Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
http://www.psc.state.mo.us

March 22, 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

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of **STAFF'S INITIAL 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
Deputy General Counsel
(573) 751-4140
(573) 751-9285 (Fax)

KRK/lb
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[3]
MAR 2 2 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 INITIAL BRIEF

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

Overview

There are two issues in this case. The principal issue is whether St. Louis County Water Company's tariff sheet No. RT 17.0 is unlawful. The precise issue is stated thus:

> Is the Company's tariff sheet P.S.C. MO No. 6 Original Revised SHEET No. RT 17.0 unjust, unreasonable, or more than allowed by law or by order or decision of the Commission, and, if so, what changes to the tariff would be proper?[1]

The Company appears to contend that the tariff sheet is *fair and reasonable* and therefore should not be disturbed.[2] This analysis unfortunately overlooks the question of whether the tariff sheet is lawful.

The Staff contends that the tariff sheet is not lawful, because it purports to authorize the Company to collect from its customers a tax that has not been authorized by statute or ordinance.

---

[1] See Issue No. 1 on the List of Contested Issues, filed January 25, 2002.
[2] See Jenkins Rebuttal, Exh. 3, pp. 6-11, in which Mr. Jenkins tells the "Reasons the Tariff is Fair and Reasonable," which is the major theme of his rebuttal testimony.

Because the tariff sheet is unlawful, the Commission should order the Company to rescind it. It does not matter whether the tariff sheet is reasonable or not, because it is unlawful.

The resolution of this case turns on the question of whether a tax "on all water service lines" is equivalent to a tax on the *customers* served by those water service lines. The Staff contends that a tax on water service lines is actually imposed on the *owners* of the water lines, not the customers. Since the owners are not identical to the customers, the tariff sheet does not collect the tax from the persons upon whom it was imposed, and the tariff sheet is unlawful.

Background

After the Missouri General Assembly passed enabling legislation[3], St. Louis County enacted an ordinance,[4] which imposed a tax of one dollar per month upon "*all water service lines* providing water service within the county to residential property having four or fewer dwelling units." (Emphasis added.)

County Water then executed a contract with St. Louis County, by the terms of which it agreed it would "add to the bill of *each residential customer* having four or fewer dwelling units a separate and clearly described fee to be paid in advance, of one dollar ($1.00) per month or three dollars ($3.00) per quarter ..."[5] (Emphasis added.)

County Water then filed the disputed tariff sheet to carry out its obligations under its contract with St. Louis County. Like the contract, the tariff sheet provided that the charge of one

[3] Section 66.405, RSMo 2000. Subsection 1 of this statute provides, in part: "If approved by a majority of the voters voting on the proposal, [St. Louis County] may, by ordinance, levy and impose annually, upon water service lines providing water service to residential property having four or fewer dwelling units ... a fee not to exceed one dollar per month or an equivalent rate collected at some other interval."
[4] Section 502.195, SCLRO 1974 as amended.
[5] See p. 2 of the Contract for Collection of Statutory Service Line Repair Charges, which is attached to Hubbs Direct, Exh. 1, as Schedule 1-5.

dollar per month, or three dollars per quarter, applied to "*residential customers* in St. Louis County having four or fewer dwelling units." [6] (Emphasis added.)

Thus, St. Louis County's ordinance imposes a tax upon "all water service lines," but County Water's tariff authorizes the Company to bill "each residential customer." Can a tax upon a water service line be lawfully collected from the customer served by that line, if the customer is not the owner of the line? That is the question that the Commission must answer in this case.

Argument

The Charge Imposed by the St. Louis County Ordinance is not a Fee, but a Tax.

County Water has chosen to characterize the one dollar per month charge as a "fee," as distinguished from a tax.[7] And both § 66.405, RSMo and § 502.195 SCLRO speak about a "fee," and make no mention of a "tax." But calling this charge a "fee" does not make it a fee. And, in fact, it is not a fee; it is a tax.

54 C.J.S. *Taxation* § 3 draws the distinction between a fee and a tax as follows:

> 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. 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.
>
> ...

