

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
December 17, 1998**

CASE NO: OO-99-44

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

Paul A. Boudreau
Brydon, Swearingen & England P.C.
PO Box 456
Jefferson City, MO 65102

Jeremiah W. Nixon
Attn: Ron Molteni
PO Box 899
Jefferson City, MO 65102

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

Paul G. Lane, Leo J. Bub
Anthony K. Conroy, Katherine C. Swaller
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101

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

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

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

Karen Winn
Office of the Commissioner of Admin.
Capitol Building, Room 125
Jefferson City, MO 65101

Robert J. Hack
Missouri Gas Energy
3420 Broadway
Kansas City, MO 64111

Susan B. Cunningham
Kansas City Power & Light
1201 Walnut Street
Kansas City, MO 64141

Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Uncertified Copy:

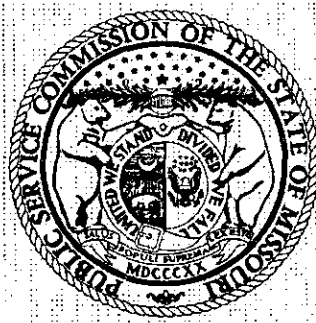
Brian Long
Office of the Governor
State Capitol Building
Room 216
Jefferson City, MO 65101

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. 00-99-44



REPORT AND ORDER

Issue Date: December 17, 1998

Effective Date: January 16, 1999

46.

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

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

APPEARANCES

Paul A. Boudreau, Brydon, Swearingen & England P.C., 312 E. Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102, for The Empire District Electric Company, St. Joseph Light & Power Company, Arkansas Western Gas Company d/b/a Associated Natural Gas Company, Missouri-American Water Company and UtiliCorp United Inc. d/b/a Missouri Public Service.

Robert J. Hack, Missouri Gas Energy, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy.

Leo J. Bub, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101-1976, for Southwestern Bell Telephone Company.

James M. Fischer, James M. Fischer, P.C., 101 W. McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Southern Missouri Gas Company, L.P., Atmos Energy Corporation, Fidelity Natural Gas, Inc. and Fidelity Telephone Company.

William H. Koegel, Kansas City Power & Light Company, 1201 Walnut Street. Kansas City, Missouri 64106, for Kansas City Power & Light Company.

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

Jeffrey Keevil, Stewart & Keevil, L.L.C., 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for Trigen-Kansas City Energy Corporation.

John Coffman, Office of the Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Dale Hardy Roberts, Chief

TABLE OF CONTENTS

I. PROCEDURAL HISTORY	3
II. FINDINGS OF FACT	4
III. CONCLUSIONS OF LAW	9
IV. ORDERED PARAGRAPHS	12

I. Procedural History

On June 29, 1998, the Commission issued its Supplemental Order No. 52, in Case No. 11,110¹ (Order 52). By virtue of this order, the Commission made its public utility assessments against public utilities provided for by section 386.370² for the Commission's fiscal year commencing July 1, 1998. The assessments thus determined were sent to the public utilities regulated by the Commission under letters dated June 30, 1998.

On July 27 a group of public utilities comprised of The Empire District Electric Company, St. Joseph Light & Power Company, Associated Natural Gas Company, Missouri-American Water Company, UtiliCorp United Inc., West Elm Place Sewer Corporation³ and Laclede Gas Company filed an Application for Rehearing and Stay (Application). The Application alleged

¹ The Commission maintains a log of sequentially numbered orders for the assessments. However, for the purpose of the request for rehearing this order was subsequently docketed as: 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 00-99-44.

² All statutory citations are to RSMo Supp 1997 unless otherwise noted.

³ West Elm Place Corporation withdrew as a party participant on September 25, 1998.

a number of errors with respect to Order 52, specifically, the manner in which the assessment amount was determined.

On August 5 the Commission issued its Order Regarding Application for Rehearing and Stay. The Commission established Case No. OO-99-44 and granted a rehearing to address the issues raised by the Application.

By separate orders dated September 1 and September 23 the Commission granted the Applications to Intervene of Southwestern Bell Telephone Company, Kansas City Power & Light Company, Missouri Gas Energy, Southern Missouri Gas Company, L.P., Atmos Energy Corporation, Fidelity Natural Gas, Inc., Fidelity Telephone Company and Trigen-Kansas City Energy Corporation.

