

LAW OFFICES  
**BRYDON, SWEARENGEN & ENGLAND**  
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON  
JAMES C. SWEARENGEN  
WILLIAM R. ENGLAND, III  
JOHNNY K. RICHARDSON  
GARY W. DUFFY  
PAUL A. BOUDREAU  
SONDRA B. MORGAN  
SARAH J. MAXWELL

312 EAST CAPITOL AVENUE  
P.O. BOX 456  
JEFFERSON CITY, MISSOURI 65102-0456  
TELEPHONE (573) 635-7166  
FACSIMILE (573) 636-6450 OR 635-0427  
E-MAIL: PBOUDREAU@MAIL.ULTRAWEB.NET

CHARLES E. SMARR  
DEAN L. COOPER  
MARK G. ANDERSON  
TIMOTHY T. STEWART  
GREGORY C. MITCHELL  
RACHEL M. CRAIG  
BRIAN T. MCCARTNEY

January 15, 1999

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

Re: Case No. OO-99-44 (Utility Assessments)

Dear Mr. Roberts:

On behalf of The Empire District Electric Company and UtiliCorp United Inc. d/b/a Missouri Public Service, enclosed is an original and fourteen (14) copies of an **Application for Rehearing and Stay** for filing in the referenced matter. I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel.

I have enclosed an extra copy of this document which I request that you stamp "Filed" and return to the person delivering it to you.

Thank you in advance for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Paul A. Boudreau

PAB:db  
enc.

cc: Office of the Public Counsel  
All parties of record

**FILED**  
JAN 15 1999  
Missouri Public  
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

FILED  
JAN 15 1999

Missouri Public  
Service Commission

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

**APPLICATION FOR REHEARING AND STAY**

Come now, The Empire District Electric Company and UtiliCorp United Inc. d/b/a Missouri Public Service (hereinafter collectively the "Applicants"), pursuant to §386.500, RSMo 1994, and 4 CSR 240-2.160, and respectfully apply to the Missouri Public Service Commission ("Commission") that it grant rehearing and hold a hearing with respect to its December 17, 1998, *Report and Order* (the "*Report and Order*") in the captioned case. The Commission's *Report and Order*, particularly as it relates to certain Article X transfers, is unlawful, unjust and unreasonable in the following respects.

1. On December 17, 1998, the Commission issued its *Report and Order* in the captioned case. That Order held that transfers mandated by Conference Committee Substitute for House Bill 1004 (88<sup>th</sup> General Assembly) ("HB 1004-88"), relating to Article X distributions for 1995, and Conference Committee Substitute for House Bill 4 (89<sup>th</sup> General Assembly) ("HB 4"), relating to Article X distributions for 1996, from the Public Service Commission Fund (the "Fund") within the Office of the State Treasurer to the General Revenue Fund ("General Revenues") in order to facilitate Hancock Amendment refunds were lawful and should be included in the Commission's public utility assessment calculation.

2. The Commission further failed to reduce its public utility assessment calculation (as ordered in *Supplemental Order No. 52*, Case No. 11,110, issued on June 29, 1998) by a sum equal

11.

to the amounts attributable to such Article X transfers for the fiscal years 1995 and 1996 (i.e., \$688,218). By implication, the Commission concluded that its assessments to recover Article X transfers from the Applicants for the fiscal years 1995 and 1996 to be lawful.

3. Further, by failing to modify its *Supplemental Order No. 52*, which assesses to Applicants some allocated portion of the amount transferred out of the Fund to General Revenues by the Missouri General Assembly for the purpose of funding Article X distributions for tax years 1995 and 1996, the Commission, by implication, has concluded that said Article X transfers were expenses to be incurred by it that are reasonably attributable to the regulation of public utilities. *See*, §386.370.1, RSMo.

4. As indicated in their original Application for Rehearing and Stay in Case No. 11,110, Applicants are aware that the disputed Article X transfers are due to factors external to the Commission's customary budgetary considerations and are, thus, the result of circumstances not entirely of the Commission's making and may not be entirely within the Commission's control. Nevertheless, Applicants believe that they have the obligation to identify and challenge items that cannot lawfully be included in the calculation of the Commission's annual utility assessment. The assessments paid into the Fund for any purpose other than to pay the Commission's cost of regulating utilities subject to its jurisdiction is a serious matter. This is evidenced by the fact that the Commission granted a hearing and has engaged in a number of thoughtful discussions about the issues raised at its regularly scheduled agenda meetings. However, because the Commission has failed to exclude from its assessment calculation the sum of \$688,218 attributable to Article X transfers for the fiscal years 1995 and 1996, Applicants believe that the Commission's *Report and Order* is unlawful and unreasonable.

5. The following are specific reasons why the Commission should grant a rehearing and enter upon another hearing concerning the appropriateness of its assessments for the 1999 fiscal year.

