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1. ASSESSMENTS — RAILROADS AND PUBLIC UTILITIES — FUND ARISING PURSUANT TO SECTION 606 G.C., PRIOR TO ITS AMENDMENT, AMENDED SUBSTITUTE SENATE BILL 174, 95 GENERAL ASSEMBLY, NOT AFFECTED BY SAID AMENDMENT — CONTINUES AS “PUBLIC UTILITIES COMMISSION FUND.”
2. STATUS — BALANCE IN ORIGINAL FUND, 1942 — CREDIT TO BE APPLIED.
3. CREDIT UNDER SECTION 606 G.C. — APPLIED TO REDUCE ASSESSMENTS AGAINST RAILROADS AND PUBLIC UTILITIES IN ANY YEAR — DETERMINATION — AMOUNT REMAINING UNEXPENDED AND UNENCUMBERED IN PUBLIC UTILITIES COMMISSION FUND AT CLOSE OF NEXT PRECEDING YEAR.
4. BIENNIAL APPROPRIATION MADE BY LEGISLATURE — NO BEARING ON DETERMINATION OF CREDIT TO BE APPLIED BY AUDITOR OF STATE TO LEVY ASSESSMENTS UNDER SECTION 606 G.C.
5. ASSESSMENTS UNDER SECTION 606 G.C., AUGUST 1 EACH YEAR, CONSIDERED AS PROVIDING FUNDS FOR YEAR THEN CURRENT FOR MAINTAINING AND ADMINISTERING PUBLIC UTILITIES COMMISSION.

6. ASSESSMENTS CERTIFIED TO TREASURER OF STATE FOR COLLECTION, IF NOT COLLECTED WITHIN THIRTY DAYS SHALL BE CERTIFIED BACK TO AUDITOR OF STATE— SECTION 20 G.C. — AUDITOR REQUIRED, SECTION 268 G.C. TO CERTIFY SUCH CLAIMS TO ATTORNEY GENERAL.

SYLLABUS:

1. The funds arising from the assessments made up on railroads and public utilities pursuant to Section 606, General Code, prior to its amendment in Amended Substitute Senate Bill No. 174 of the 95th General Assembly, is not affected by said amendment, but continues under said amendment as the "public utilities commission fund" mentioned therein.

2. The balance in such original fund at the close of the year 1942 was properly carried into the fund designated in the amendatory act as the public utilities commission fund, and was to be considered in determining the credit to be applied to assessments for the ensuing year. If not so credited on the assessment levied in 1933, such balances would be carried over to the assessment to be levied in 1944.

3. In determining the credit under Section 606, General Code, to be applied in reduction of the assessments to be levied against railroads and public utilities in any year, such credit should be the amount remaining unexpended and unencumbered in the public utilities commission fund at the close of the next preceding year.

4. The biennial appropriation made by the legislature has no bearing on the determination of the credit to be applied by the auditor of state in levying the assessments provided for by Section 606 of the General Code.

5. The assessments against railroads and public utilities made under Section 606, General Code, as of August 1st of each year, are to be considered as providing funds for the year then current for maintaining and administering the public utilities commission.

6. Assessments made under Section 606, General Code, and certified to the treasurer of state for collection, if not collected within thirty days shall be certified back to the auditor of state, as provided in Section 20, General Code, and said auditor is required by Section 268, General Code, to certify such claims to the Attorney General.

Columbus, Ohio, August 16, 1944

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Under provisions of Am. Sub. S.B. No. 174, an act to amend Sec. 606 G.C., relative to the maintainance of the public utilities commission, the Auditor of State has certain required duties in connection with determining credits to be applied against the assessments due from railroads and public utilities.

The language and intent of the amended bill is not clearly defined when considered in the light of the appropriation act (H.B. 227) and former Sec. 606 prior to the amendment by Am. Sub. S.B. No. 174. In order that we may be properly guided in our procedure to carry out the intent of the law, we are requesting your opinion and advice, as follows:

No. 1. Does the special fund established under original Sec. 606 G.C., and known in the Auditor of State’s office as a statutory fund within the General Revenue Fund, and designated as the statutory ‘Public Utilities Commission Fund’ continue on and be the same fund as by the terms of Am. Sub. S.B. No. 174, to be known as a statutory ‘public utilities commission fund’?