On October 6 the parties filed a Stipulation of Facts in lieu of an evidentiary hearing and a Statement of Issues Presented. The Stipulation of Facts consisted of fifty-one (51) numbered paragraphs and eight (8) attachments thereto (Exhibits A-H). The Statement of Issues Presented is comprised of four (4) separately stated issues. Also on October 6 the parties filed their separate Memoranda of Law addressing the issues which had been identified by the parties themselves as well as the issues identified by the Commission.

The Commission convened a hearing for the purpose of oral argument on October 14, 1998. Post-hearing briefs were filed on or before November 2.

II. Findings of Fact

The Missouri Public Service Commission has considered all of the competent and substantial evidence upon the whole record in order to make the following findings of fact. The Commission has considered the positions and arguments of all of the parties in making these findings.

Failure to specifically address a particular item offered into evidence or a position or argument made by a party does not indicate that the Commission has not considered it. Rather, the omitted material was not dispositive of the issues before the Commission.

The Commission has made certain findings with regard to the individual parties and intervenors. These companies are "public utilities" as that term is defined at section 386.020(42), and each is subject to the jurisdiction and supervision of the Commission as provided by law. In addition to those regulated entities The Office of the Public Counsel (Public Counsel) and the staff of the Missouri Public Service Commission (Staff) also participated as parties.

The Missouri Public Service Commission is an executive agency of the State of Missouri within the Department of Economic Development and, among other things, is charged by law with regulating the rates and terms and conditions of service of electric, gas, heating, water, sewer and telecommunications corporations as provided in Chapters 386, 392 and 393, as amended.

The Commission's primary source of funding for payment of expenses incurred by it and attributable to the regulation of public utilities are assessments against public utilities rendered by the Commission on or before the first of July of each year. Generally, and as more specifically provided in section 386.370, the Commission is authorized to estimate the amount of such expenses to be incurred by it in the coming fiscal year which are directly attributable to groups of public utilities, as well as the amount of these expenses which are not directly attributable to any such group, and then to allocate said expenses to each group (i.e., electric, gas, heating, water, sewer and telecommunications corporations. The amount so allocated is then assessed against the public utilities in

each group in proportion to their respective gross intrastate operating revenues. In addition to public utility assessments, the Commission receives some small degree of funding from the federal Department of Transportation in connection with the administration of gas safety requirements.

The public utility assessments are prepared by the Commission's Internal Accounting Department (Staff) and approved by the Commission. Public utilities are required to pay the amounts assessed against them, when due, to the Missouri Director of Revenue who, in turn, remits the payments to the Missouri State Treasurer. The payments are deposited by the Missouri State Treasurer and credited to the Public Service Commission Fund (Fund). The Fund is a special fund within the State Treasury devoted solely and specifically to the payment of expenditures actually incurred by the Commission and attributable to the regulation of public utilities.

See, §§386.480.4 and 33.571.

The moneys collected as a result of the Commission's public utility assessments are appropriated out of the Fund by the Missouri General Assembly. Any amount remaining in the Fund at the end of any fiscal year may not, by statute, revert to the State's General Revenue Fund. Rather, those remaining funds are applied by the Missouri General Assembly to the payment of the Commission's expenditures in the succeeding fiscal year.

Any remaining funds are applied by the Commission to the reduction of the amount assessed against public utilities in the following fiscal year. The Commission receives no appropriations out of the State's General Revenue Fund in connection with its regulation of public utilities.

In 1996, the 88th General Assembly passed into law Conference Committee Substitute for House Bill No. 1004 (HB 1004-88). HB 1004-88

directed that certain amounts chargeable to specific State funds "as are necessary for disbursements required by Article X, Section 18(b), Constitution of Missouri" be transferred out of the State Treasury to the General Revenue Fund (General Revenue). The amount specified by HB 1004-88 to be transferred out of the Fund to General Revenue was \$262,347. HB 1004-88 was signed into law by the Governor on June 13, 1996.

In 1997, the 89th General Assembly passed into law Conference Committee Substitute for House Bill No. 4 (HB 4-89). HB 4-89 directed that the aggregate sum of \$42,284,895 "as are necessary for disbursements required by Article X, Section 18(b), Constitution of Missouri" be transferred out of the State Treasury to General Revenue. HB 4-89 did not direct that any specific dollar amount be transferred out of the Fund to General Revenue. HB 4-89 was signed into law by the Governor on June 27, 1997. On or about February 26, 1998, a representative of the Office of Administration notified fiscal officers of affected State agencies of the amounts to be transferred out of each State fund in order to carry out HB 4-89's Article X transfer directive. Said notification provided a spreadsheet showing the proportional share of the transfer for each affected State fund, including the Fund. The amount specified to be transferred out of the Fund to General Revenue pursuant to HB 4-89 was \$425,871.