- The Commission erred in concluding that the Article X transfers ordered by the Missouri General Assembly and the Office of Administration by virtue of HB 1004-88, HB 4 and Conference Committee Substitute for House Bill 1004 (89<sup>th</sup> General Assembly)("HB 1004-89") were lawful in that the money paid into the Fund is not a component of total state revenue ("TSR") and is not, therefore, subject to the Hancock Amendment's calculation of excess state revenues. Rather, the money in the Fund has come from assessments imposed by the Commission on public utilities. Because these assessments are devoted solely and specifically to the payment of expenditures actually incurred by the Commission which are attributable to the regulation of public utilities, they are in the nature of a direct charge to cover the costs of regulation and are not intended to raise revenue to defray general customary governmental expenditures. This is evidenced by the simple fact that the Commission, which imposes the assessments, is not a political subdivision and has no taxing power whatsoever. *See*, §386.370, RSMo. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983); *Zahner v. City of Perryville*, 813 S.W.2d 855, 858 (Mo. banc 1991).
- Even if the money in the Fund is a part of TSR for purposes of calculating how much excess revenue has been collected by the State in any particular tax year, the Commission erred in concluding that the money in the Fund may be lawfully transferred into General Revenues in order to pay for Constitutionally mandated

Article X distributions. Section 386.370.4, RSMo Supp. 1997, states that "[a]ny amount remaining in [the 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..." (emphasis added) The term "revert" as used in this context simply means that the money in the Fund may not be transferred to General Revenues. This provision specifically prohibits the use of monies paid into the Fund for any purpose other than to defray the Commission's expenses of regulating public utilities. Article X transfers, even if authorized by law with respect to other special funds, are unlawful with respect to the Fund. HB 1004-88, HB 4 and HB 1004-89 cannot supercede or repeal general legislation such as §386.370, RSMo, because they were merely appropriations bills. Including general legislation in an appropriations bill would be to include to entirely and separate subjects in violation of *Mo. Const.*, Art. III, §23. See, *State ex rel. Davis v. Smith*, 75 S.W.2d 828 (Mo. banc 1934) and *Rolla 31 School District v. State*, 837 S.W.2d 1, 4 (Mo. banc 1992).

- The Commission erred in concluding that Article X transfers for 1995 and 1996 were expenses to be incurred by the Commission. The Article X transfers were entirely unrelated to the Commission's regulatory responsibilities. Furthermore, they took place *prior* to the beginning of the 1999 fiscal year (i.e., June of 1998). (Stip., ¶33, 34). These facts are undisputed.
- The Commission erred in concluding that the Article X transfers for 1995 and 1996 were reasonably related to the regulation of public utilities. This finding is directly

contrary to the undisputed facts. All parties to this case, including the Staff of the Commission, agreed that the disputed Article X transfers were *not* reasonably related to the regulation of public utilities by the Commission. The Commission simply ignored the facts presented to it and reached the very opposite conclusion without any evidentiary support whatsoever.

- The Commission further erred in concluding that the 1995 and 1996 Article X transfers out of the Fund to General Revenues should be included in its assessments to the public utilities for expenses to be incurred by the Commission that are reasonably related to the regulation of public utilities. By including these transfers in the assessments to the public utilities, the Commission is trying to recover from the utilities and their customers money which the General Assembly has taken from it to give to the income taxpayers of the state. HB 1004-88 and HB 4 both clearly state that these funds are to be transferred out of the State Treasury to General Revenues "as are necessary for refunds required by Article X, Section 18(b)." For the Commission to thereafter attempt to recover the Article X transfers in a subsequent assessment, as it has done in this case, is to take specific regulatory action which will nullify legislative action taken by the Missouri General Assembly. This the Commission cannot do. *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission*, 225 S.W.2d 792, 794 (Mo. App. 1950). Furthermore, this money was distributed to Missouri income taxpayers because, pursuant to Article X, the state is not entitled to that money. For the Commission to try to recoup money

to which it is not entitled would violate Section 18(b) of the Hancock Amendment<sup>1</sup> in both letter and in spirit. *See, Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100 (Mo. banc 1997).

- The Commission failed to include *all* of the stipulated facts in its findings of fact. The Commission is bound by the record before it and may not ignore or modify the undisputed facts presented in the *Stipulation of Facts*. *See*, 4 CSR 240-2.130(9).
- The Commission erred by submitting inadequate Findings of Fact and Conclusions of Law. The Commission's conclusions of law are completely conclusory and provide no insight into how the controlling issues were resolved. Consequently, the *Report and Order* is inadequate and a reviewing court will be unable to discharge its duty within the limits of its authority. *State v. Public Service Commission*, 716 S.W.2d 791, 795 (Mo. banc 1986); *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 65 (Mo. App. 1949); *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39, 42-43 (Mo. App. 1982).
- In its "Findings of Fact," the Commission omitted making ultimate findings as to facts which were relevant to the inquiry at hand. In its "Conclusions of Law," the Commission erred by failing to make findings with regard to essential issues in the case. By ignoring issues presented by the parties, the Commission has not issued findings or conclusions sufficient for judicial review. *See, Century State Bank v. State Banking Board*, 523 S.W.2d 856, 859 (Mo. App. 1975); *Minewald v. Board of*

---

<sup>1</sup>Mo. Const., Art. X, §§16-22.