No. 2. If the original fund continues on, are the balances in same to be considered in establishing the credit against the assessments under provisions of Am. Sub. S.B. No. 174?

No. 3. If the fund under original Sec. 606, G.C., does not continue on, in what status will this fund be shown on the books of the Auditor of State, inasmuch as previous accounting for many years standing has been based on the construction of the original Sec. 606, G.C., which established a special fund; and since both funds would be carried for the same purpose and intent?

No. 4. Under either consideration of the above, shall the credits of remaining balances in the fund be determined as a result of:

(a) actual expenditures paid, or

(b) appropriations as made by the General Assembly, or

(c) a combination of both — e.g., the allowing of a credit between the appropriations made by the Legislature for the biennium if same is under the amount to be assessed for the biennium, plus cash balances remaining in the fund where the expenditures are less than the amounts so appropriated, or in figures:

Assessments	\$275,000.00	\$275,000.00	\$550,000.00
Appropriations	260,820.00	264,320.00	525,140.00
Possible Credits	\$ 14,180.00	\$ 10,680.00	\$ 24,860.00
Appropriations	\$260,820.00	\$264,320.00	\$525,140.00
Expenditures	180,000.00	185,000.00	365,000.00
Possible Credits	\$ 80,820.00	\$ 79,320.00	\$160,140.00
Total Credits } as combined }	\$ 14,180.00 80,820.00	\$ 10,680.00 79,320.00	\$ 24,860.00 160,140.00
	\$ 95,000.00	\$ 90,000.00	\$185,000.00

It is easily seen that additional balances in the fund can be accumulated in this manner.

No. 5. Are the appropriations made by the Legislature, as designated in H.B.227 by the terms '1943' and '1944,' to be considered separately for the determination of credits against the assessments, or, under the terms of H.B. 227 are the biennium totals to be considered the appropriation, and no credits allowed against the appropriations until it is determined whether the assessments have been fully made for the biennium?

No. 6. Are the assessments made under Sec. 606, G.C., as of August 1 of any year to be construed as providing funds for expenditures paid within that year or for the next succeeding year, as implied in the assessments against the public utilities and railroads, and which under the Am. Sec. 606, Par. 2 thereof, states that 'according to the respective portions of said sum of \$275,000 so assessable against them for the *ensuing* calendar year.'

No. 7. When does an assessment against a public utility become delinquent — inasmuch as it is within the authority of the Auditor of State to certify delinquency to the Attorney General after a thirty-day period, or as soon thereafter as the department reports such delinquency?"

Section 606, General Code, as it stood prior to the passage of Amended Substitute Senate Bill No. 174, effective June 26, 1943, read as follows:

"For the purpose of maintaining the department of public utilities commission of Ohio, including the payment of salaries, traveling expenses, printing, rent, light, heat, water, telephones and all other overhead expenses, and the exercise of police supervision of railroads and public utilities of the state by it, a sum *not exceeding two hundred thousand dollars each year* shall be apportioned among and assessed upon the railroads and public

utilities within the state, by the commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.

On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment appropriated by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public utilities commission."

The same section as amended reads:

"For the sole and only purposes of maintaining and administering the public utilities commission of Ohio, including the payment of all such expenses as salaries, traveling expenses, supplies, printing, rent, light, heat, water, telephones and all other overhead expenses, and the exercise by said commission of such supervision of and jurisdiction over the railroads and public utilities of the state as is provided by law, *the sum of two hundred and seventy-five thousand dollars for each calendar year* shall be apportioned among and assessed upon and against the railroads and public utilities within the state, by the commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the calendar year next preceding that in which such assessments are made.

On or before the first day of August next following, and on or before the first day of August in each year thereafter, the commission shall certify to the auditor of state the respective portions of such sum of two hundred and seventy-five thousand dollars so assessed by it against each such railroad and public utility, whereupon he shall certify such assessments to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund to be known as the public utilities commission fund, and to be devoted to and expended solely for the maintenance and administration of such commission; and all amounts, if any, remaining in said fund at the end of any year not appropriated and paid to the commission for the purposes aforesaid shall be credited ratably by said auditor to such railroads and public utilities respectively, according to the respective portions of said sum of two hundred and seventy-five thousand dollars assessable against them for the ensuing calendar year, and thereupon the assessments for such calendar year shall be reduced correspondingly."