On June 17, 1998, the \$262,347 attributable to fiscal year 1995 was transferred out of the Fund to General Revenue. On June 22, 1998, the \$425,871 attributable to fiscal year 1996 was transferred out of the Fund to General Revenue. The total transferred out of the Fund attributable to fiscal years 1995 and 1996 was \$688,218. This amount (\$688,218) has been used by the Missouri State Treasurer to make disbursements of excess state

revenues to the income taxpayers of the State relating to tax years 1995 and 1996 in accordance with the provisions of the Missouri Constitution Article X, §§16-24 (Article X). See Mo. Const., Art. X, §§16-24.

In 1998, the 89th General Assembly passed Conference Committee Substitute for House Bill No. 1004 (HB 1004-89). HB 1004-89 directed that certain amounts chargeable to enumerated State funds "as are necessary for disbursements required by Article X, Section 18(b), Constitution of Missouri" be transferred out of the State Treasury to General Revenue. The transfer specified by HB 1004-89 to be made from the Fund to General Revenue was \$534,114. HB 1004-89 was signed into law by the Governor on June 19, 1998. The transfer specified by HB 1004-89 to be made from the Fund to General Revenue is anticipated to take place during fiscal year 1999. This amount (\$534,114) will be used by the Missouri State Treasurer to make state revenue disbursements to the income taxpayers of the State relating to tax year 1997. HB 1004-88, HB 4-89 and HB 1004-89 were appropriations bills.

On June 29, 1998, the Commission issued its Order 52 in its Case No. 11,110. The purpose of Order 52 was to estimate, in accordance with the provisions of section 386.370, the expenses to be incurred by the Commission during its 1999 fiscal year commencing July 1, 1998, and reasonably attributable to the regulation of public utilities (the assessment). The process of calculating the assessment requires Staff to determine assessments for each public utility regulated by it within each group. Order 52 was sent to each affected public utility under cover of letter of the Commission's Executive Director dated June 30, 1998, which set forth the specific amount(s) assessed against each public utility.

The Commission's "Estimated Cash Balance June 30, 1998" filed as an

attachment to Order 52 includes as a deduction to the cash "carry-over" calculation a transfer of \$688,218 for Article X. The Commission's Calculation of PSC Assessment filed as an attachment to Order 52 includes in the calculation of the Commission's fiscal year 1999 assessment a cost of \$534,114 attributable to Article X transfer.

III. Conclusions of Law

This case has been submitted on stipulated facts, pursuant to section 536.060, and Commission rule 4 CSR 240-2.130(9). Based upon the findings in this order and the facts as agreed to by the parties and contained in the parties' Stipulation of Facts, the Commission makes the following conclusions of law.

Although the Commission agreed to review the Motion for Rehearing it must be noted that agency adjudicative power extends only to the ascertainment of facts and the application of existing law in order to resolve issues within the given area of agency expertise. In re City of Kinloch, 242 S.W.2d 59, 63 (1951). "[A]n administrative body or even a quasi-judicial body is not and cannot be a court in a Constitutional sense." *Id.* The judicial power of the State is vested only in the courts designated in Mo. Const. Art. V, Sec. 1. The Public Service Commission has no power to declare any principle of law or equity. Lightfoot v. City of Springfield, 236 S.W.2d 348, 352 (1951). Therefore, the PSC has no power to declare statutes unconstitutional. State ex rel. Missouri Southern Railroad v. Public Service Commission, 168 S.W.2d 1156, 1164 (banc 1914). The PSC may hear evidence from a party regarding the constitutionality of the statute but only for the purposes of creating a record for the issue to be resolved judicially. Missouri Bluffs Golf Venture v. St. Charles

County Board of Equalization, 943 S.W.2d 752, 755 (Mo. App. Ct. 1997).

