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Case No. WD71019

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WESTERN DISTRICT

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CITY OF KANSAS CITY, MISSOURI,

Respondent (Petitioner below),

v.

**DIRECTOR OF REVENUE,
STATE OF MISSOURI,**

Appellant.

**Appeal from the Missouri Administrative Hearing Commission
The Honorable John J. Kopp, Commissioner**

Brief of the Respondent

**SERVICE BRIEF
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SCANNED

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JURISDICTIONAL STATEMENT

This action involves the question of whether the manner in which the City of Kansas City, Missouri (hereinafter “Respondent” or “City”) charges its tenants at Charles B. Wheeler Airport for electricity is subject to sales tax pursuant to § 144.020 RSMo Cum. Supp. 2008, and hence involves the construction of the revenue laws of the State of Missouri. Respondent submits that the question is not controlled by prior cases of the Supreme Court that construe this statute contrary to Appellant’s Jurisdictional Statement. Additionally, this appeal presents a question of whether Article III, Section 39(10) Mo. Constitution (1945 as amended) prohibits the Appellant from assessing sales tax on the City’s manner of charging airport tenants for electricity, and thus involves a provision of the constitution of this state. The questions are within the exclusive jurisdiction of the Supreme Court as provided in Article V, Section 3, Mo. Constitution (1945, as amended). This case should be transferred to the Supreme Court.

STATEMENT OF FACTS

Respondent adopts Appellant's statement of the facts subject however to the objection and the additions set forth below.

Objection to Appellant's Statement of Facts

Rule 84.04 (c) provides that "the statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Appellant (sometimes referred to in this brief as the "Director") has included subheadings in the statement of facts portion of the brief which are argumentative. Subheadings A. and B. contain assertions that the City "sold" electricity to its tenants at the Wheeler Airport. To the extent Appellant implies that a taxable "sale" of electricity occurred, that is refuted by the decision of the Administrative Hearing Commission below. Moreover it is the essential question presented on this appeal. Statements of an argumentative nature interspersed in an appellant's statement of facts are expressly forbidden by Rule 84.04 (c). *See, Estate of DeGraff* 560 S.W.2d 342, 345 (Mo.App. K.C.D. 1977).

Supplement to the Statement of Facts

The City is a “charter” or “home rule” city. The City’s Charter was adopted initially in 1926 with a restatement and amendment thereof in 2006.¹ Section 406 of the City’s Charter provides in part:

- (a) **Duties.** There will exist an Aviation Department, under the supervision of a Director of Aviation, to administer the operations of the City’s airports and associated activities of the City, including:
 - (1) **Management of airports.** Management and operation of all the buildings and fields owned and operated by the City for the purpose of serving aviation;
 - (2) **Property management.** Negotiate all leases for the facilities under control of the Aviation Department;
 - (3) **Development of future aviation facilities.** Study and make recommendations to the City Manager concerning the regulation and development of aviation, including proposals for the enlargement of existing or the addition

¹ The courts of this state may take judicial notice of the provisions of the City’s home rule charter. Art. VI, Section 19, Mo. Constitution (1945 as amended).

of new facilities to serve the aviation industry adequately;

- (4) **Promotion of aviation.** Make recommendations to the City Manager of programs for the promotion and growth of aviation;

The rate charged the tenants for electrical usage is designed to recover the City's direct expense for electricity. (Tr. 39) The rate is not designed to recover any costs to upgrade the distribution system (Tr. 40); and no amount is added to recover the City's cost of maintaining the electrical distribution lines or substations the City may own or operate. (Tr. 52)

POINT RELIED ON

THE ADMINISTRATIVE HEARING COMMISSION COMMITTED NO ERROR IN DECIDING THAT THE CITY OF KANSAS CITY IS NOT REQUIRED TO COLLECT SALES TAX ON ITS CHARGE FOR ELECTRICITY USED BY ITS WHEELER AIRPORT TENANTS BECAUSE THE CITY IS NOT ENGAGED IN A “BUSINESS” AS STATUTORILY DEFINED IN § 144.010.1 (2), RSMo 2000 IN THAT THE CITY DERIVES NO GAIN, BENEFIT OR ADVANTAGE FROM THE CHARGE, AS THE CHARGE CONSTITUTES A REIMBURSEMENT FOR THE CITY’S DIRECT COSTS OF SUPPLYING ELECTRICITY TO THE LEASEHOLDS. MOREOVER, A SALES TAX ON THE ELECTRICITY PURCHASED AND USED BY THE CITY FOR ITS AIRPORT TENANTS IS PROHIBITED BY ARTICLE III, SECTION 39(10) MO. CONSTITUTION (1945 AS AMENDED).

