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IN THE MISSOURI SUPREME COURT

801 SKINKER BOULEVARD CORPORATION, UNION ELECTRIC d/b/a AMEREN UE COMPANY, and LACLEDE GAS COMPANY,	)	**Cause No. SC92401**
Appellants,	)	**PETITION FOR REVIEW**
v.	)	
DIRECTOR OF REVENUE,	)	
Respondent.	)	

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This case involves the construction of a state revenue law and therefore this Court has exclusive appellate jurisdiction pursuant to Missouri Constitution, Article V, Section 3.

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STATEMENT OF FACTS

A. Procedural History

Appellants, 801 Skinker Boulevard Corporation ("801"), Union Electric d/b/a Ameren UE Company n/k/a Ameren Missouri ("Ameren") and Laclede Gas Company ("Laclede"), collectively known as ("Appellants"), made applications to Respondent, The Director of Revenue ("DOR"), for refunds of sales tax paid June, 2006 through May, 2009, for the purchase of natural gas and electricity. (LF 44-46). Said applications were timely but were denied. (LF 44-46). Thereafter, Appellants filed their Complaint with the Administrative Hearing Commission on July 9, 2009, alleging that the utilities were purchased for domestic use by the individual owners and residents of 801 all in accordance with RSMo. §144.030.2 (23). (LF 1-35).

Appellants filed their Motion for Summary Decision on June 4, 2010. (LF 35-227). Respondent filed its Response to Petitioner's Motion for Summary Decision and its own Cross Motion for Summary Judgment on August 6, 2010. (LF 228-413). Petitioner filed its Reply on August 26, 2010 to Respondent's Response to its Motion for Summary Judgment as well as its Response to Respondent's Cross Motion for Summary Judgment. (LF 485-498). Finally on September 14, 2010, Respondent filed its Reply to Petitioner's Response to its Motion for Summary Decision. (LF 499-524).

On February 7, 2012, Commissioner Nimrod T. Chapel, Jr. rendered the Opinion of the Administrative Hearing Commission. (LF 541-553). Appellant now files its

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appeal of the Administrative Hearing Commission's denial of Petitioners' request for a refund of sales tax, interest, attorneys' fees and costs.

B. Facts

801 Skinker Boulevard Corporation ("801") is a residential cooperative, consisting of 39 units. (LF 42, para 9). 801 is a Cooperative which consists of members, all of which own an exclusive right to occupy a residential unit in the building owned by 801. (LF 88, para 1). 801 provides maintenance services to the units, common areas and facilities, the cost of which is paid for by the members through assessments.[1] (LF 42, para 8; 43, para 12; 88-90).

The governing documents of 801 are embodied in the "Certificate of Incorporation of Eight-0-One Skinker Boulevard Corporation" ("Certificate"), the "Perpetual Use Contract" ("Contract") and the "Amended and Restated By-Laws of Eight-0-One Skinker Boulevard Corporation, as amended ("By-Laws"). (LF 42, para 7).

The 801 property is restricted exclusively for the purpose of residential use under Section 3(b) of the Certificate. (LF 42, para 9). As part of its responsibilities to provide services, from June 2006 through May 2009, 801 purchased natural gas and electric

[1] DOR's Response to 801's Statement of Undisputed Material Facts is defective in refuting 801's "Facts." Not one of DOR's responses cites to any document, affidavit, deposition or admission. Such general denials are deemed admissions in the context of a Summary Decision. Fed. R. Civ. P. 74.04 *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.* 854 S.W.2d 371, 381 (Mo. Banc. 1993).

utilities for the exclusive purpose of serving the units, common areas and facilities of the property. (LF 43, para 10, 11).

The utilities purchased were used to provide heating, cooling, lighting, hot water, and other services for the units, common areas and facilities, including hallways, lobbies, elevators, entrance ways, parking areas, and other areas and facilities of the property. (LF 43, para 13, 14).

In accordance with the Contract, each of the members is responsible for the cost of such utilities in an amount consistent with their proportionate ownership share of 801. (LF 43, para 13). The common areas and facilities are maintained for the use of all residential owners. (LF 43, para 15).