[6] See County Water's Tariff Sheet No. RT 17.0, which is attached to Hubbs Direct, Exh. 1, as Schedule 1-3.

[7] Jenkins Rebuttal, Exh. 3. In his Rebuttal Testimony, Mr. Jenkins consistently and repeatedly referred to the charge as "fee." An incomplete listing includes the following: p. 3, lines 20 and 29; p. 4, lines 6-26; p. 5, line 2; and p. 5 line 26. To Staff's knowledge, he never referred to it as a "tax." See also County Water's Answer to Complaint, in which it consistently referred to the charge as a "fee."

> The distinction between a fee and a tax does not depend upon its label, but rather on the nature and function of the charge and any applicable statutes must be considered in determining the validity of such a charge. Thus, where its central purpose is to raise revenue, rather than to regulate, an assessment is a "tax" even though it is denominated a fee.[8]

Thus, 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. Examples include a fishing license, an occupation license, and franchise fees. In these cases the person paying the fee gets some specific thing in return.

In the present case, however, the payments are not made to cover the expense of providing a service or of the regulation and supervision of certain activities. They are instead made to confer benefits on the general public, rather than on the particular person on whom they are imposed.

The obligation that is imposed by § 502.195, SLCRO is therefore a tax, and must be analyzed as such.

St. Louis County Imposed its Tax upon the Owner of the Water Service Line.

Unless there is an explicit statement to the contrary, a tax or fee that is imposed upon property becomes the obligation of the person who owns the property, and not upon a lessee of the property or upon another person who happens to be using the property. Thus, real estate taxes are imposed upon the real estate and become the obligation of the owner of the real estate, and not the obligation of a lessee or renter. Although the owner of the real estate may be able to shift the obligation for the payment of such taxes to a lessee or tenant by contract, the obligation remains upon the real estate and the owner thereof.

[8] 54 C.J.S. *Taxation* § 3, at pp. 91-93.

The foregoing general statement seems almost too plain to require citation, but it has been surprisingly difficult to find a clear statement of this principle. Black-letter law is, however, found at 54 C.J.S. *Taxation*, § 133, which states as follows:

> Except where otherwise authorized by statute, property should be taxed to the owner, and to that person only, and taxes not being a lawful charge on property unless assessed in the name of the owner, any attempt to enforce payment of taxes assessed and charged to the wrong person will be ineffectual.[9]

And again:

> Taxes should ordinarily be assessed to the real owner of the property without regard to temporary occupancy. If a statute requires the assessment of real property to be made to the owner, it cannot be taxed to a person who is in possession but is not the owner.[10]

The meaning of these general statements is clear: the tax is *generally* imposed upon the owner of the property.

There are exceptions to this general rule in certain circumstances, for C.J.S. goes on to state the following:

> The taxpayer may be subject to a property tax even if the taxpayer does not possess actual title to the property provided that he or she consents to the taxation.[11]

There is, however, no evidence or reason to believe in this case that the non-owner customers of County Water have consented to shift this tax from the owner of the water service line to themselves. Accordingly, the tax obligation must fall upon the owners.

Thomas F. Eagleton responded to a similar question in Opinion of the Attorney General 68 Overbay, 8-14-61. The questions posed were: "To whom are the improvements upon leased land assessed? In other words is the lessor or lessee assessed for any improvements placed upon the land?" In answer, Mr. Eagleton, citing § 137.075, RSMo 1959, stated:

---

[9] 54 C.J.S. *Taxation* § 133, at pp. 218-219.
[10] 54 C.J.S. *Taxation* § 133, at p. 219.
[11] 54 C.J.S. *Taxation* § 133, at p. 219.

> Under this section, the tax liability for improvements on leased land attaches to the owner of such improvements. If title to improvements is held by the lessee, he should be assessed.[12]

Mr. Eagleton then discussed various cases in which the lessee was found to be the owner of the improvements. As noted above, there is no evidence in this case that would establish that the customers of County Water who rent property from a landlord have become the owner of the improvements on the property that they rent.