Article III, Section 39(10) Mo. Constitution (1945 as amended)

Section 144.010, RSMo Cum. Supp. 2008

Section 144.020, RSMo Cum. Supp. 2008

ARGUMENT

THE ADMINISTRATIVE HEARING COMMISSION COMMITTED NO ERROR IN DECIDING THAT THE CITY OF KANSAS CITY IS NOT REQUIRED TO COLLECT SALES TAX ON ITS CHARGE FOR ELECTRICITY USED BY ITS WHEELER AIRPORT TENANTS BECAUSE THE CITY IS NOT ENGAGED IN A “BUSINESS” AS STATUTORILY DEFINED IN § 144.010.1 (2), RSMo 2000 IN THAT THE CITY DERIVES NO GAIN, BENEFIT OR ADVANTAGE FROM THE CHARGE, AS THE CHARGE CONSTITUTES A REIMBURSEMENT FOR THE CITY’S DIRECT COSTS OF SUPPLYING ELECTRICITY TO THE LEASEHOLDS. MOREOVER, A SALES TAX ON THE ELECTRICITY PURCHASED AND USED BY THE CITY FOR ITS AIRPORT TENANTS IS PROHIBITED BY ARTICLE III, SECTION 39(10) MO. CONSTITUTION (1945 AS AMENDED).

In her single point of error, the Director² contends that contrary to the conclusion reached by the Administrative Hearing Commission (AHC) below, the City engages in a “business” as defined in § 144. 010.1 (2) RSMo Cum. Supp. 2008³ when it assesses tenants at its Charles B. Wheeler Airport⁴ a charge for electricity used by such tenants which is based upon metered usage and designed to reimburse the City for its direct costs only. In support, the Director argues, among other things, that the AHC ignored the plain language of the statute; that the AHC added a “profit motive” element to the statutory test; and that the “City’s sale of electricity” to the tenants provided a “gain, benefit or advantage” to the City by

² On July 9, 2009, Governor Nixon appointed Karen King Mitchell, the Director of Revenue, to fill the vacancy on this Court left by Judge Paul Spinden. Governor Nixon appointed Alana M. Barragán-Scott Acting Director of the Department and she serves in that position during the preparation of this brief.

³ Subsequent statutory citations are to RSMo Cum. Supp. 2008 unless otherwise indicated.

⁴ The facility is often referred to as “Wheeler Airport” and will be referred to in that way from time to time in this brief. Its frequent sobriquet is “Downtown Airport.”

making the airport more “desirable to its tenants.” These arguments have no merit and the Director’s point should be denied.

Regarding the standard of review, the City agrees that:

The AHC's interpretation of revenue laws is reviewed de novo. *DST Sys., Inc. v. Dir. of Revenue*, 43 S.W.3d 799, 800 (Mo. banc 2001). The AHC's factual findings will be upheld if the findings are supported by substantial evidence in the record. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

MFA Petroleum Co. v. Director of Revenue, 279 S.W.3d 177, 178 (Mo. banc 2009). The findings and conclusions of the AHC in this matter should not be disturbed and its decision should be affirmed.

At the outset, there is an assertion in Appellant’s Summary of the Argument found on page 12 of her brief that should be corrected. There, the Director asserts that “[a]ll commercial tenants at the downtown airport in Kansas City, Missouri are required by law to pay sales tax on their purchases of electricity.” In support of this statement, the Director cites § 144.020.1. This is erroneous. State law does not impose sales tax on the consumer. The statute is quite clear that a “tax is hereby levied and imposed on all **sellers**.” (emphasis added) There is no obligation at law for any commercial tenant at the City’s Wheeler airport to pay sales tax on

electricity. Moreover, the City does not engage in the energy business and makes no sales of electricity to its tenants at the air field.