801 was charged and paid state sales tax on purchases of electric and natural gas utilities from June, 2006 to May, 2009. (LF 43, para 10). 801 filed for a refund of the 2008 sales tax on its Ameren and Laclede bills in the amount of $11,993.17. (LF 44, para 17; 44, para 22). Appellant Ameren filed for a refund on behalf of 801 for 2006, 2007 and 2009 in the amount of $10,028.55. (LF 45, para 26). The Director denied Ameren's application by notice dated June 23, 2009. (LF 45, para 27). Ameren's appeal was timely filed. (LF 45, para 28). Ameren appointed Marvin J. Nodiff as its attorney-in-fact for the purposes of prosecuting the appeal in this matter. (LF 45, para 30). Appellant Laclede filed for a refund on behalf of 801 of the sales tax for 2006, 2007 and 2009 in the amount of $17,407.96. The Director denied Laclede's application by notice dated June 23, 2009. (LF 46, para 33).

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Appellants seek their attorneys' fees, an award of interest (6% per annum) and costs.

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POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANTS' MOTION FOR SUMMARY DECISION BECAUSE APPELLANTS ESTABLISHED THEIR RIGHT TO A REFUND OF STATE SALES TAX BECAUSE THE PURCHASED UTILITIES WERE FOR RESIDENTIAL/DOMESTIC USE AND NOT FOR BUSINESS, COMMERCIAL OR INDUSTRIAL PURPOSES, PURSUANT TO RSMO. §144.030.2(23).

A. The AHC'S Holding That The Common Areas Are Partly Commercial Because "Someone Had To Change The Light Bulbs" Is Contrary To The Statute And Common Sense.

B. It Is The Use Of The Utility That Defines Whether It Is Exempt From Sales Tax, Not The Nature Of The Purchaser.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED WHEN IT HELD THAT CONDOMINIUM UNITS, APARTMENTS AND THEIR COMMON AREAS QUALIFY FOR THE SALES TAX EXEMPTION ON UTILITIES ONLY IF THE ENTIRE COMPLEX RECEIVES ITS UTILITY SERVICE THROUGH A SINGLE OR MASTER METER, BECAUSE: (1) THE PLAIN LANGUAGE MERELY REQUIRES THAT USAGE IS THROUGH A METER – SINGLE OR

MASTER, BUT NOT NECESSARILY A SINGLE METER FOR THE ENTIRE COMPLEX; (2) SUCH HOLDING, IN ALMOST ALL CASES, DISQUALIFIES CONDOMINIUM UNITS, APARTMENTS AND COMMON AREAS FROM SALES TAX EXEMPTION; AND (3) ASSUMING *ARGUENDO* THAT THE STATUTE DOES INDICATE THAT A MASTER METERING OF A COMPLEX CONSTITUTES DOMESTIC USE, THE STATUTE DOES NOT SAY APARTMENTS, CONDOMINIUMS AND THEIR COMMON AREAS QUALIFY FOR THE EXEMPTION "ONLY IF" THERE IS SUCH A MASTER METERING.

III. THE ADMINISTRATIVE HEARING COMMISSION'S DENIAL OF LACLEDE'S AND AMEREN'S CLAIM BASED ON "WINDFALL" IS WITHOUT MERIT BECAUSE LACLEDE AND AMEREN FILED THEIR CLAIMS ON BEHALF OF 801 AND THE RSMO. §144.190.2 AUTHORIZES THEM TO MAKE THIS CLAIM.

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ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING APPELLANTS' MOTION FOR SUMMARY DECISION BECAUSE APPELLANTS ESTABLISHED THEIR RIGHT TO A REFUND OF STATE SALES TAX BECAUSE THE PURCHASED UTILITIES WERE FOR RESIDENTIAL/DOMESTIC USE AND NOT FOR BUSINESS, COMMERCIAL OR INDUSTRIAL PURPOSES, PURSUANT TO RSMO. §144.030.2(23).

RSMo. §144.030.2 (23) provides the instances whereby purchasers are exempt from the payment of state sales tax. Included in that list is the following:

> (23)…all sales of metered water service, electricity, electrical current, natural, artificial or propane gas, wood, coal or home heating oil for domestic use…

The legislature defined "domestic use" in subparagraph (a) to paragraph 23 as follows:

> (a) "Domestic use" means that portion of metered water service, electricity, electrical current, natural, artificial or propane gas…which an individual occupant of a residential premises uses for nonbusiness, noncommercial or nonindustrial purposes. Utility service through a single or master meter for residential apartments or condominiums,

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> including service for common areas and facilities and vacant units, shall be deemed to be for domestic use. Each seller shall establish and maintain a system whereby individual purchases are determined as exempt or nonexempt."