(Emphasis added.)

A comparison of the old and new enactments will make it evident that the later enactment was not intended to create a new scheme for

financing the utilities commission, nor to abolish the old. Its purposes were (1) to clarify the objects and procedure and (2) to increase the amount available for the support of the commission. Instead of "not exceeding two hundred thousand dollars each year" we have a flat "two hundred and seventy-five thousand dollars for each calendar year" to be apportioned to the railroads and utilities, coupled, however, with a new provision whereby that amount so to be apportioned may be reduced by a credit to the extent of the amount "remaining in the public utility commission fund at the end of any year not appropriated and paid to the commission."

It will be noted that under both the old and new law, the assessment is to be certified to the auditor of state "on or before the first day of August next following." These words in the first enactment presumably refer to the effective date of the act. This is clarified in the amendment, as it says "on or before the first day of August next following and on or before the first day of August in each year thereafter."

Since the dominant features of the new act are the same as those of the former, I believe we are justified in applying the principle of construction that the provisions contained in an amendatory act which were in the original act are not to be considered as repealed and re-enacted, but are regarded as having been continued and undisturbed by the amendatory act.

McKibben v. Lester, 9 O.S. 627

State ex rel v. Cincinnati, 52 O.S. 419, 445

State ex rel Durr v. Spiegel, 91 O.S. 13

In Re Allen, 91 O.S. 315

In Re Hesse, 93 O.S. 230

1 Lewis' Sutherland, Statutory Construction,
(2nd Ed.) Sec. 237

In the case of State ex rel. v. Spiegel, *supra*, it was held:

"Where an amendatory act contains the entire section or sections as amended and repeals the original section or sections in compliance with Section 16, Article II of the Constitution, the amended sections are to be given the meaning they would have had if they had read from the beginning as they do as amended,

except where such construction would be inconsistent with the manifest intent of the legislature.”

The court said in the opinion at page 22:

“The presumption is that when the legislature adopts an amendment it intends to make some change in the statute amended, and when it reenacts the original statute as amended it has then made the only change it desired to make, leaving the rest of the provisions undisturbed.”

The same principle was announced in each of the other cases above cited.

In light of the above, it would appear that moneys assessed and collected under the former act and deposited in a special fund for the purposes stated in said act, should be included in “the public utilities commission fund” provided by the amendatory act, even though such fund was not in terms so designated under the former act. The moneys in each case are derived from the same sources and are to be applied to the same purpose. It is clearly the same fund. Your first question is therefore answered in the affirmative.

Coming to your second question, it seems to me that the principles above stated must again be applied. If the intention of the Legislature was to continue the same plan for financing the work of the utilities commission on a somewhat more liberal basis, it must be presumed to have known that there was or might be a balance in the fund as previously raised, and to have made the changes with the idea of using such balance through the system of credits which it set up. There is nothing in the amendment to negative that presumption or to suggest an opposite intention. This disposes, of course, of your third question.

Passing then to your fourth inquiry, as to the basis for determining the amount of the credits to be applied in reduction of the assessments to be made against the railroads and public utilities, we must examine the provisions of the amendatory act in order to discover the intention of the Legislature.

It is provided the commission shall annually certify to the auditor its apportionment of the *entire* sum of two hundred and seventy-five

thousand dollars; that the auditor shall certify such assessment to the treasurer, who shall proceed to collect the same, and pay the same into the special fund above referred to; then follows in the same paragraph, and separated only by a semi-colon, a provision **that if there be a balance** in said fund at the end of any year "not appropriated and paid to the commission for the purposes aforesaid", the auditor shall credit such balance to the respective utilities as against their assessment for the *ensuing* year, and thereby the *assessments* for such ensuing year shall be reduced.