A brief review of the facts would be helpful here. Electrical power to Wheeler Airport is supplied by Kansas City Power & Light Company (KCPL) through two substations. One substation is mounted on a building located at 10 Richards Road. Power from this substation energizes a 14.4 kv distribution line that primarily serves buildings on the west side of Wheeler. The City is billed by KCPL for the service delivered to the substation at 11 Richards Road. The City pays no sales tax to KCPL for the electricity. (Tr. 56)

After the power is delivered to the substation it is carried over the City's distribution line and metered by the separate meters to the tenants. (Tr. 55) Every building on the west side of Wheeler Airport is equipped with a City owned meter which measures the energy used at those buildings. An Aviation Department employee records monthly usage of electricity at those buildings. (Tr. 33) That employee reports usage to the accounting department which then prepares a bill. (Tr. 50-51)

On the east side of Wheeler Airport the City supplies electricity through City owned energy distribution facilities to tenants occupying: 150 Richards Road (Hanger No. 2), 200 Richards Road (Hanger No. 3) and 250/300 Richards Road

(the Terminal Building).⁵ Electricity for the two hangers is metered each month and billed to the tenant. For the Terminal Building there is no separately metered charge for power. (Tr. 36) The City's cost of insuring, custodial care, cost of supplying electricity, and provision of water and sewer to the Terminal Building are embedded in the rate of rent. (Tr. 36, 46).

The rate the City charges the tenants for electrical usage is designed to recover the City's direct expense for electricity purchased from KCPL. (Tr. 39) The rate is not designed to recover any costs to upgrade the system (Tr. 40) and no amount is added to recover the City's cost of maintaining the electrical distribution lines or substations the City may own or operate. (Tr. 52)

In this case, the Director does not attempt to tax the City's electricity costs that are embedded and recovered in the rents paid by the tenants in the Terminal Building. It is only the reimbursement of the City's electricity costs which are paid by tenants on a metered basis that the Director contends is a taxable "sale."

A. The City's recovery of its direct costs of electricity is not a "business" as defined in § 144.010.1(2).

Section 144.020.1 provides in part that

⁵ Three tenants, VML, Inc., BJS Pilot School and Cherokee Distribution Services, Inc., occupy the terminal building on the east side of Wheeler Airport. (Tr. 30)

[a] tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.

On page 13 and continuing to page 14 of her brief, the Director breaks down the opening paragraph of the statute into five elements, which, if they are shown, warrant a tax: 1) a seller; 2) in the business; 3) of selling tangible person property or rendering taxable service; 4) at retail; 5) in this state.⁶ The Director claims that all but the “in the business” element was satisfied at hearing below. The argument must fail. The Director has misunderstood the statutory definitions for these critical terms and how they coalesce.

1. *The City is not a “Seller” or making “Sales at retail.”*

Section 144.010.1 is the source of the apposite definitions. Those definitions or pertinent portions thereof are quoted below:

(2) “**Business**” includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either

⁶ That the activities involved in this matter all occurred in the state of Missouri has never been an issue.

direct or indirect, and the classification of which business is of such character as to be subject to the terms of sections 144.010 to 144.525.

* * *

(3) “**Gross receipts**”, except as provided in section 144.012, means the total amount of the sale price of the *sales at retail* including any services other than charges incident to the extension of credit that are a part of such sales made by the businesses herein referred to, capable of being valued in money, whether received in money or otherwise;

* * *

(10) “**Sale at retail**” means any transfer made by any person *engaged in business* as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and *not for resale* in any form as tangible personal property, for a valuable consideration;

* * *

(11) “**Seller**” means a person selling or furnishing tangible personal property or rendering services, *on the receipts from which a tax is imposed* pursuant to section 144.020; [bold italics represent supplied emphasis]

As the legislature has defined and linked these terms, whether one is a “seller” who engages in “sales at retail,” depends entirely on whether that “person”⁷ is engaged in a “business.” The AHC was persuaded justly that the City is not engaged in a “business” and therefore, the other elements of a taxable sale were not established, contrary to what the Director has argued. In terms of statutory interpretation, the focus of this appeal is whether the City is in “business” when it meters the electricity it extends on behalf of its airport tenants.

