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November 2, 1998

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FILED

NOV - 2 1998

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

**RE: Case No. OO-99-44**

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of **Staff's Post-Hearing Brief**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

*William K. Haas*

William K. Haas  
Senior Counsel  
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WKH:sw

Enclosure

cc: Counsel of Record

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

**FILED**  
NOV - 2 1998  
Missouri Public  
Service Commission

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

**STAFF'S POST-HEARING BRIEF**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its Post-hearing Brief states:

The Missouri Public Service Commission (Commission or PSC) established this case to address an application for rehearing and stay regarding the Commission's June 29, 1998 Supplemental Order No. 52 in Case No. 11,110. In that Order, the Commission set out the public utility assessments, pursuant to Section 386.370, RSMo Supp. 1997, for the Commission's fiscal year commencing July 1, 1998.

On September 23, 1998, the Commission issued its Order Regarding Procedural Schedule which directed the parties to address certain questions within each party's memorandum of law. On October 6, 1998, the parties filed a Stipulation of Facts and Statement of Issues Presented which listed four issues. The Staff's Memorandum of Law and Argument, which was filed on October 6, 1998, addressed the issues presented both in the Commission's September 23 Order and in the parties' October 6 Statement. The Staff's Memorandum of Law and Argument is incorporated herein by reference. In this Post-hearing Brief, the Staff will address three topics raised from the bench at the conclusion of the hearing. (Tr. 208-210).

**1. Whether payment under protest is a condition precedent for a public utility to obtain a refund on its Commission assessment?**

The procedure for an applicant to seek a refund of its PSC assessment appears to be a question of first impression; each applicant should rely on the advice of its own attorney.

Subsection 1 of Section 136.035 RSMo 1994 states that the director of revenue from funds appropriated shall refund any overpayment or erroneous payment of any "tax" which the state is authorized to collect. Subsection 3 of this statute provides that no refund shall be made by the director of revenue unless a claim for refund has been filed with the director within two years from the date of payment.

In Community Federal Savings & Loan Association v. Director of Revenue, 752 S.W.2d 794 (Mo. banc 1988), the appellants, savings and loan associations, sought under § 136.035 RSMo a refund of intangible property tax payments. The appellants paid the tax believing the law to be constitutional. The appellants did not file a protest with the director but did join in a declaratory judgment action which resulted in the tax being declared unconstitutional. The court stated that in the absence of statutory authority, taxes voluntarily, although erroneously paid, albeit under an unconstitutional statute, cannot be refunded. First, the court held that the appellants did not pay the taxes voluntarily because payment to avoid harsh penalties is not voluntary payment of taxes. Second, the court held that a reasonable construction of the terms "overpayment" and "erroneous" as used in Section 136.035 RSMo includes the term "illegal." In other words, the court held that Section 136.035 RSMo provided the statutory authority for a refund of the taxes paid under the unconstitutional statute.

In State ex rel. Brady Motorfrate, Inc. v. State Tax Commission, 517 S.W.2d 133 (Mo. 1974), the Missouri Supreme Court applied the two year limitation period of Subsection 3 of Section 136.035 RSMo to deny a claim for overpayment of motor carrier license "fees."

**2. Whether the PSC funds "reverted" or were "transferred" to the General Revenue Fund for the payment of Hancock Amendment refunds?**

Subsection 4 of Section 386.370 RSMo Supp. 1997 states that any amount remaining in the PSC Fund at the end of the fiscal year shall not "revert" to the General Revenue Fund but shall be applicable by appropriation of the General Assembly to the payment of the Commission's expenditures attributable to the regulation of public utilities in the succeeding fiscal year. This subsection provides an exception to the general mandate of Section 33.080 RSMo 1994 that the unexpended balance in funds shall, at the end of the biennium, be transferred to the credit of the ordinary revenue fund. The movement of monies from the PSC Fund<sup>1</sup> to the General Revenue Fund is not being accomplished by the operation of Section 33.080 but rather is being accomplished by Sections 4.035 of House Bill No. 1004 (1996), House Bill No. 4 (1997), and House Bill No. 1004 (1998) which direct the "transfer" of monies to the General Revenue Fund for refunds under the Hancock Amendment.

**3. Whether the General Assembly can legislate through an appropriations bill?**

In State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 350 (Mo. App. 1980), the court stated, "Appropriations of money for payment of state obligations and the amendment of a general statute are entirely different and separate subjects for legislative action. *State ex rel. Gaines v. Canada*, 342

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<sup>1</sup> House Bill No. 549, enacted in 1983 and codified at Section 33.571 RSMo 1994, abolished the PSC Fund and replaced it with an account in the General Revenue Fund within the state treasury.

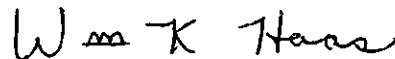
Mo. 121, 113 S.W.2d 783, 790 (banc 1937), reversed on other grounds, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); [additional citation omitted].”

In State ex rel. Gaines v. Canada, the Missouri Supreme Court stated, “Legislation of a general character cannot be included in an appropriation bill. To do so would violate Section 28 of Article 4 of the Constitution<sup>2</sup> which provides that no bill shall contain more than one subject which shall be clearly expressed in its title.” 113 S.W.2d at 790.

### **Conclusion**

As explained in the Staff’s Memorandum of Law and Argument, the Commission’s Report and Order should recite conclusions of law based upon legislative enactments and judicial opinions that explain the Commission’s authority and duty to act as it has in this matter. Consistent with such conclusions of law, the Commission should deny the applicants’ request to set aside Supplemental Order No. 52.

Respectfully submitted,



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<sup>2</sup> Section 28 of Article 4 of the 1875 Constitution of Missouri, which was cited to by the *Gaines* court, has been readopted in substance at Section 23 of Article III of the 1945 Constitution of Missouri.

**SERVICE LIST FOR  
CASE NO. OO-99-44  
November 2, 1998**

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