C.J.S. states the general rule with regard to leased property and leasehold estates as follows:

> A lessor rather than the lessee is responsible for taxes on the full value of the property, since the lessor's interest in property is not just a future right to receive property back at the end of a term, but a present right to receive income in the form of rent.[13]

Imposing the tax upon the owner of the real estate is also the logical result. Repairs to water service lines are not inexpensive; the average cost of repairs under the Service Line Repair Program to date has been about $2,000.

In the absence of the Service Line Repair Program, it is reasonable to assume that the burden of paying this significant expense would have to be borne by the landlord. It would be an unusual tenant indeed who would bear the burden of such a repair. The far more likely result is that, when confronted with a bill of this size, the tenant would move out. The Service Line Repair Program thus benefits the owner of the residential property, not the tenant, and it is reasonable that the cost of supporting the program should also fall upon the owner.

The St. Louis County Ordinance is Unambiguous and Must be Construed as Written.

It is well-established law that, where the language of a statute or ordinance is clear, unambiguous, and admits of only one meaning, there is no room for construction and the

[12] Opinion of the Attorney General 68 Overbay, 8-14-61, first page.
[13] 54 C.J.S. *Taxation* § 137, at p. 223.

legislature is presumed to have intended what the statute or ordinance says. See, for example, *Davis v. Byram,* 31 S.W.3d 148 (Mo. App. E.D. 2000) and *State v. Rousseau,* 34 S.W.3d 254 (Mo App. W.D. 2000).

Where a statute uses words that have a definite and well-known meaning at common law, it will be presumed that the terms are used in the sense in which they were understood at common law, and they will be so construed unless it clearly appears that it was not so intended. *Karpierz v. Easley,* 31 S.W.3d 505.

In this case, there is no ambiguity. The ordinance states that the tax is imposed "upon all water service lines providing water service within the county to residential property having four or fewer dwelling units." As demonstrated above, a tax that is imposed upon property is imposed upon the owner. Nothing can be found in the ordinance to suggest that this was not the intent of the ordinance. In fact, the ordinance further removes any ambiguity on this subject by stating that the tax applies to residential property "having four or fewer dwelling units." A landlord might own residential property that consists of four dwelling units; but a tenant would not occupy residential property that consists of four dwelling units. Because the ordinance addresses residential properties with up to four dwelling units, it is clear that it was directed to landlords, and not to tenants. In fact, to do otherwise could result in multiple payments of the tax for a single service line installation.

County Water has placed heavy emphasis on the intention of the General Assembly in enacting § 66.405, RSMo. In fact, it offered the testimony of Senator Wayne Goode, one of the sponsors of that legislation, for the sole purpose of showing that, notwithstanding the language

that it actually used, the General Assembly intended to impose the one dollar per month tax on the customers, rather than on the owners.[14]

As noted above, however, the statute and the ordinance in this case are unambiguous, and there is no room for construction. See *Pipe Fabricators, Inc. v. Director of Revenue,* 654 S.W.2d 74 (Mo. 1983), which held that the affidavit of a state senator as to the legislature's intent was properly refused, since the court is bound by the written law, not by what may have been intended.

The Staff concedes that, where a statute is ambiguous, courts may consider the testimony of legislators to determine legislative intent[15] and that where a statute is of doubtful meaning, consistent statements made by sponsors of legislation and committee chairmen are useful aids of interpretation.[16] But the testimony of a senator may only be considered if the statute is of ambiguous or is of doubtful meaning.

In addition, County Water's argument and the testimony of Senator Goode focus upon the intent of the General Assembly in enacting § 66.405. This completely overlooks the fact that the legislation whose meaning is at issue in this case is not the state statute. It is, rather, the St. Louis County ordinance.

There has been no testimony whatsoever concerning what the St. Louis County Council intended when it enacted § 502.595, SCLRO. It is, of course, possible that the County Council did intend to impose the tax on customers, contrary to the language that it used. But it is also possible that the county legislature intended to impose the tax upon the owners, as the ordinance unambiguously provides. There is simply no testimony from any county legislator, and no

[14] Goode Rebuttal, Exh. 4, pp. 1-7.
[15] *McBud of Missouri, Inc. v. Siemens Energy & Automation, Inc.,* 68 F. Supp.2d 1076, affirmed 210 F.3d 379.
[16] *Kansas City, Mo. v. Federal Pac. Elec. Co.,* 310 F.2d 271, certiorari denied 83 S. Ct. 256, 371 U.S. 912, 9 L.Ed. 2d 171, certiorari denied 83 S.Ct. 1297, 373 U.S. 914, 10 L.Ed. 2d 415.

reason for the Commission to conclude that the county legislature intended anything other than the plain, unambiguous meaning of the words it used.