The record shows that the City Aviation Department undertakes the comprehensive management of Wheeler Airport pursuant to the terms and provisions of the City Charter. One of the duties of the Aviation Department created by the Charter is the leasing of available facilities. Modern airports, and the facilities at such airports, require the convenience of electrical power. The City has incurred considerable expense in offering a power supply over its own assets to the Wheeler tenants and subtenants who occupy office and hanger space. **That power is not being used by the City as a commodity for sale.** Its intention in metering the electricity supplied is strictly to determine a fair amount of each tenant’s reimbursement for the City’s costs. The City’s objective is not to acquire gain or advantage, but merely to “break even.” Moreover, whether the subject is the metered or unmetered tenancies where the City connects power, the use of the

⁷ The City qualifies as a “person” under the statutory definition. *See*, § 144.010 (6).

electricity is for the purpose of furthering the City's governmental interest in leasing the facilities. The provision of electrical energy for each tenancy is a coincident of renting facilities and does not constitute a sale independent of that overarching purpose.

Providing electricity or having it available to the buildings it leases at the Wheeler Airport *fosters* the City's interest in leasing the properties; it is not the driving interest. Although crucial to operation of an airport, electricity is secondary to the overarching City goal of leasing the facilities. Supplying electric power to the tenants has no distinctive proprietary significance to the operations of the airport. It is one of many utilities that a tenant would need for productive use of leased facilities. The electricity supplied is integral to the lease transaction. It is not a separate transaction as the Director asserts on pages 25 through 27 of her brief. Unlike the South African Krugerrands, Mexican Pesos and Canadian Maple Leaf coins which were the items sold in *Martin Coin Co. of St. Louis v. King*, 665 S.W.2d 939, 940 (Mo. banc 1984) cited by the Director, the metered electricity supplied by the City cannot be singled out as a specific merchandise item.

2. *The City is not motivated by profit or commercial gain or advantage.*

The Director argues that in rendering its determination in this case the AHC improperly added an element of “profit motive” to its interpretation of “business.” It is correct that the AHC did not believe the City provided electricity to its tenants “with a profit motive in mind”⁸ but this was not the basis of the AHC’s decision. The AHC properly determined that the City supplied electricity to its tenants only as a “necessary incident to its governmental service of providing an airport facility, and not “with the object of gain, benefit, or advantage.” Even so, “profit motive” is not divorced from this definition. According to Black's Law Dictionary (8th ed. 2004), “gain” means

1. an increase in amount, degree, or value. 2. Excess of receipts over expenditures or of sale price over cost. See PROFIT (1). 3. Tax. The excess of the amount realized from a sale or other disposition of property over the property's adjusted value. IRC (26 USCA) § 1001. -- also termed realized gain; net gain.”

The AHC did not invent a new element of interpretation for the definition of “business.” “Gain” (or profit) is expressly mentioned in the applicable definition.

3. *The AHC's interpretation of the term “business” produces no inconsistencies or absurd contradictions.*

⁸ Appx. at page 11.

On page 17 of her brief, the Director argues that interpreting “business” to allow the City’s private tenants to avoid a sales tax on the electricity they use would “circumvent the legislature’s express purpose of taxing the sale of electricity and would produce an absurd result in this case.” In response, the City observes that it purchases a wide range of tangible personal property from retail suppliers which would otherwise be taxable if the City were not the purchaser. By treating the City’s purchases of electricity as nontaxable, no matter how the electricity is subsequently used or distributed, the AHC has entered a decision which is perfectly consistent with constitutional requirements, and hence is hardly absurd.

On the same page of her brief, the Director argues that the manner in which the City recovers its costs for electricity allows its tenants to evade the sales tax. There is no evidence in the record that this arrangement is devised to permit tenants to evade any lawful tax.

Also on page 17 and continuing to page 18 of her brief, the Director argues that if the City’s method of covering its electricity costs is allowed to continue, it would create an absurd and contradictory situation in which some airport tenants would pay sales tax for their electricity and others would not. It must be remembered that the Director only objects to the absence of sales tax on the electricity the City measures by a meter. The City estimates its cost of electricity for the Terminal Building and blends that cost into the rent due. The commercial

tenants in the Terminal Building will continue to receive energy for their leaseholds without paying a sales tax. Ostensibly, the Director does not consider the City's method to recover the cost of electricity which is delivered to the Terminal Building as a contradictory result.

