Missouri Public Service Commission

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April 5, 2002

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

RE: Case No. WC-2002-146-Staff of the Missouri Public Service Commission v. St. Louis County Water Company d/b/a Missouri-American Water Company.

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of **STAFF'S REPLY 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,

Keith R. Krueger
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Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[3]
APR 0 5 2002
Missouri Public Service Commission

Staff of the Missouri Public Service Commission,	)	
Petitioner,	)	
v.	)	
St. Louis County Water Company, doing business as Missouri-American Water Company,	)	Case No. WC-2002-146
Respondent.	)	

STAFF'S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and, for its Reply Brief, states to the Missouri Public Service Commission as follows:

I. Introduction.

Respondent St. Louis County Water Company argued in its Initial Brief that the tariff sheet that it filed constitutes good public policy, because it would enable the Company to collect a service line repair fee from the customers who are served by the service lines, and those monies could then be used to repair service lines without imposing hardship upon the customers. The Staff agrees that would be a good policy for the Company to follow, and it has urged the Company to establish similar programs in the past.

The problem in this case, however, is that the Company is not establishing a program of its own, but is attempting to collect a tax that has been imposed by St. Louis County. It must therefore collect the tax that the County has imposed. The County's ordinance, § 502.195, SLCRO 1974 as amended, imposes the tax upon the owners of the water service lines, not upon the customers served by them. County Water is not free to collect the tax in a manner that is

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different from that which is required by the county ordinance, regardless of how noble its objectives are.

Both the enabling statute, § 66.405, RSMo 2000[1], and the county ordinance are clear and unambiguous. The legislative intent is therefore clear, and extraneous evidence may not be used to change the meaning of the legislation, which must be construed as written.

The fee that the County's ordinance imposes is a tax, and it must be treated as such. Taxes on property ("water service lines" in this case) must ordinarily be paid by the owners of the property. County Water has failed to show any reason why the tax in this case should be imposed on County Water's customers, instead of being imposed upon the owners of the service lines.

II. The concept of imposing a service line repair fee on customers is sound, but the Company must carry into effect the St. Louis County ordinance, which the tariff sheet fails to do.

The entire thrust of the Company's argument in its Initial Brief is wrong or misplaced. The Company reasons that because its objective in imposing the one-dollar-per-month charge is commendable, the tariff should be approved.

The question, however, is not whether the company's objective is commendable, or whether the collection of this charge would serve a good and useful purpose. The question is whether the Company is collecting the tax that the St. Louis County ordinance imposes.

The Staff agrees that, as a general proposition and as a matter of good public policy, it would be better if the one-dollar charge could be imposed on the County Water's customers, rather than on the owners of the service lines. But that is not what the enabling statute and the county ordinance that are at issue in this case provide.

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

In this case, the Company purports to collect a tax[2] that is imposed by St. Louis County. In doing so, it can lawfully do only what the ordinance requires – regardless of what the Staff prefers, and regardless of what noble purpose would be served by doing otherwise.

If, instead of collecting the tax that is imposed by St. Louis County, the Company had proposed a service line repair fee as part of a rate case, the Staff's position might be different; but that is not the issue that is presented in this case.

The Company correctly notes, at page 8 of its Initial Brief, that in other cases the Staff has supported proposals to require the Company to recover the costs of a service line repair program from all customers. The Company also notes, at page 7 of its Initial Brief, that the Staff "went to court" to attempt to require the Company to maintain service lines.

But both of those situations are easily distinguished from the present case. In those cases, the Staff sought to require the Company to pay the cost of maintaining its service lines, and to recover the cost of doing so from its customers. Those cases were unlike the present case, in that there was no tax involved in those cases and no payment to a government entity or fund of any kind. In the present case, the Company purports to collect, on behalf of St. Louis County, the tax that is imposed by the county ordinance, Section 502.195 SCLRO 1974 as amended, and is paying the amount collected to the County. It must therefore collect the monies in accordance with the ordinance. Neither the Company nor the Commission is free to collect from anyone other than as provided in the statute, merely because another pattern of imposing the tax is seen as more just or efficient.

[2] The one-dollar-per-month charge is properly analyzed as a tax, even though the statute and the ordinance both refer to it as a fee. See the discussion in Section IV, below.

III. The statute and ordinance are unambiguous; they provide that the tax is imposed upon the owners of the service lines.

In construing the statute, or more appropriately, the ordinance, the threshold question is: Is the ordinance ambiguous?