The key to RSMo. §144.030.2(23)(a) is the analysis of what is meant by domestic use. The exemption is clearly meant to apply so long as the **use** made of the utility service is for a nonbusiness, noncommercial or nonindustrial purpose.

The electric and gas usage purchased by 801 fits squarely within that definition. The service was used for common areas and facilities, including hallways, lobbies, elevators, entrance ways, parking areas, and other common areas and facilities of the residential property (the "common areas"). These common areas are not used for any purpose other than to enhance and support each of the units of the residential facility. There is no business carried on in these common areas. No entity is profiting from the member's use of these common areas. In fact, without these common areas, the members would not even have access to their units. The utility service is used for residential – domestic use only.

The statute makes this even more clear in the second sentence of the definition section. It states that common areas of apartments and condominiums so long as they receive their utilities through a metered service, qualify for domestic use. This aspect of the definition section is more fully briefed in part II of this Brief. Whether 801 is

considered an apartment or a condominium, this second sentence spells it out clearly that the common area use of utilities constitutes domestic use.

A. The AHC'S Holding That The Common Areas Are Partly Commercial Because "Someone Had To Change The Light Bulbs" Is Contrary To The Statute And Common Sense.

The Administrative Hearing Commission ("AHC") argued in its decision that someone "had to clean the hallways, service the elevators, change the light bulbs and used the utilities while doing so." It held that such use of the utilities by maintenance personnel was not "domestic use" and since 801 had no way to apportion such use in order to arrive at a correct percentage of such "non-domestic" use, Appellants were not entitled to the exemption.

This argument is absurd. All residential property requires cleaning, maintenance and changing of light bulbs. The DOR does not insist on an apportionment of such use for all residential/domestic use purchasers, such as homeowners or condominium units. The statutory exemption is for domestic use – that is, nonbusiness, noncommercial or nonindustrial. This does not mean there must be a computation made for all houses, apartments and condominiums, as to the time spent by cleaning and maintenance personnel for regular maintenance of the residential property. Such maintenance simply does not constitute non domestic use. Instead, it is required for the domestic use.

This point was made abundantly clear by this Court in *American Healthcare*. The DOR refused to grant an exemption to various nursing homes partly because they "had not presented an appropriate means of allocating the utilities used by the individual

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residents." *Id.* at 498. The DOR argued that the exemption should not apply to those areas where residents receive some level of nursing care. The Court reasoned that such an apportionment was unnecessary because it was no different than if the residents lived at home and received home health services, for which they would obviously not lose their exemption.

This applies equally to 801. Simply because maintenance people use the facility while changing light bulbs should not reclassify any portion of the sales tax classification for the residents of 801. Such classification would not change if they were each living in separate houses – which would also require that light bulbs be changed and other maintenance be performed. Just as in *American Healthcare*, the 801 sales tax is passed on to the residents in their annual assessments as part of their residential use of the building. Clearly, the nursing homes in *American Healthcare* required that maintenance contractors enter the facility and provide services. Yet there was no mention of apportionment for the time spent by such workers. This Court saw no reason to apportion the exemption because of time spent in the facility by maintenance workers, especially, when this Court saw no need to apportion the exemption for areas of the facility relegated for nursing care. The Administrative Hearing Commission's Decision cannot be accepted and should be reversed.

B. It Is The Use Of The Utility That Defines Whether It Is Exempt From Sales Tax, Not The Nature Of The Purchaser.

Although the Administrative Hearing Commission seemed to agree that the issue to be examined is the "use" of the utility, the DOR argued that because the purchaser of

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the electricity and gas were by 801 and not the unit owners individually, that such purchase is commercial. This argument has been repeatedly debunked by this Court in both *Hyde Park Housing v. Director of Revenue*, 850 S.W.2d 82 (Mo. Banc. 1993) and *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496 (Mo. 1999). Instead, the exemption is based on the end use of the utility service, even though the service is master-metered or the purchaser is not the consumer.