3. *City of Springfield v. Director of Revenue*

The Director cites *City of Springfield v. Director of Revenue*, 659 S.W.2d 782 (Mo.banc 2002), for the premise that municipalities are subject to sales tax even if the items sold are implementing an article of the city charter and the transactions are not intended to reap a profit. In that case the Supreme Court upheld the Director's assessment of sales taxes on Springfield park board transactions. The gross receipts upon which the Director has assessed sales tax were derived from park board sales of items at concession stands, fees charged for admission to softball games, the zoo and the use of and participation in a grand variety of other events, facilities and programs. The City contends that this case is distinguishable on its facts in that the kind of sales activity which Springfield engaged in was classically mercantile and without exception occurred over the counter.

The objective of Springfield's merchandise sales and schedule of fees was not to "pass through" or reimburse Springfield for a utility service or some other direct and identifiable cost. Springfield's sales and "fee for service" activities were

periodic. The exchanges were not based on contract. The “buyers” were voluntary, varied and under no proprietary compulsion to purchase the goods or services for sale by Springfield. In the instant case, each tenant is obligated to pay for the electrical power serving its leasehold and that need for power is constant and inextricably joined to the use and enjoyment of the leasehold. The principles enunciated in *City of Springfield* are not applicable to the situation at Wheeler Airport.

4. *St. Louis Country Club v. Administrative Hearing Commission.*

The second of the Director’s principal case citations is *St. Louis Country Club v. Administrative Hearing Commission*, 657 S.W. 2d 614 (Mo. banc 1983). In that case Judge Blackmar affirmed the decision of the AHC which determined that guest golf fees charged by a private not for profit country club were subject to sales tax. In interpreting the definition of “business” in § 144.010.1(2), the Court wrote:

That section gives a very special meaning to the term “business,” which is not limited to ordinary commercial enterprises. Under § 144.010.1(2) “business” includes “activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, *either direct or indirect...*” (emphasis supplied [by the Court]). This language is very broad, and is surely designed to

make transactions which might not otherwise be covered taxable. The issue is whether the “activity” of allowing the guests to use the facilities for a fee paid by their host is “with the object of gain, benefit or advantage, either direct or indirect,” to the country clubs. The director does not have to show that the taxpayer has a purpose of maximizing revenue, or of deriving income from the general public.

There must be some benefit to the clubs in allowing guests to use the facilities, or they would not be received. Although the clubs want to restrict guests' use of their facilities to a sufficient extent that members' use is not infringed, the privilege of having guests is an obvious inducement to membership in the clubs. It is a benefit to the clubs because it is a benefit to their members, the majority of whom must want the privilege of bringing guests.

Id. at 617-618.

The City contends that this ruling does not justify reversing the AHC's decision in this case. First, it is obvious that the City has not established a place of amusement, entertainment or recreation in the manner it has chosen to recover its cost of electrical power extended to the airport tenants. Although the City qualifies as a “person” under § 144.010.1 (6), its municipal character and very public role must not be ignored. Second, the operation of a modern airport is

imbued with benefits to the public at large. This Court should take into account the dramatic difference between the City's duties of property management and safety at Wheeler Airport, and the improvement of a guest's golf swing or potential club membership.

Under the analysis of *St. Louis Country Club*, the issue in this case is whether the City's metering of electric power distributed to its airport tenants and the recovery of the City's cost of electricity by means of a tenant surcharge based on metered electricity consumption (the "activity") is engaged in with the "object of gain, benefit or advantage, either direct or indirect." The City is not motivated by gain when it engages in this "activity." That much should be clear to the Court. The benefits and advantages, direct and indirect, of mechanisms used to recover the City's costs of administration generally, and the City's costs of Wheeler Airport property management specifically, are mammoth.

The Director does Respondent great service by affirming that the City has used and allocated its energy distribution and measuring devices, and its tenantable spaces at Wheeler Airport in the most economical, advantageous and beneficial way. (App. Br. at 21-24)⁹ This is what the City's Aviation Department is expected by the City charter to do. It is true that the City could have opted to upgrade at high cost and expense the 14.4 kv distribution line serving the western side of the

⁹ Appellant's Brief will be cited as "App.Br." followed by a page number.

airport and transferred it to KCPL for no consideration. (App. Br. at 22) It is equally true as the Director concedes, that is not a truly advantageous alternative. (App. Br. at 23) It is true that the City could have insisted that the tenants pay for an extension of KCPL's facilities to each leasehold but as the Director agrees, those tenant costs would compromise the attractiveness of renting space at the airport. (App. Br. at 24) If the City had pursued the options above it would have been economically imprudent for the City, but the options would subject the airport tenants to sales tax.

