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FILED[2]
APR 03 2002
Missouri Public Service Commission

April 3, 2002

Missouri Public Service Commission
Attn: Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
200 Madison Street, Suite 100
P. O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. WC-2002-146 **VIA EXPRESS MAIL**

Dear Secretary Roberts:

Enclosed for filing please find an Original and eight copies of the **REPLY BRIEF** of the Respondent Missouri-American Water Company in the above styled Complaint. Will you please bring this matter to the attention of the Commission at your earliest convenience.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

Richard T. Ciottone
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Certificate of Service
Copies of this transmittal and its attachments have on the date below indicated been sent to the Office of Public Counsel, to the attorney for St. Louis County, Missouri, and to the General Counsel to the Missouri Public Service Commission by prepaid U.S. Mail.

4-3-02

FILED[2]
APR 0 3 2002
Missouri Public Service Commission

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

| | | |
|---|---|---|
| Staff of the Missouri Public Service Commission, Complainant, vs. St. Louis County Water Company, d/b/a Missouri-American Water Company, Respondent. | ) | Case No. WC-2002-146 |

# REPLY BRIEF OF RESPONDENT MISSOURI-AMERICAN WATER COMPANY

Respectfully submitted,

Richard T. Ciottone, MBE#21530
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Copies of the foregoing have on the date below written been provided to the Office of Public Counsel, to the General Counsel of the Missouri Public Service Commission and to the attorney for St. Louis County, Missouri, by electronic transmission and by first class prepaid U.S. Mail.

4-3-02



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

| | | |
|---|---|---|
| Staff of the Missouri Public Service Commission, Complainant, | ) | |
| vs. | ) | Case No. WC-2002-146 |
| St. Louis County Water Company, d/b/a Missouri-American Water Company, Respondent. | ) | |

**REPLY BRIEF OF RESPONDENT**
**MISSOURI-AMERICAN WATER COMPANY**

Staff's logic is difficult to follow. This is because it is classic example of circularity. The flaw of circular reasoning is that it is supported only by an infinite regression of purported axioms that depend on one another and cannot stand independently. Typically, it clams legitimacy in some "self-evident truth." Here, the reasoning goes this way:

> Why is the charge "on service lines" only on owners? *Because it is a tax, and taxes are imposed only on owners.* But, why is it a "tax" when it is called a "fee?" *Because it is imposed on property, and that makes it a "tax."* But why can't we charge it to customers instead of owners? *Because it is a "tax."* But how do we know it is a "tax?" *Because it is assessed against property and that is the same as against owners.* But why can't it be imposed against users? *Because it is a "tax."*

The critically necessary "self-evident truth" element on which the entire circle is supported, is described by Staff as, "almost too plain to require citation, but it has been surprisingly difficult to find a clear statement of this principle." This purported axiom is that, "...a tax or fee[1] that is imposed upon property becomes the obligation of the person who owns the property, and not upon a lessee or the property or upon another person who

happens to be using the property." This is, quite simply, not the universal truth that it purports to be. And without it, the circle collapses in upon itself.

We did learn two things in Staff's Brief. First, we now know why they refused to use the word "fee" that was chosen by the General Assembly, and insisted on replacing it with the word "tax" in all of their evidence and briefing. Second, we learned that, as surmised, they are not arguing ambiguity; they instead are making the rather unusual claim that the plain language of the statute supports their contention.

The most fascinating aspect of these two arguments, is that they are paradoxically inconsistent. If we are to deal with plain language, the word "tax" isn't in that plain language. In other words, if there really is legal distinction between the definition of "tax" and "fee," and if the General Assembly chose the word "fee," then does it not necessarily follow that the General Assembly did not want this charge to have those aspects of a "tax" that Staff attributes to the use of the word?

Next, the quoted definition from C.J.S., (which is essentially an encyclopedia of legal generalities rather than black-letter law), seems to refute the Staff's position, rather than in support of it:

> A clear distinction exists between the exercise of the taxing power and the imposition of a fee pursuant to the regulatory or police power. While the primary purpose of a tax is to obtain revenue for the government, the primary purpose of a fee is to cover the expense of providing a service or of the regulation and supervision of certain activities. A true fee is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed. In contrast, a tax is a charge that is unrelated to or materially exceeds any special benefits conferred upon those assessed. In order for a governmental levy or fee to not be denominated a tax, it must be fair and reasonable and bear a reasonable relationship to the services provided, or to the benefits conferred on those receiving services. (Staff's Brief page 3).

Let us examine these elements that allegedly distinguish "fees" from "taxes":

1. *"While the primary purpose of a tax is to obtain revenue for the government, the primary purpose of a fee is to cover the expense of providing a service or of the regulation and supervision of certain activities."*

[1] Note the curious inclusion of both the words "fee" and "tax" in this purported axiom. This is hard to reconcile with Staff's argument that a "fee" and a "tax" are fundamentally different.

Section 66.405 (4) states:

> The funds collected pursuant to such ordinance shall be deposited in a special account to be used solely for the purpose of paying for the reasonable costs associated with and necessary to administer and carry out the water service line repairs as defined in the ordinance...

And Section 1112.030 of the Ordinances of St. Louis County, states:

> There is hereby established a special revenue fund... All monies received thereby shall be deposited in this fund upon receipt, together with all interest generated on deposited funds, and shall stand appropriated upon receipt for payment of costs reasonably associated and necessary to administer and carry out the Water Service Line Repair Program.

2. *"A true fee is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed."*

Since the money may be used "solely" for service line repairs and replacements, the only beneficiaries are those who rely on those water service lines for water service. These are the exact same parties that pay the charge.

3. *"In contrast, a tax is a charge that is unrelated to or materially exceeds any special benefits conferred upon those assessed."*

Again, the funds are segregated by law and used only for repairs. Staff concedes that non-owner customers benefit from the program. Furthermore, it is also anticipated that the charge will decline over time, as funds accumulate and the backlog of needed repairs is addressed

4. *"In order for a governmental levy or fee to not be denominated a tax, it must be fair and reasonable and bear a reasonable relationship to the services provided, or to the benefits conferred on those receiving services."*

Curiously, one objection the Staff had to the Tariff, is that it allows for a reduction of the fee. The fee amount is directly dictated by the cost of the benefits conferred. As was the case with the City of St. Louis' fund, it is anticipated that the charge will be reduced if and when possible. The expenditures from the fund

are defined in the County's Ordinances, and the money goes essentially to plumbers and materials. Under no circumstances, does the law permit the money to be appropriated for governmental purposes unrelated to the water service line program.

So, even using Staff's strained logic and questionable precedent, we are left with the following: A charge that the General Assembly purposely labeled as a "fee," that was intended by the General Assembly to be assessed against all customers regardless of ownership, and the proceeds from which are limited to use for service line repairs and replacements.

Staff says taxing non-owners might be acceptable with "consent"(Staff's Brief page 5), and isn't it indeed "consent" when a party applies for water service when the charge is a published and expressed condition of that service? And did we forget that the entire County VOTED on the program?

Staff says, "a fee is a payment that is made by a person to the government in exchange for some specific thing that the government gives to that particular person" (Staff's Brief page 4.) Do they mean some specific thing like maybe... service line insurance?

Giving Staff's logic every benefit of doubt, there is no reasonable way to twist this into the conclusion that imposing this charge on non-owner customers violates the statute, unless the Commission chooses to rewrite the statute by adding an "owners-only" restriction where none was intended and where none was written.

Respectfully submitted,

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