*Boiler and Pressure Vessel Rules*, 868 S.W.2d 232 (Mo. App. 1994). The Commission failed to make specific findings with regard to two of the four issues that all parties agreed were essential to this case, specifically (1) whether Article X transfers for the year 1995 and 1996 represent expenses to be incurred by the Commission that are reasonably attributable to the regulation of public utilities and (2) whether the Commission may recover Article X transfers from the Fund to General Revenues in the calculation of subsequent public utility assessments.

The Commission also erred by implying conclusions that were contrary to the facts as argued and submitted by all parties concerned, including the Staff of the Commission. For instance, the Commission must have found that Article X transfers out of the Fund for tax years 1995 and 1996 were reasonably related to the regulation of public utilities or else the Commission would have ordered that those transfers, like the transfer for 1997, be excluded from the revised assessment calculation. This implicit conclusion contradicts the contentions of all parties that Article X transfers are *not* reasonably related to the regulation of public utilities. Though this is one of four essential issues presented in this case, the *Report and Order* was so vague that the Applicants had to infer that this was the Commission's conclusion.

Further, the Commission's Conclusions of Law are defective in that the *Report and Order* specifically states that "[t]he Article X transfers from the Fund for fiscal years 1995 and 1996 were not included in the calculation of assessments against public utilities." However, it is absolutely clear that \$688,218 attributable to Article X transfers for tax years 1995 and 1996 *was* included in the Commission's



assessment for fiscal year 1999. This was a stipulated (i.e., undisputed) fact. (See, Stipulation, ¶46). By concluding otherwise, the Commission has simply disregarded the record evidence offered by all of the parties, including Staff of the Commission, that indicates that the Commission did, in fact, include the Article X transfers for those years in its fiscal year 1999 assessment.

6. In view of the foregoing, Applicants believe that the Commission should grant a rehearing so that further inquiry could be made into those issues with which Applicants are claiming the Commission erred.

7. The Commission should stay the effectiveness of its *Report and Order* so that the matters hereinabove described may be inquired into, reheard and reconsidered by the Commission.

WHEREFORE, Applicants respectfully request that the Commission stay the effectiveness of its *Report and Order*, grant a rehearing and enter upon a hearing concerning the propriety of its public utility assessments and other matters relating thereto and, upon reconsideration, issue a new Report and Order setting aside its December 17, 1998 *Report and Order*, which new Report and Order is consistent with the evidence and the applicable law as more fully set forth above in this pleading.

Respectfully Submitted,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 

James C. Swearengen

#21510

Paul A. Boudreau

#33155

312 East Capitol Avenue

P.O. Box 456

Jefferson City, MO 65102-0456

Phone: (573) 635-7166

Fax: (573) 635-0427

Attorneys for Applicants

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 15th day of January, 1999, to:

Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

James M. Fischer, Esq.  
James M. Fischer, P.C.  
101 W. McCarty Street, Suite 215  
Jefferson City, MO 65101

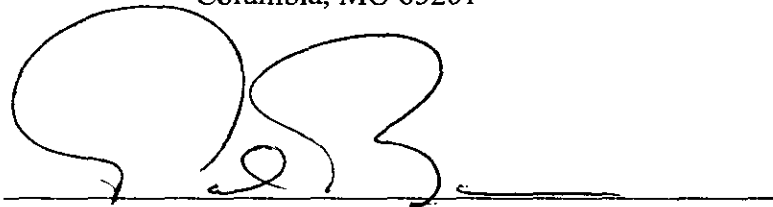
Robert J. Hack  
Senior Attorney  
Missouri Gas Energy  
3420 Broadway  
Kansas City, Mo 64111

William H. Koegel  
Staff Attorney  
Kansas City Power & Light Company  
1201 Walnut Street  
Kansas City, MO 64106

Paul G. Lane  
Leo J. Bub  
Anthony K. Conroy  
Katherine C. Swaller  
Southwestern Bell Telephone Company  
One Bell Center, Room 3518  
St. Louis, MO 63101-1976

Michael C. Pendergast  
Laclede Gas Company  
720 Olive Street, Room 1520  
St. Louis, MO 63101

Jeffrey Keevil  
Stewart & Keevil, L.L.C.  
1001 Cherry Street, Suite 302  
Columbia, MO 65201

A handwritten signature in black ink, appearing to read 'J. Keevil', is written over a horizontal line.