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November 2, 1998

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

FILED

NOV - 2 1998

Missouri Public  
Service Commission

Re: Case No. QO-99-44

Dear Judge Roberts:

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

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

Very truly yours,

*Leo J. Bub*  
*by [signature]*

Leo J. Bub

Enclosure

cc: Attorneys of Record

FILED

NOV - 2 1998

Missouri Public  
Service Commission

**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 ) Case No. OO-99-44  
Expenses of the Commission for the Fiscal Year )  
Commencing July 1, 1998. )

**SOUTHWESTERN BELL TELEPHONE COMPANY'S  
POST HEARING BRIEF**

Southwestern Bell Telephone Company respectfully submits this post hearing brief.

**Introduction**

The parties to this case have not objected to the Commission's determinations as to the amount of funds it needs to actually perform its regulatory duties. Traditionally, the parties have accepted the Commission's estimate of those expenses and have paid the amount assessed without question. Rather, the concern being raised here focuses on the use of monies generated by the Commission's utility assessment to fund Hancock Amendment refunds.

No party, including Staff, disputes that the transfers from the Public Service Commission Fund (the Fund) for Hancock refunds were not expenditures actually incurred by the Commission and attributable to the regulation of public utilities. And as a result of these transfers, the Commission has had to increase its assessment on Missouri utilities to fund its continued operations. In Supplemental Order No. 52,<sup>1</sup> the Commission notified all regulated Missouri utilities that their annual assessment for the fiscal year beginning July 1, 1998 would increase significantly due to transfers of monies from the Fund to the State's General Revenues to help fund Hancock refunds. These transfers were directed by the Missouri Legislature. Specifically, HB 1004-88 directed the Commission to transfer \$262,347. HB 4 directed a similar

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<sup>1</sup>In the matter of the assessment against the public utilities in the State of Missouri for the expenses of the Commission for the fiscal year commencing July 1, 1998, Case No. 11,110, Supplemental Order No. 52, issued June 29, 1998. (See, Stipulation of Fact, Exhibits F and G).

transfer but without specifying a dollar amount. (In February 1998, the State Office of Administration directed the Commission, pursuant to HB 4, to transfer \$425,871 to General Revenues for Hancock refunds.) And in 1998, HB1004-89 directed the Commission to transfer \$534,114.<sup>2</sup> On a total basis, these transfers increased the assessment of all regulated Missouri utilities \$1.2 million. Southwestern Bell's assessment increased \$218,000 due to the transfers.<sup>3</sup> These transfers are not consistent with Missouri statutes.

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

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

The state treasurer shall credit such payments to a special fund, which is hereby created, to be known as "The Public Service Commission Fund", which fund or its successor fund created pursuant to Section 33.571 RSMo, shall be devoted solely to the payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities subject to the jurisdiction of the commission as aforesaid. . . . (emphasis added).

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

The commission shall, prior to the beginning of each fiscal year . . . make an estimate of the expenses to be incurred by it during such fiscal year reasonably attributable to the regulation of public utilities as provided in Chapters 386, 387, 392 and 393, RSMo, and shall also separately estimate the amount of such expenses directly attributable

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<sup>2</sup>See, Factual Stipulation, paras. 25-26, 28, 30-31, 36-37, 41-43.

<sup>3</sup>Id., Exhibit H.

to such regulation of each of the following groups of public utilities: Railroad corporations, street railroad corporations, other common carriers, electrical corporations, gas corporations, water corporations, heating companies and telephone corporations, telegraph corporations, sewer corporations and any other public utility as defined in Section 386.020, as well as the amount of such expenses not directly attributable to any such group. (emphasis added).

And Section 386.370.4 specifically forbids the reversion of any excess funds at the end of a fiscal year to General Revenue. Rather, it requires such monies to be appropriated for the Commission's needs in the next fiscal year:

Any amount remaining in such special fund or its successor fund at the end of any fiscal year shall not revert to the general revenue fund, but shall be applicable by appropriation of the General Assembly to the payment of such expenditures of the commission in the succeeding fiscal year and shall be applied by the commission to the reduction of the amount to be assessed to such public utilities in such succeeding fiscal year, such reduction to be allocated to each group of public utilities in proportion to the respective gross intrastate operating revenues of the respective groups during the preceding calendar year. (emphasis added).

