this case (See Exhibit 1), that the five year average is not simply an alternative method for estimating the "expenses directly attributable to the regulation of [each utility group]" as required by Section 386.370.2. Nor is the five year average designed to ensure that common costs will be allocated on the basis of each group's intrastate operating revenues, as required by that same statutory section. Instead, it is an entirely separate step, which is only applied by the Commission after it has already estimated the expenses directly attributable to the regulation of each utility group and already allocated common costs on the basis of intrastate revenues.

By employing this additional, after the fact, step (which is nowhere authorized in Section 386.370), the Commission's assessment process will produce assessment allocation results that, as a matter of pure mathematics, will invariably differ from those that would be produced if the statutorily prescribed method were simply followed. For this reason, the use of the five year average should be eliminated.

III.

CONCLUSION

WHEREFORE for the foregoing reason, Laclede Gas Company respectfully requests that the Commission issue a revised Supplemental Order No. 52, in which the assessments for each utility are recalculated to eliminate: (1) any amounts associated with Article X transfers; and (2) the effects of using a five year average assessment percentage for purposes of allocating assessment amounts among utility groups.

Respectfully submitted,

Michael C. Pendergast
Associate General Counsel
Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, MO 63101
Missouri Bar No. 31763

CERTIFICATE OF SERVICE

Michael C. Pendergast, Associate General Counsel for Laclede Gas Company, hereby certifies that the foregoing Brief of Laclede Gas Company in this case has been duly served upon all parties of record to this proceeding by placing a copy thereof in the United States mail, postage prepaid, on this 2nd day of November, 1998.

Michael C. Pendergast