BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Metropolitan St. Louis Sewer District,	)	
	)	
Complainant,	)	
	)	Case No. WC-2007-0040
v.	)	
	)	
Missouri-American Water Company,	)	
	)	
Respondent.	)	

MISSOURI-AMERICAN WATER COMPANY'S
RESPONSE IN OPPOSITION TO
MOTION FOR SUMMARY DETERMINATION OF
METROPOLITAN ST. LOUIS SEWER DISTRICT

Is it reasonable to require Missouri-American Water Company ("MAWC") to give away information about its customers' water usage ***for free*** – information that costs MAWC and its ratepayers $1.8 million per year to collect from meters that cost $35 million to install throughout St. Louis County?

That is the issue in this case, and that is the issue Metropolitan St. Louis Sewer District ("MSD") consistently and completely ignores in its Motion for Summary Determination ("Motion"). Nowhere in its Motion or Suggestions in Support of its Motion ("Suggestions") does MSD attempt to explain the most important words in §249.645.1 RSMo (the "Statute"): "upon reasonable request." In fact, MSD writes this language out of the Statute.[1]

[1] In its first quote of the Statute, MSD purposefully deletes the crucial language: "[a]ny private water company...shall...make available to such sewer district its records and books so that such sewer district may obtain therefrom such data as may be necessary to calculate the charges for sewer service." (Suggestions at 1). The statute actually reads: "Any private water company, public water supply district or municipality supplying water to the premises located within a district shall, ***upon reasonable request***, make available to such sewer district its records and books so that such sewer district may obtain therefrom such data as may be necessary to calculate the charges for sewer service" (emphasis supplied).

MSD's refusal to address the meaning of "upon reasonable request" is understandable for a number of reasons, including the following:

- For years, MSD has been paying a fee to acquire water usage data from MAWC pursuant to agreement. By its own conduct, MSD has shown that it is reasonable for sewer districts to pay a fee for water usage data.

- The Missouri Public Service Commission (the "Commission") has approved the parties' agreements and several tariffs setting the amount of the fee that MSD must pay to acquire the data. MSD is now contending that the Commission violated the Statute by approving the charging of a fee. In effect, MSD is asking the Commission to rule that the Commission acted illegally in approving a fee.

- MAWC provides usage data to other sewer districts in Missouri for a fee. None of these districts has ever contested MAWC's right to charge a fee under the Statute.

- Principles of statutory construction require that every word in a statute be given meaning, and that interpretations having confiscatory results will not be allowed. MSD's motion would violate both principles – the words "upon reasonable request" are read out of the Statute, and the result would be the confiscation of costly MAWC property without compensation.

As a matter of law, MAWC has a right to charge a fee to sewer districts that request water usage data. MSD's Motion should be denied, and MAWC respectfully requests that the Commission enter an order ruling that MAWC has a right to charge a fee for the data.

STATEMENT OF FACTS

Because the Factual Background submitted in MSD's Suggestions omits a substantial number of critical facts, MAWC herein provides a more complete Statement of Facts.

In June 1993, MAWC (f/k/a St. Louis County Water) and MSD entered into an agreement under which MAWC would provide water usage data to MSD for a fee (the "1993 Agreement," attached hereto as Exhibit 1). The 1993 Agreement stated that "Company and MSD desire to enter into a contract detailing the terms and conditions under which the aforementioned information can be provided by Company to MSD, subject to the approval of" the Commission. *1993 Agreement* at 1-2. The purpose of the 1993 Agreement, as stated in the Commission's subsequent order of approval, was to allow MSD "to use the information to develop a new billing procedure for residential sewer service based on water usage rather than a flat rate," which had previously been used. *Order Approving Agreement and Tariff*, Case No. WO-93-349 at 1, attached hereto as Exhibit 2.

The parties further agreed that the "price to be charged to MSD by Company for providing the aforementioned information shall approximate 50% of Company's cost of obtaining the necessary data[2] and shall be set by rate tariff attached hereto as Exhibit 'A' which must be approved by the Commission." *1993 Agreement* at 4. The tariff proposed by the parties and approved by the Commission was $1.24 per residential customer per year: "This rate is available to the Metropolitan St. Louis Sewer District, under the terms and conditions of the contract on file with" the Commission. (1993

[2] The reason for the 50% cost sharing is clear – MAWC reads each residential customer's meter four times per year, and MSD needs two reads in order to establish a customer's winter quarter usage, on which MSD bases its rates.

Agreement, Exhibit A/Original Sheet RT 14.0). The term of the 1993 Agreement was from July 1, 1993 to July 1, 1995, to continue from year to year thereafter subject to termination by either party on 30 days notice.

On August 10, 1993, the Commission issued its Order Approving Agreement and Tariff. The Staff Memorandum stated that the $1.24 per residential customer rate was "based on one half the cost of providing two meter readings for a residential customer." *Staff Memorandum*, Case No. WO-93-349 at 1, attached hereto as Exhibit 3.

MAWC filed a supplemental application on December 30, 1993 requesting that the Commission approve an amendment to the 1993 Agreement, in order to provide MSD with additional water usage information. MSD had "determined that the limited winter usage data being provided for residential customers [was] inadequate for equitable billing." *Order Approving Amended Agreement*, Case No. WO-93-349, January 25, 1994 at 1, attached hereto as Exhibit 4. The Commission approved a new tariff on February 25, 1994, which provided that non-residential and residential multi-family water usage data and customer billing information could be acquired by MSD for $0.622 per meter reading. *Original Sheet RT 16.0*, attached hereto as Exhibit 5.