Because the tariff in this case does not comply with the St. Louis County ordinance, it is unlawful. And this is true regardless of what the General Assembly intended when it enacted § 66.405.

The Tariff Sheet Only Became Effective Because the Staff Reasonably Believed the Company Would Withdraw It.

Staff witness Wendell R. Hubbs testified that the Commission received the Company's tariff sheet on January 25, 2001, and that it bore an effective date of February 26, 2001.[17] He also testified that, prior to the effective date of the tariff sheet, Company personnel told him and another Staff member that they would withdraw the tariff. The Company did not, however, withdraw the tariff sheet, which then became effective by operation of law on February 26, 2001.[18] Company witness James M. Jenkins, on the other hand, testified that the Company did not agree to withdraw the tariff sheet. Mr. Jenkins also testified that Mr. Hubbs was telling the truth about this matter "as he believes it,"[19] and Mr. Hubbs testified that both parties were telling the truth, "as we each believe it."[20] The Staff did not ever, and does not now, suggest than any representative of the Company made any deliberate misrepresentation with regard to the withdrawal of the tariff.

But the question of whether the Company did agree to withdraw the tariff sheet, and then failed to do so, or whether it never agreed to withdraw the tariff sheet in the first place, is immaterial. The relevant fact is that the Staff allowed the tariff sheet to go into effect by operation of law, because it mistakenly believed that the tariff sheet would be withdrawn.

---

[17] Hubbs Direct, Exh. 1, p. 2, line 17 – p. 3, line 1.
[18] Hubbs Direct, Exh. 1, p. 4, line 3 – p. 5, line 11.
[19] Jenkins Rebuttal, Exh. 3, p. 2, lines 3-16.

The fact that the tariff sheet did become effective justifies the Company's actions in billing its customers and collecting the tax as prescribed in the tariff sheet, and in remitting the funds collected to St. Louis County. And the fact that the Staff believed that the tariff sheet would be withdrawn serves to explain why it allowed an unlawful tariff sheet to become effective by operation of law.

The only thing that matters is whether the tariff sheet is lawful, and whether the Company should continue to collect this tax from its customers.

Relief Requested.

The Company's tariff sheet is unlawful, and it must be rescinded.

The Company has collected taxes pursuant to this tariff sheet, but, as the Staff understands it, the Company has paid all of those revenues over to St. Louis County and does not now hold any of the taxes it has collected. Furthermore, although the tariff was not lawful, it was reasonable and appropriate for the Company to collect the taxes pursuant to this tariff from and after the day that the tariff sheet became effective. In fact, the Company claims that one of the very reasons that it filed the tariff sheet was to insulate itself against a claim that it had improperly collected the taxes, and to protect itself against the obligation to refund the amounts collected.[21] Revenues collected pursuant to an approved tariff are lawful. Therefore, the Staff does not request that the Company be ordered to refund the revenues it has collected pursuant to this tariff.

Although the Company is adamantly opposed to refunding any of the monies it has collected under this tariff sheet, it has also said that it is willing to modify the tariff

[20] Hubbs Surrebuttal, Exh. 2, p. 3, lines 12-18.
[21] Jenkins Rebuttal, Exh. 3, p. 3, lines 3-11 and p. 2, lines 18-22.

prospectively.[22] The Company should be permitted to file a substitute tariff sheet that will collect the tax, according to the ordinance as properly construed. The Company has testified, however, that collecting the tax from the owners of the water service lines is not a practical solution, because of the difficulty of identifying the owners of the property, and because it has no means or authority to collect the tax from owners who are not customers of the Company.[23]

The Staff recognizes that it would be impractical for the Company to collect the taxes as prescribed by the ordinance. The Staff also believes that the ordinance has a good purpose and that it is a reasonable solution to a significant problem. But it is not enough that the tariff sheet be reasonable; it must also be lawful. This tariff sheet is unlawful, and it must therefore be rescinded.