2. The Appropriation Bills Directing the Transfers from the Commission's Fund Did Not Implicitly Repeal Section 386.370 RSMo (1994).

Staff contends that Legislature's appropriation bills HB 1004 (1996), HB 4 (1997) and HB 1004 (1998) directing the transfers implicitly repealed Section 386.370.4 RSMo Supp. 1997 which requires the Commission's Fund to be devoted solely to payment of the Commission's expenditures for the regulation of public utilities.<sup>4</sup>

Staff is incorrect. An appropriations bill can not explicitly or implicitly repeal a Missouri statute. In State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. banc 1934), the Missouri Supreme

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<sup>4</sup>Staff's Proposed Conclusions of Law, p. 2; Staff's Memorandum of Law and Argument, pp. 6-7.

Court ruled that an appropriation that contravenes general statutory law is unenforceable. There, the Court held that a legislative appropriation to the Board of Barber Examiners to pay the board members did not override the general statute which limited the payment of the board's salaries to the amount of the revenue received by the board during the year. The Court specifically rejected one board member's argument that the appropriation statute specifically amended the general statute and entitled him to payment. The Court held that legislation of a general character can not be included in an appropriation bill because such an act would contain more than one subject in violation of the Missouri Constitution. State ex rel. Davis, 75 S.W.2d at 830.

The Missouri Supreme Court recently reaffirmed the principles from Davis in Rolla 31 School District v. State, 837 S.W.2d 1, 4 (Mo. banc 1932). There, the Court stated: "This constitutional limitation, which provides that no bill shall contain more than one subject and limits appropriations to appropriations only, is still good law."

3. The Commission's Fund May Not Be Used as a Source of Hancock Refunds Even if the Fund is Used in Calculations to Determine Hancock Refunds.

To achieve a goal of reigning in increases in government revenue and expenditures, the Hancock Amendment established an annual revenue limit for state government and requires the State to disgorge the excess when its annual revenues exceed the constitutional revenue ceiling.

The calculation of that revenue limit in Article X, Section 18(a) of the Hancock Amendment is based on "total state revenues." In Missourians For Tax Justice Education Project v. Holden, 959 S.W.2d 100, 106 (Mo. banc 1997), the Missouri Supreme Court held that "total state revenue" as used in Section 18(a) of the Hancock Amendment is the "sum (total) of 'taxes, excises, customs, duties, and other sources of income' the state receives into its treasury in a given fiscal year." In Kelly v. Hanson, 959 S.W.2d 107, 111 (Mo. banc 1997), the Supreme

Court further explained that since “revenue” consists of funds that are available “for public use,” funds not subject to appropriation -- either by the General Assembly or by operation of law -- will not be considered revenue for purposes of determining total state revenue.

While funds generated from the Commission’s public utility assessment are subject to appropriation by the Legislature, Section 386.480.4 strictly limits such appropriation to the “payment of expenditures actually incurred by the commission and attributable to the regulation of such public utilities subject to the jurisdiction of the commission.”<sup>5</sup> This appropriation restriction may limit these funds’ availability “for public use” and make questionable their use in the total state revenue calculation for Hancock Amendment refunds.

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

To do otherwise would defeat the purpose of the Hancock Amendment. Article X, Section 16 of the Missouri Constitution provides that “state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution.” As a result of the Legislature’s directing the transfer of monies from the Commission’s Fund to General Revenues for Hancock Refunds, each regulated utility’s current assessment increased. This occurred through a \$688,218 reduction in the amount of the prior year’s budget surplus which would have carried-over to reduce the current year assessment; and a

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<sup>5</sup>See also, Factual Stipulation, para 22.

\$534,114 Article X transfer included as an itemized and budgeted expense for the current fiscal year. Increasing utility assessments in this manner is inconsistent with the Hancock Amendment because its effect is to generate additional revenue for the State in excess of the constitutional spending limit without a popular vote.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail on November 2, 1998.

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