Missouri courts recognize that the legislative intent of RSMo. §144.030.2(23) is to exempt domestic uses from state sales tax. The exemption is based on the end-use of the utility service, even though the service may be master-metered or the purchaser is not the consumer, and that the statute expressly includes common areas and facilities as "domestic" purposes. *Hyde Park Housing*.

In fact, the statutory exemption under RSMo. §144.030.2(23) authorizes a refund of state sales tax charged on domestic use even though the utility company taxed its customer under a nonresidential tariff. This Court has found that the statute's refund provision "rationally assumes" that nondomestic purchasers may purchase some utility service for domestic use, and thus allows the purchasers to recover sales tax paid on that portion of their purchases that are tax exempt. *American Healthcare*. See also *Bert v. Director of Revenue*, 935 S.W.2d 319, 322 (Mo. 1996) (statute allows nondomestic purchasers to recover sales tax paid on utility service for domestic use as long as refund claims are not time barred). Thus, the critical element is the manner of use -- whether the utility services are used for domestic purposes -- not how the utility company may classify the customer.

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The Court in *American Healthcare* stated that sales taxes on utilities are ultimately passed on to the nursing home residents because they paid the operators to maintain the facilities and common areas under contract, which included purchasing utilities on residents' behalf. *Id.* at 498. This implies that a purchaser buying utilities for its residents does not detract from the domestic use of those utilities. *Id.*

Here, as in *American Healthcare*, the Corporation owns and operates a residential cooperative containing individual dwelling units and purchases utility services on behalf of its residents for the units, common areas and facilities. Under its governing documents, the entire Cooperative property is restricted exclusively for the purpose of residential use. Section 3(b) of the Certificate. The Corporation provides services to the community pursuant to the residential use restriction in its governing documents. Sections 2 and 9(a) of the Contract; Article 3, Section g(ii)(5) of the By-Laws.

The services are provided to such common areas and facilities as corridors, elevators, lobbies, entranceways, and parking areas that are essential to accessing and using the units. Services include lighting, heating, cooling, elevator service, hot water service, fire suppression systems, and other uses of electricity and natural gas related to and essential for residential occupancy of the dwellings. Similar to *American Healthcare*, the consumption of these services at 801 is by the residents for domestic purposes found in multi-family dwellings. Thus, the utility services are consumed by and are for the benefit of the individual residents in connection with their residential dwellings.

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II. THE ADMINISTRATIVE HEARING COMMISSION ERRED WHEN IT HELD THAT CONDOMINIUM UNITS, APARTMENTS AND THEIR COMMON AREAS QUALIFY FOR THE SALES TAX EXEMPTION ON UTILITIES ONLY IF THE ENTIRE COMPLEX RECEIVES ITS UTILITY SERVICE THROUGH A SINGLE OR MASTER METER, BECAUSE: (1) THE PLAIN LANGUAGE MERELY REQUIRES THAT USAGE IS THROUGH A METER – SINGLE OR MASTER, BUT NOT NECESSARILY A SINGLE METER FOR THE ENTIRE COMPLEX; (2) SUCH HOLDING, IN ALMOST ALL CASES, DISQUALIFIES CONDOMINIUM UNITS, APARTMENTS AND COMMON AREAS FROM SALES TAX EXEMPTION; AND (3) ASSUMING *ARGUENDO* THAT THE STATUTE DOES INDICATE THAT A MASTER METERING OF A COMPLEX CONSTITUTES DOMESTIC USE, THE STATUTE DOES NOT SAY APARTMENTS, CONDOMINIUMS AND THEIR COMMON AREAS QUALIFY FOR THE EXEMPTION "ONLY IF" THERE IS SUCH A MASTER METERING.

RSMo. §144.030.2(23)(a) states in full:

> (a) "Domestic use" means that portion of metered water service, electricity, electrical current, natural, artificial or propane gas, wood, coal or home heating oil, and in any city not within a county, metered or unmetered water service, which an individual occupant of a residential premises uses for nonbusiness, noncommercial or nonindustrial purposes. Utility

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> service through a single or master meter for residential apartments or condominiums, including service for common areas and facilities and vacant units, shall be deemed to be for domestic use. Each seller shall establish and maintain a system whereby individual purchases are determined as exempt or nonexempt;

1. The Plain Reading Of The Statute Does Not Require Condominiums, Apartments And Their Common Areas To Receive Service Through One Master Meter For Their Entire Complex To Qualify For The Exemption.