The latter provision making it the duty of the auditor to make such credit and reduction must be read as a modification and limitation on the duty imposed by the earlier language, which read by itself would require him to certify the full sum of two hundred and seventy-five thousand dollars annually to the treasurer, and the treasurer to collect that full sum. The provision relative to the crediting of this balance might well have been introduced by the words "except" or "provided". This interpretation seems to me the only possible one **that can be arrived at, and it gives to** the language used by the Legislature its natural construction and plain meaning.

Accordingly, still following our proposition that the amendment under consideration continued the same method, and that the special fund remained unchanged, it became the duty of the utilities commission, on or before August 1, 1943, to apportion to the railroads and utilities the full sum of two hundred and seventy-five thousand dollars and to certify the apportionment to the state auditor, this notwithstanding the fact that the new law only became effective on July 26, 1943. Whether or not it became the duty of the auditor to ascertain what if any balance remained in the special fund as of the 31st day of December, 1942, and to reduce the sum of two hundred and seventy-five thousand dollars by the amount of such balance and to certify such reduced amount to the treasurer for collection, is now academic, inasmuch as I have been advised that the full sum of two hundred and seventy-five thousand dollars was in fact assessed for the year 1943, and certified to the treasurer for collection. Accordingly **the whole amount remaining in the public utilities fund at the end of the year 1943, including the balance carried over from the special fund at the close of 1942, would constitute the credit to be applied in making the assessment for the year 1944.**

It was the manifest intention of the Legislature to provide somewhat

more liberally for the annual needs of the commission, but at the same time to prevent the accumulation of a large balance in the fund which would result from the *arbitrary assessment and collection* from the utilities of the maximum amount allowed.

Your fifth question as to the effect of the appropriation act for the current biennium may properly be considered in this connection as having a possible bearing on the basis for determining the "amount remaining in said fund".

The words "not appropriated and paid to the commission" may give rise to some uncertainty. It appears to me that "paid to the commission" must be interpreted as meaning rather the amount "paid out" of the fund, including the salaries paid to the members of the commission and all the other expenses of administering the various activities; in other words, as including all of the moneys actually drawn pursuant to proper vouchers and within the annual appropriation from the public utilities commission fund, and furthermore as including all proper encumbrances against such appropriation.

Giving the natural interpretation to the words "appropriated and paid", we must arrive at the conclusion that since the appropriation is merely the boundary line of possible expenditures, the balance "remaining in the fund" at the close of any year would be the amount unexpended and unencumbered, and that that should be taken as the credit to be applied by the auditor in determining the amount to be assessed for the "ensuing year". And in applying this rule, we must disregard the fact that the appropriation is for the biennium and that moneys appropriated for and not spent during the first year are available for expenditure during the second. The statute under consideration does not, in my opinion, deal with appropriations, biennial or otherwise, except as they are incidental to, and a basis for, allowable expenditures.

Coming to your sixth question, whether the assessments made under Section 606, General Code, as of August 1st of any year, are to be construed as providing funds for expenditures within the year when levied, or for the next succeeding year, I note that the same question was propounded to one of my predecessors, as shown by 1921 Opinions of the Attorney General, p. 486. The then Attorney General did not specifically answer the question, his comment thereon being as follows:

“As to your third question, it is difficult to avoid ambiguity of expression in dealing with it, or even, may be remarked, in stating it. It is believed that the most accurate way to put the answer is to say that the assessments are not levied for any period of time whatsoever; they are simply levied. In respect of the uses to which the revenue is to be applied it may be said, of course, that the assessments are ‘for the year’ succeeding their collection, inasmuch as that is the year in which they will be applied to the support of the commission. From the point of view of the basis of apportionment, they are, of course, levied for the year for which report is made as prescribed by the commission, which, as stated in the commission’s letter, is the calendar year.”

By not answering the question directly, it may be inferred that he regarded it as of no practical import, with which conclusion one could agree. If it be contended that the assessment for a given year, though collected within that year and in the fund at the close of that year, is to provide for the following year, then under the rule laid down in the statute as to a credit on the assessment to be levied in the ensuing year, the auditor would find the fund up to or near the limit and it would be impossible to levy an assessment in any substantial amount, and the purpose of the law would be defeated. It appears to me that the more substantial conclusion would be that the assessment for a given year, even though it may not be collected until late in the year, really furnishes the basis for the appropriation for that year, although a portion of the money to cover the appropriation may not then be in the treasury, but merely anticipated to come in.