The first principle of construing a statute or ordinance is: If the statute or ordinance is unambiguous, it must be given its plain meaning. The best indication of what a statute says is what it says. Only if the ordinance is ambiguous may other methods of construction, such as an attempt to determine the legislative intent, be applied.

In its Initial Brief, the Company seemed unsure of whether the Staff finds the language of the statute ambiguous or unambiguous. In the first full paragraph on page 7, for instance, the Company states that "[i]t is curious that the Staff does not seem to contend that the statutory language is ambiguous." But in the last sentence of the same paragraph, the Company says "ambiguity does not arise by simply an allegation ... but in this case, an allegation is all the Staff has," thus suggesting that the Staff has only "an allegation" to support its claim that the statute is ambiguous.

Let's be clear: The Staff contends that the ordinance is not ambiguous, and that it unambiguously imposes the tax upon the owners of the service lines.

The Company, on the other hand, appears to contend that the statute[3] unambiguously imposes a "fee" on customers.[4] But at the same time, the Company, on two occasions, cites cases where courts have given instructions on how to construe a statute when the statute is

[3] As noted elsewhere, the document that requires interpretation in this case is the county ordinance, because the Company is attempting to collect the tax that is imposed by the ordinance, not by the statute. The Company has, however, directed its argument at the interpretation of the statute that authorized St. Louis County to impose the tax.
[4] The one-dollar-per-month charge is a tax. See the discussion in Section IV, below.

ambiguous,[5] and on another occasion it quotes a legal encyclopedia about how to construe a statue that is "susceptible of more than one construction."[6]

The Company's evidence relies heavily upon ascertaining the intent of the General Assembly in enacting the statute, apparently on the premise that the statute is ambiguous. Indeed, if the statute is unambiguous, as the Company apparently contends, there would be no justification for going beyond the plain language of the statute.

Although the Company seems to suggest, by presenting testimony about the legislative intent, that the statute is ambiguous, the Staff contends that § 66.405 is unambiguous.

IV. In legal effect, the service line repair fee is a tax.

In construing the St. Louis County ordinance, it is important to determine whether the "fee" that is authorized by § 66.405 and that is imposed by § 502.195, SLCRO is a "tax" or not. The Company addresses this issue briefly in footnote 1 to its Initial Brief.

The Company argues in that footnote that the definition of "tax" is no more significant than "money for the support of government." The brief cites a nonlegal reference, Webster's New World Dictionary, without telling which edition of the dictionary it refers to, and without otherwise enabling the Staff to verify the accuracy or completeness of its citation. The relevant definition of "tax" in the American Heritage Dictionary, Second College Edition, utilized by Staff's counsel, is: "A contribution for the support of a government required of persons, groups, or businesses within the domain of that government." It makes no mention of fees assessed by government.

[5] *Blue Cross and Blue Shield of Kansas City v. Nixon,* 26 S.W.3d 218, 228 (Mo. App. W.C. 2000), and *Missouri Com'n on Human Rights v. Red Dragon Restaurant, Inc.,* 991 S.W.2d 161, 166 (Mo. App. W.D. 1999). See discussion at pages 12 and 13 of Company's Initial Brief.

[6] 82 C.J.S. *Statutes* § 323, p. 607. See page 12 of the Company's Initial Brief.

The Company's brief also cites "Black's Law Dictionary, etc.," but again without telling which edition of the dictionary it consulted, and without otherwise enabling Staff to verify the accuracy and completeness of its citation. Black's Law Dictionary, Seventh Edition, published by West Group, includes 3 ½ pages of definitions under its "taxes" listing. The main definition included in that entry reads as follows:

> A monetary charge imposed by the government on persons, entities, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupation, and enjoyment of the people, and includes duties, imposts, and excises. Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money.

The same dictionary defines "fee" as follows: "A charge for labor or services, esp. professional services." From these definitions, it seems clear that this charge is a "tax," and is properly analyzed as such.

The Company also argues that its one-dollar-per-month charge does not actually go to "support of government," because it does not go into the County's general fund, but is deposited into "a separate fund for the single purpose authorized by the statute."[7] Mere deposit into a separate fund does not, however, transform a tax into something else. If that were the case, FICA "contributions," for example, would not be a tax. Likewise, a gasoline tax that is used exclusively for construction, maintenance and repair of roads would not be a tax. And a cigarette tax that is used exclusively to fund government health programs would also not be a tax.

The "fee upon water service lines" is therefore a tax.

[7] See Company's Initial Brief, footnote 1, at page 1.