Commissioner Chapel argues that the second sentence of paragraph (a), which refers to apartments, condominiums and common areas and facilities, provides a very limited circumstance under which common areas and facilities can qualify for the sales tax exemption. The Commissioner calls it the "safe harbor", where condominiums, apartments and their common areas are "deemed" as for "domestic" use only if the utility is provided through a single or master meter for the entire complex.

In other words, the only way condominiums and apartments can qualify according to the Commissioner, is if a single meter services all apartments and their common areas or all the condominium units and their common areas. Otherwise, tenants of apartments and condominium owners do not qualify as domestic users unless their entire building is served by one meter.

This is simply a corrupt analysis of the provision at hand. The second sentence was clearly meant to emphasize the point that a utility, provided through a meter, single

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or a master, for apartments, condominiums and common areas shall qualify for the exemption as domestic users. Nowhere does it say that no tenants in apartments or owners of condominiums within a building or complex can be considered domestic users unless the building is entirely serviced through just one meter.

Instead, meters are included as a means to measure consumption, not as a determination of use. In, *Hyde Park* this Court emphasized the legislative intent of RSMO. § 144.030.2(23) was to ease the burden of costs on residential users. *Hyde Park* at 84. This intent was affirmed by the Supreme Court of Missouri in *American Healthcare* at 499. Thus, DOR and the Commissioner's attempt to construe the statutory language is contrary to substantial judicial determination of the intent, and does not support a conclusion that the common areas are not used for domestic purposes merely because of how such areas are metered.

With respect to 801, it is immaterial whether the utility meters include services to the individual dwelling units. If the individual dwelling units were separately metered, the owners and occupants would not be taxed on their respective billings. At 801, to the extent consumption occurred in the individual units, the fact remains that the Association paid sales tax for all consumption in the common areas of the property.

2. The Commissioner's Interpretation Would Deny Most Apartments And Condominiums Their Exemption.

It is common knowledge that condominiums and apartments generally do not collectively function from a single master meter. Instead, individual condominium units and apartments have their own meters that are used for billing directly by Ameren and

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Laclede. Likewise, most common areas of condominium buildings feed off their own meter and are billed directly by the utilities as well. The Commissioner made the assumption that the statute referred to a single meter for the entire complex. However, the statute does not say that all units and common areas needed to be on the same meter. Requiring the units and the common areas of a condominium or apartment to be on the same meter to qualify for the exemption would obliterate the exemption for virtually every apartment and condominium. The legislature's concern is for the use of the utility. This is made abundantly clear in the first sentence. Meters, on the other hand are not indicative of the kind of use for the utility. The meter is indicative that the utility's commodity is provided by the utility company and provides a measure of consumption – not a determination of the characterization of usage.

3. Assuming "*Arguendo*" That The Provision Does Mean That If Dwellings And Their Common Areas Are On The Same Meter It Constitutes Domestic Use, Nowhere Does It Say That Common Areas Will Qualify "Only If" There Is Such Master Metering.

Even assuming *arguendo* that the Commissioner and DOR are correct in their interpretation of the second sentence, that if condominiums and their common areas are on a master meter, they then qualify for a tax exemption - this still does not foreclosure 801 from its tax exemption. The sentence fails to provide any verbiage to indicate that such dwelling units and common areas can qualify "only if" they are hooked into a master meter together. Merely stating that a master metering of a building or complex shall constitute or be deemed domestic use, does not foreclose all other metering

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arrangements. The provision dos not provide an "only if" clause or some other limiting phrase. In other words, the legislature in no way said that this is the only way that condominiums, apartments and common areas would qualify.

The Commissioner makes reference to the possibility of an "only if" by relying on a rather strained analysis of the meaning of "deemed." He argues that common areas of either an apartment building or condominium complex cannot be characterized as domestic use because maintenance people use the heat and air conditioning while cleaning, changing light bulbs or painting the hallways. Considering that such activity is not limited to common areas, but instead, applies to all residential dwellings, the Commissioner's reasoning falls short. No residential facilities, whether they be houses, apartments or condominiums can go without the occasional maintenance or other non-resident visit that would use the heat or air conditioning of the residence. (See prior arguments in this Brief's First Section.)