This would avoid the practical difficulty which I have suggested in the case of the other alternative. It would, in my opinion, be consistent with the language of the usual appropriation act, such as found in the appropriation for 1943-1944, where it is provided in Section 1, House Bill 227:

“The sums set forth herein designated ‘total personal service’, ‘total maintenance’, ‘total subsidies’ and ‘total additions and betterments’, for the purposes therein specified, are hereby appropriated out of any moneys in the state treasury not otherwise appropriated. Appropriations for departments, divisions, bureaus, institutions, offices, and other agencies and bodies, for the uses and purposes of which, or of any activity or function thereof, including the audit by the auditor of state of the accounts and records of any such departments, division, bureau, institution, office, agency, body or activity, or function, specific funds in the

state treasury are provided by law, are hereby made from such specific funds in so far as such funds are subject by law to appropriation and expenditure for the purposes herein mentioned, and to the extent that the moneys to the credit of such specific funds on the day when this act shall take effect *or which may be credited thereto prior to December 31, 1944*, shall be sufficient to satisfy such appropriations. Unless otherwise provided by law, *any sums necessary to supply the balance of such appropriations are hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund, not otherwise appropriated; * * **"

(Emphasis added.)

This language clearly means that the state intends to provide for the needs of its several departments and agencies whether the specific funds designed for their support have or have not immediately the moneys required to cover the appropriation. At the same time, as in the present case, means have been provided by law whereby revenues may reasonably be anticipated to come into the treasury to meet these specific needs.

Answering your question as to when an assessment made pursuant to Section 606, General Code, may be considered delinquent so as to be subject to certification to the Attorney General for collection, I note that the statute in question makes no provision as to the time within which such assessments are payable. But the fact that the auditor is required to certify them to the treasurer who is specifically required to collect the assessments, leads me to the conclusion that they are due on demand made by the treasurer, and that he would be governed by Section 20 of the General Code, reading in part as follows:

"When an officer or agent of the state comes into possession of a claim due and payable to the state, he shall demand payment thereof, and on payment have the amount duly certified into the state treasury. If he fails to collect such claim within thirty days after it comes into his possession, he shall certify it to the auditor of state, specifying the transaction out of which it arose, the amount due, the date of maturity, and the time when payment was demanded. * * *

It then becomes the duty of the auditor, under Section 268, General Code, to certify such claims to the Attorney General for collection.

Specifically answering your question, it is my opinion:

1. The fund arising from the assessments made upon railroads and

public utilities pursuant to Section 606, General Code, prior to its amendment in Amended Substitute Senate Bill No. 174 of the 95th General Assembly, is not affected by said amendment, but continues under said amendment as the "public utilities commission fund" mentioned therein.

2. The balance in such original fund at the close of the year 1942 was properly carried into the fund designated in the amendatory act as the public utilities commission fund, and was to be considered in determining the credit to be applied to assessments for the ensuing year. If not so credited on the assessment levied in 1933, such balances would be carried over to the assessment to be levied in 1944.

3. In determining the credit under Section 606, General Code, to be applied in reduction of the assessments to be levied against railroads and public utilities in any year, such credit should be the amount remaining unexpended and unencumbered in the public utilities commission fund at the close of the next preceding year.

4. The biennial appropriation made by the legislature has no bearing on the determination of the credit to be applied by the auditor of state in levying the assessments provided for by Section 606 of the General Code.

5. The assessments against railroads and public utilities made under Section 606, General Code, on or before August 1st of each year, are to be considered as providing funds for the year then current, for maintaining and administering the public utilities commission.

6. Assessments made under Section 606, General Code, and certified to the treasurer of state for collection, if not collected within thirty days shall be certified back to the auditor of state, as provided in Section 20, General Code, and said auditor is required by Section 268, General Code, to certify such claims to the Attorney General.

Respectfully,

THOMAS J. HERBERT

Attorney General