V. The Company has failed to demonstrate that the St. Louis County Council intended to impose the tax upon customers, rather than owners.

The Company places heavy reliance on the rebuttal testimony of Sen. Wayne Goode, to support its claim that there is no dispute that the legislature intended to authorize a fee applicable to all customers.[8] The Staff, however, does not concede that that is what the legislature intended.

Sen. Goode's testimony is loaded with hearsay, conclusions and speculation. Although the testimony was admitted into evidence without objection, the Commission can, and should, consider the nature of the testimony in deciding how much weight to give to it.

The Company did not provide any of the legislative history of this statute. Sen. Goode made general statements about what the "working group" decided[9] and recommended[10], without mentioning how many people were in the working group, or who they were, or offering any documentation of what the working group decided, or the extent of agreement by the group. He refers to the "assumption from the beginning"[11], without stating whose assumption it is. He states what "all Senators" knew about the bill[12], without telling how they knew it and without giving the Commission any way to know how extensively they had studied the bill and its ramifications.

Senator Goode's statements may all be correct. In fact, Staff witness Wendell R. Hubbs testified that he had no reason to doubt any of Senator Goode's statements.[13]. But that is not a sufficient reason for the Commission to conclude that the General Assembly intended that the statute would mean something different than the unambiguous language of the statute in question.

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[8] See Company's Initial Brief, at page 6.
[9] Goode Rebuttal, Ex. 4, p. 2, line 29 – p. 3, line 2.
[10] Goode Rebuttal, Ex. 4, p. 2, lines 20-22.
[11] Goode Rebuttal, Ex. 4, p. 2, line 26.
[12] Goode Rebuttal, Ex. 4, p. 3, line 18-20.

For Senator Goode's testimony to constitute proof of legislative intent, one must: first, believe that what the senator said is true, accurate, complete and not misleading in any way; second, accept his suppositions about what other senators intended when they approved this law; and third, guess what the members of the House of Representatives may have thought about the bill, for there was virtually no testimony whatsoever about the House's view of the matter.

Finally, and most importantly, we must remember that what County Water is attempting to do, through this one-dollar-per-month charge, is to carry into effect the St. Louis County ordinance, § 502.195, SLCRO. If legislative intent matters at all, the intention that matters is what the members of the St. Louis County Council intended when they enacted § 502.195. Sen. Goode offered no testimony about the council's intent, nor did any other County Water witness. The Commission could only guess what that intention might have been.

VI. The Company's interpretation of the statute requires the reader to insert words that are not present in the statute.

The Company argues, at pages 13 and 14 of its Initial Brief, that "Staff's interpretation [of the statute] requires the insertion by implication of the words 'owners of' before the words 'water service lines' to reach the restriction they contend is mandatory." The argument fails. In fact, that entire section of the Company's argument makes the Staff's point just as effectively as it makes the Company's point.

Section 66.405 authorized the County to levy a fee "upon water service lines." Obviously, the water service lines, themselves, are not going to pay the tax; some person will have to pay the tax that is levied upon the lines. As the Staff noted at page 5 of its Initial Brief, under the usual interpretation, a tax that is imposed upon property is imposed on the owner

[13] Hubbs Surrebuttal, Ex. 2, p. 18, lines 19-20.

thereof.[14] Thus, although the words "owners of" do not appear in the statute, they are implied, and the burden must rest upon the Company to show that that was not intended in this case.

The Company argues that the tax must be paid by the customers, not the owners. Thus, its argument requires the insertion by implication of the words "customers served by" before the words "water service lines" to reach the restriction it contends is mandatory. Its interpretation requires the insertion of words just as certainly as Staff's interpretation does. But the words it seeks to insert would cause the tax to be imposed in a different way than taxes on property are ordinarily imposed. There is no persuasive argument for the Company's interpretation.

VII. The language in Subsection 5 of § 66.405 does not change the meaning of the language in Subsection 1 of the statute.

The Company argues, apparently, that § 66.405 unambiguously requires the Company to collect the tax or fee from its customers. But in order to support this position, the Company felt compelled to rely upon the provisions of Subsection 5 of the statute to explain what is meant by the provisions of Subsection 1.

Subsection 1 is clearly the place where the General Assembly intended to describe the persons upon whom St. Louis County could impose its tax. Subsection 5, on the other hand, is the place where the General Assembly authorized a way for the County to collect those taxes. The Company reasons that, since Subsection 5 authorizes the County to contract with the Company to collect the taxes along with the bills for water service, that that must mean that only persons who have water bills may be subject to the tax. This conclusion is not justified.