Because Missouri common law states that an administrative agency, such as the Missouri Public Service Commission, has no jurisdiction to determine the constitutionality of a statute, it seems equally apparent that the Commission lacks the jurisdiction to rule on the constitutionality of an Executive Order such as the directive issued by the Missouri Office of Administration to transfer moneys out of the Fund and into the General Revenue. Based upon a review of the common law of Missouri the Commission concluded that it would convene a hearing but that the scope of any such hearing would be for the limited purpose of developing the record for the primary issue(s) to be resolved judicially.

A plain reading of section 386.370 reveals that the moneys paid into the Fund shall be devoted solely to the payment of expenditures actually incurred by the Commission and attributable to the regulation of public utilities. As such, they are in the nature of a charge for a service rendered or privilege granted and they are not intended for the purpose of raising revenue. The Courts may be guided by the fact that the Commission by virtue of its statutory power imposes public utility assessments. The Commission is not a political subdivision and has no taxing power. Rather, the Commission is an executive state agency of the State of Missouri within the Department of Economic Development and is charged by law with regulating the rates and terms and conditions of the service of public utilities as provided in Chapters 386, 392 and 393.

The Commission finds that two separate events have occurred or are in progress. The first event, which has transpired, transferred \$688,218 out of the Fund balance in June 1998. The Commission concludes that this event was lawful in that it was directed by the Missouri General Assembly pursuant to HB 1004-88 (1996) and HB 4-89 (1997) which were signed into law

by the Governor.

The second event is the prospective transfer of \$534,114 from the Fund. Its effect on the Fund will not be evident until the end of fiscal year 1999 when the Fund balance is computed. Nevertheless, the prospective transfer was directed by the Missouri General Assembly pursuant to HB 1004-89 (1998) and was signed into law by the Governor. Therefore, the Commission finds that the prospective transfer is lawful.

The Article X transfers from the Fund for fiscal years 1995 and 1996 were not included in the calculation of assessments against public utilities. The calculation of assessments for fiscal year 1999 was based upon expenses to be incurred that are reasonably attributable to the regulation of public utilities, plus the Article X transfer for the fiscal year 1997, less the balance remaining in the Fund at the end of fiscal year 1998.

The Commission concludes that its assessments for fiscal year 1999, as determined in its Order 52 in Case No. 11.110 were incorrectly calculated to the extent that they included an amount of \$534,114, attributable to Article X transfers for fiscal year 1997. The Commission cannot conclude that this Article X transfer represents an expense to be incurred that is reasonably attributable to the regulation of public utilities. Accordingly, Staff will be directed to delete the amount of \$534,114 and recalculate the public utility assessments for fiscal year 1999.

With respect to the five-year averaging which was inserted into the assessment process by the Staff, the Commission recognizes Staff's effort to smooth the yearly fluctuations created in the annual assessment process. However, the Commission concludes that the process produced an unreasonable result for some utilities. Therefore, the Commission shall direct Staff

to recalculate the assessments without the use of the five-year averaging process.

IV. ORDERED PARAGRAPHS

IT IS THEREFORE ORDERED:

1. That the Commission's Staff recalculate the Public Utility Assessments for fiscal year 1999 omitting from the calculation the five-year averaging process and the amount of \$534,114 identified in the order as Article X Transfer.

2. That all public utilities regulated by the Commission which received assessments for fiscal year 1999 shall receive revised assessments and, further, that each public utility so assessed shall receive an appropriate refund, credit or adjustment for any amount(s) overpaid or underpaid.

3. That all other requests of the parties are denied.

4. That all objections not previously ruled upon are over-ruled and all motions not previously ruled upon are denied.

5. That this Report and Order shall become effective on January 16, 1999.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray,
Schemenauer and Drainer, CC.,
Concur and certify compliance with
the provisions of Section 536.080,
RSMo 1994.

Dated at Jefferson City, Missouri,
on this 17th day of December, 1998.

Roberts, Chief Regulatory Law

Atty/Sec'y:

Roberts / Bridgman

12-16-98
Date Circulated

00-99-44
CASE NO.

82
26, 7, 8, 10, 11, 12
Lumpke, Chair

8, 11, 12
Crumpton, Commissioner

5, 6, 7, 8, 9, 10, 11, 12
Murray, Commissioner

82
12, 14, 12
Schemenauer, Commissioner

12
12
Drafter, Vice-Chair

12-17-98
Agenda Date

Action taken: 5-044

Must Vote Not Later Than _____

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

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,

Missouri, this 17th day of December, 1998.

Dale Hardy Roberts

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