Nevertheless, the Commissioner builds on this faulty precept by explaining that because common areas do not ordinarily qualify as using utilities for domestic use the legislature's use of the word "deemed" supports his conclusion. Thus, only if the apartments, condominiums and their common areas are serviced by one master meter can they be "deemed" as domestic users of utilities. He argues that "deemed" is used because the legislature is acknowledging that common areas would not otherwise be exempt.

In light of the clear intent to provide an exemption to residential users of utilities, this analysis misses the mark. The absurd result of such reasoning is that it would virtually eliminate the exemption for thousands of condominium units and apartments in

this state. This is because employing his logic, apartments and condominium units would also be subject to the same analysis – that they too are ordinarily not considered as "domestic" under the statute – but so long as they too are served by a single meter into the complex, then and only then would they qualify as a domestic use. This simply cannot be the case and reaches an absurd result. Courts assume "that the legislature intended a logical and reasonable result . . . not an absurd or unreasonable result" *Breeze v. Goldberg*, 595 S.W.2d 381 (Mo. App. 1980).

The Commissioner's paradigm rests on a stool with no legs. There is no reason for the legislature to create such a harsh "only if" exception to the general definition contained in the first sentence of the statute. That is, so long as the utility is used for nonbusiness, noncommercial and nonindustrial use, the exemption should apply. Even assuming that the provision states that if the dwellings are metered with the whole complex in one meter, the word "deemed" simply does not translate into "only if."

III. THE ADMINISTRATIVE HEARING COMMISSION'S DENIAL OF LACLEDE'S AND AMEREN'S CLAIM BASED ON "WINDFALL" IS WITHOUT MERIT BECAUSE LACLEDE AND AMEREN FILED THEIR CLAIMS ON BEHALF OF 801 AND THE RSMO. §144.190.2 AUTHORIZES THEM TO MAKE THIS CLAIM.

The Commissioner made a determination that Laclede and Ameren were not entitled to an award (anyway) because they filed their claims for refunds "for themselves." They cite *Central Hardware Co. v. DOR*, 887 S.W.2d 593, 595 (Mo. Banc. 1994) in support of their contention that receiving refunds would entail a windfall.

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However, Laclede and Ameren's claims are quite different than the claims made by Central Hardware and Hertz in the *Central Hardware* case. There, the claimants were clearly making their claim on their own behalves with no plan to refund their customers. Their customers had paid sales tax on their purchases, but claimants wanted a refund because they were charged a fee for each purchase from the credit card companies.

There is nothing similar about this case. Here, the limited Powers of Attorney protect 801's rights to ensure that it will collect the refunds. (LF 27; 226-22). Both these Powers of Attorney clearly indicate that they are for the purpose of appealing the sales tax for a particular customer account.

The Commissioner also fails to acknowledge RSMo. §144.190.2 which states:

> If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525, and the balance, with interest as determined by section 32.065, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

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Laclede and Ameren were the parties "legally obligated to remit the tax" and therefore were authorized to make the claims. Laclede and Ameren could hardly keep any refund obtained herein for 801 under the present circumstances. 801 will not allow Ameren or Laclede to receive a windfall.

CONCLUSION

For the foregoing reasons, the utilities purchased by 801 fall squarely within RSMo. §144.030.2(23) which exempts sales tax on utility services used for nonbusiness, noncommercial or nonindustrial purposes. The kind of metering and the nature of the entity purchasing the utility is wholly irrelevant to the determination of use.

This Court should reverse the holding of the Administrative Hearing Commission in sustaining the DOR's Motion for Summary Decision and its denial of 801's Motion for Summary Decision. This Court should award a refund in full of the sales tax paid, plus interest at the rate of 6% per annum together with 801's reasonable attorneys' fees and costs.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 7th day of September, 2012, served a true and correct copy of the foregoing via the Missouri Electronic Filing System upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The Undersigned hereby certifies that this Respondent's Substitute Brief was prepared in the format of Microsoft Word using Times New Roman typeface in font size 13. This Brief contains approximately 4,382 words.

/s/ Ira M. Berkowitz
Ira M. Berkowitz, 32542

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