It would certainly be convenient if all of the taxes could be collected in this manner. But it is also plausible that including the tax on a residential customer's bill could be utilized for collecting from many customers, and that those customers who fail to pay as required would be

[14] 84 C.J.S. *Taxation,* § 133.

disconnected, but that for those non-customers who owe the tax some other method of collection would be required.

VIII. The principal issue in the case is the proper interpretation of the statute and ordinance; this is a question of law that does not require evidentiary support.

The Company criticizes the Staff for not offering any evidence in support of what the Company calls Staff's "that is" rule of statutory interpretation.[15] The principal issue in this case is a legal question concerning how a statute and ordinance should be construed. This requires a legal argument, not evidence as to why a particular interpretation is necessary.

The Staff's only witness, Mr. Hubbs, is not an attorney. Accordingly, he properly refrained from offering legal opinions in his testimony. The Company submitted the testimony of only two witnesses, James M. Jenkins and Sen. Goode. Neither of them claimed in their testimony to be an attorney, and to the best of Staff's knowledge, neither of them is an attorney. Accordingly, they also properly refrained from offering legal opinions in their testimony.

But evidence is not required on this subject; argument is. The argument is provided in the briefs. Mr. Hubbs's failure to testify as to why the Staff interprets the statute as it does is of no significance whatsoever.

IX. Other Matters.

The Staff wishes to correct some incorrect statements that appear in the Company's Initial Brief.

The Company states, at page 3 of its brief that the General Assembly is not competent to realize what the words in its statute mean. The Staff did not say, and does not imply or believe

[15] The Staff has not espoused any such rule of statutory interpretation. The "that is" rule was invented by the Company's counsel for use in the Company's Initial Brief. See page 4 of Company's Initial Brief. The Staff merely used the term "that is" before explaining the meaning of the statute as the Staff understands it, using the usual principles of statutory construction. Thus, it does not explain why the Staff reached the conclusion that it did, but only summarizes what that conclusion is.

that the legislature is not competent to say what it intends to say; the Staff merely disagrees with the Company about the meaning of the words the legislature used.

The Company states, at page 15 of its brief, that "Staff anoints the word 'approved' with a definition." To the best of Staff's knowledge, the Staff did not even define the word "approved," much less "anoint" the definition it has applied. As with other words used in this case, the word "approved" should be given its ordinary and usual meaning. As the Staff noted in its Initial Brief, Staff does not seek a declaratory judgment on the consequences of submitting a contract to the Commission. The Staff only wants it clear that the Commission has not approved the specific contract in this case. The Company states that it did not ask for approval of the contract, so it should not complain if the Commission states that it has not approved the contract. If it is necessary to make this clearer, the Commission could state that it neither approves nor disapproves the contract.

The Company also claimed in its Initial Brief that it is "impossible" to impose the service line repair fee upon the owners of the service lines. It is, of course, not impossible; real estate tax collectors impose taxes on the owners of real estate every year. The Staff concedes that it is probably infeasible to do it, but it is not impossible.

As the Staff noted in its Initial Brief, it is not seeking an order requiring the Company to refund any taxes that have been unlawfully collected.

Finally, the Staff notes that in its own Initial Brief, it quoted several passages from C.J.S. articles on *Taxation,* citing them as 54 C.J.S. *Taxation.* Each of those citations was in error. They should have been to 84 C.J.S. *Taxation.*

X. Conclusion.

Although the Company's tariff appears to be well-intentioned and would serve to promote a useful purpose, it does not collect the taxes from the persons who are obligated by the County's ordinance to pay the taxes.

WHEREFORE, the Staff requests that the Commission order County Water to immediately cease charging its customers the fee specified in its contract with St. Louis county, and that it order the Company to rescind P.S.C. MO No. 6 Original Revised SHEET No. RT 17.0.

Respectfully submitted,

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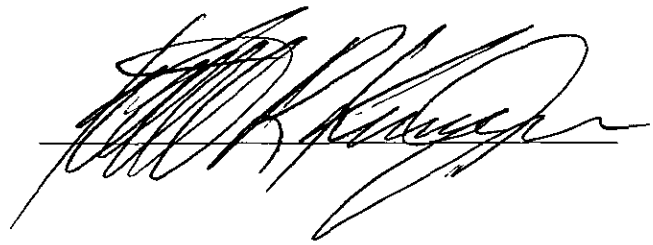
Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 5th day of April 2002.



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