The Director does not mention another alternative available to the City. The City could remove the electricity meters for its tenants and then embed the estimated cost of electricity in the annual rental for each affected facility. Under this alternative, the Director would not be entitled to sales tax, but the tenants might be charged more for electricity than they use, or alternatively, the City might pay for more electricity than it estimated in the annual rent payment. **The test of whether the City is engaged in a "business" should not and does not depend on whether it uses a meter to fairly measure the electricity its tenants consume at Wheeler Airport.**

The definitions in § 144.010.1 cannot be stretched to include as "businesses" every possible beneficial and advantageous device utilized by a municipality in recovering its costs of administration. The City contends that the efficient

measurement of electrical power used by tenants of municipally owned property, no matter how beneficial or advantageous to the environment, the public lessor, the commercial lessee or the public, is not an activity or business the legislature sought to tax pursuant to § 144.020. That activity is not a classification that is of “such character as to be subject to the terms of sections 144.010 to 144.525.” See, § 144.010.1(2). The AHC so found and its determination should not be overturned. (Appx. at 12)¹⁰

B. Article III, Section 39(10) Mo. Constitution (1945 as amended) prohibits a sales tax on the City’s charges for electricity consumed by its tenants.

The discussion of whether the City is a “business” under § 144.010.1(2) is rendered academic when the issues in this case are tested against the Missouri Constitution. Article III, Section 39(10) of the Missouri Constitution provides:

The general assembly shall not have power:

. . .

(10) To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision.

¹⁰ The appendix to Appellant’s Brief will be cited as “Appx.” followed by the page number.

Electricity is a species of personal property that is bought and sold, transported and distributed. It is also tangible, although dangerously so.¹¹ The City purchases electricity from KCPL and takes delivery at the substation at 11 Richards Road. (Tr.32) From that substation the City uses the electricity across its own facilities for purposes connected with the operations and administration of Wheeler Airport. There is no dispute that payment for the electricity is paid for from City funds.

In this case, the parties agree that the City has prudently utilized capital assets in the interest of advancing and promoting aviation at Wheeler Airport. The City has committed airport properties to their highest and best use, yielding optimum benefits and advantages for itself, its constituency and its tenants. In this process the City has installed meters to measure electricity consumed by its airport tenants, the cost of which electricity is the City's ultimate responsibility.

The meter is beneficial to the City in that it can accurately impose a cost on the cost causer, and provides an incentive for the tenant to conserve. The meter is

¹¹ Judge Wolff notes that “[e]lectricity can be touched, and when a person does so and thereby completes an electrical circuit, it may be the last earthly sensation he or she feels.” *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725, 728 fn. 6 (Mo. banc 2001). In Missouri, electricity is tangible personal property.

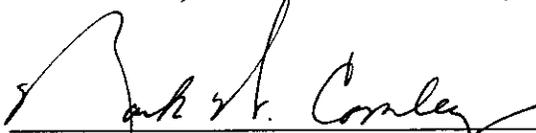
beneficial to the tenant because it will pay no more for electricity than what was consumed. The tenant is rewarded for efficiency. In consequence of the City's commendable stewardship in this manner, the Director seeks to impose a sales tax. The Director's attempt to impose a sales tax on the City under these circumstances is precisely what Article III, Section 39(10) of the Missouri Constitution was adopted to prohibit.

CONCLUSION

On the basis of the above and foregoing, the City respectfully requests that the decision of the Administrative Hearing Commission be affirmed.

Respectfully submitted,

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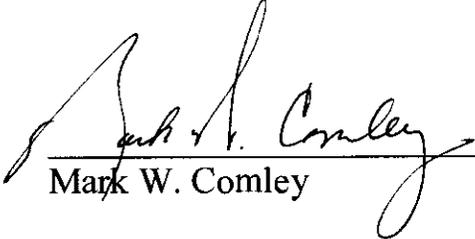
Certification of Service and Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 17th day of September, 2009, two true and correct copies of the foregoing Respondent's Brief, and one disk containing the foregoing Respondent's Brief, were mailed, postage prepaid, to:

Jeremiah J. Morgan
Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102.

The undersigned further certifies that the foregoing Respondent's Brief complies with the limitations contained in Rule 84.06(b) and that Respondent's Brief contains 4,779 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of Respondent's Brief, has been scanned for viruses and is virus-free.



Mark W. Comley