How can the Company achieve its goal of collecting from its customers the monies required to pay the cost of repair to, and replacements of the water service mains? One solution would be to go back to the General Assembly to amend the statute that was enacted in 1999, and then to go back to the County Council to amend the St. Louis County ordinance that was later enacted. This may not be an easy solution to the problem. But the issue is not what is expedient; the issue is what is lawful.

The Commission's Approval of the Tariff Sheet Does Not Constitute Approval of the Company's Contract with St. Louis County.

The second issue in this case is whether the Commission's approval of a tariff also constitutes approval of a contract that is filed with the tariff and on which the tariff is based.

It appears that all parties are in agreement that, at least in this case, by allowing Tariff Sheet No. TR 17.0 to go into effect by operation of law the Commission has not, explicitly or

[22] Jenkins Rebuttal, Exh. 3, p. 3, lines 3-11. See also Paragraph 17 of County Water's Answer to Complaint.
[23] Jenkins Rebuttal, Exh. 3, p. 5, lines 4-20.

implicitly approved County Water's Contract with St. Louis County, on which the tariff sheet was based. In its Statement of Positions, the Staff states that the contract was not submitted to the Commission for its approval, and the Commission has not approved it.[24] County Water and St. Louis County both stated, in their Position Statements, that no party in this proceeding is claiming that the contract has been approved.[25]

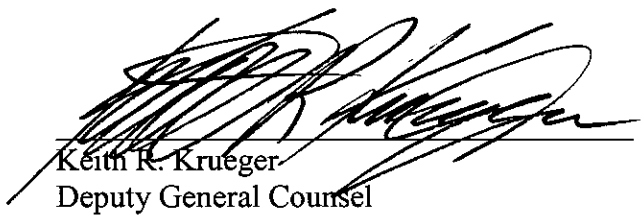
In its Position Statement, the Public Counsel said that approval of a tariff does not necessarily constitute approval of the underlying contract, and that there is no reason to decide, in this case, that all contracts based upon a tariff must be approved if the tariff is approved.[26] The Staff does not seek such a broad ruling, or "declaratory judgment on this technical question of protocol," as County Water described it. It is enough, in this case, to determine that the Commission has not approved the contract in question, that is, the agreement between County Water and St. Louis County, which was attached to the Staff's Complaint as Exhibit A.

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

[24] Staff's Statement of Positions, p. 2.
[25] Respondent's Position Statement, p. 2.
[26] Position Statement of the Office of the Public Counsel, p. 1.

Respectfully submitted,

DANA K. JOYCE
General Counsel

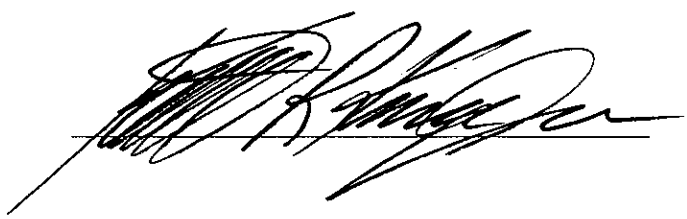


Keith R. Krueger
Deputy General Counsel
Missouri Bar No. 23857

Attorney for the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-4140 (Telephone)
(573) 751-9285 (Fax)
kkrueg01@mail.state.mo.us

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 22nd day of March 2002.



Service List for
WC-2002-146
Verified: March 22, 2002 (lb)

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

David Abernathy, Esq.
St. Louis County Water Co
D/B/A Missouri-American Water Co
535 North Ballas Rd.
St. Louis, MO 63141

Brent C. Cantor/Robert Grant
St. Louis County, Missouri
41 South Central
Clayton, MO 63105

Richard T. Ciottone
St. Louis County Water Co
D/B/A Missouri-American Water Co
949 E. Essex
St. Louis, MO 63122