The rates charged pursuant to Sheets RT 14.0 and RT 16.0 were changed during the course of MAWC rate cases as of January 9, 1997 and as of January 1, 1998. *Third Revised Sheets RT 14.0 and 16.0*, attached hereto as Exhibit 6. The new rates were $1.31 per residential customer per year and $0.655 per meter reading for non-residential and multi-family customers.

Prior to 1999, the Statute applied only to public sewer districts created under the provisions of §§249.430 - 249.660 RSMo. An amendment in 1999 made the Statute

applicable also to sewer districts "established pursuant to article VI, section 30(a) of the Missouri Constitution" – that is, MSD. Accordingly, in 1999, the following became applicable to MSD:

> "Any private water company, public water supply district or municipality supplying water to the premises located within a district shall, **upon reasonable request**, make available to such sewer district its records and books so that such sewer district may obtain therefrom such data as may be necessary to calculate the charges for sewer service" (emphasis supplied).

However, in 1999, MSD did not assert that MAWC was now required to provide the usage information to MSD for free. To the contrary, as was reasonable, MSD continued to pay a fee for the usage data: $444,059.91 in 1999, $445,415.75 in 2000, and $447,830.09 in 2001. *Affidavit of Thomas M. Deters* ("Deters Affidavit"), attached hereto as Exhibit 7, ¶ 3.

Not only did MSD continue to pay a fee after the 1999 statutory amendment, it entered into ***a new agreement*** with MAWC in February 2002 (the "2002 Agreement," attached hereto as Exhibit 8), again agreeing to pay 50% of MAWC's costs in collecting water usage data from their joint customers. The 2002 Agreement is virtually identical to the 1993 Agreement, with certain changes in the type and timing of the data requested and the billing procedures therefor. The term of the 2002 Agreement was from December 1, 2001 to December 1, 2003, to continue from year to year thereafter subject to termination by either party on 30 days notice.

On April 9, 2002, the Commission issued its Order Approving Agreement and Approving Tariff. *Order Approving Agreement and Approving Tariff*, Case No. WO-2002-431, attached hereto as Exhibit 9. Two new tariff sheets were also approved for service effective April 11, 2002. Third Revised Sheet 14.0 was cancelled and replaced

by Fourth Revised Sheet 14.0, which now provided: "Reserved for future filing." Third Revised Sheet 16.0 was also cancelled and replaced by Fourth Revised Sheet 16.0, which provided: "Availability: This rate is available to The Metropolitan St. Louis Sewer District, for all water usage meter reading data and customer billing information. Rate: $.54 per account read. This rate is available to the Metropolitan St. Louis Sewer District, under the terms and conditions of the contract on file with the Missouri Public Service Commission." *Fourth Revised Sheet RT 14.0 and Fourth Revised Sheet RT 16.0*, attached hereto as Exhibit 10. Accordingly, there was no longer any rate distinction between residential reads on the one hand, and non-residential and multi-family reads on the other hand. All reads would be charged at $0.54 per read.[3]

MSD paid the following in annual fees to MAWC after executing the 2002 Agreement: $701,860.68 in 2002, $759,823.74 in 2003, $756,194.40 in 2004,[4] $754,900.56 in 2005, and $766,930.14 in 2006.[5] *Deters Affidavit*, Exhibit 7, ¶ 3.

Near the end of 2003, the parties entered into negotiations regarding a revised agreement, and exchanged correspondence agreeing to terminate the 2002 Agreement. See *Correspondence*, attached hereto as Exhibit 11. But the parties continued to abide by the terms of the 2002 Agreement pending the execution of a new agreement. MSD still pays $0.54 per read for the usage data.[6]

---

[3] The $0.54 per read rate was "backed into" in an attempt to approximate the 50 percent of meter reading costs that MSD would pay each year. (*See Correspondence dated February 18, 2004*, attached hereto as Exhibit 12.)

[4] In 2004, in connection with its rate case, MAWC submitted a revised tariff to the Commission for a flat annual rate of $760,000 for the usage data, based on MSD's payment of $759,823.74 for the data in 2003. MAWC withdrew the tariff after MSD objected.

[5] Because the fees for calendar year 2006 have not all been paid yet, $766,930.14 represents the amount invoiced to MSD for water usage data.

[6] The $0.54 tariff is still in effect. This rate was approved by the Commission on April 9, 2002, in Case No. WO-2002-431, and MAWC's tariff sheet, P.S.C. Mo. No. 6, Fourth Revised Sheet RT 16.0 was approved for service effective April 11, 2002. According to §386.270 RSMo, "all rates, tolls, charges, schedules and joint

SUMMARY DETERMINATION

The Missouri Rules of Civil Procedure do not apply to Commission proceedings. *Johnson v. Missouri Board of Nursing Administrators*, 130 S.W.2d 619, 626 (Mo. App. 2004) ("The rules of civil procedure by their very terms of promulgation apply only to civil actions in judicial courts"). Motions for summary determination before the Commission are permitted and governed by 4 CSR 240-2.117.

ARGUMENT

I. "Upon Reasonable Request"

Contrary to well-established Missouri law regarding principles of statutory construction, MSD reads the words "upon reasonable request" out of the Statute. As the Missouri Supreme Court has said:

> It is presumed that the legislature intended that every word, clause, sentence, and provision of a statue have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.

Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993). *See also State ex rel. Killingsworth v. George*, 168 S.W.3d 621, 625 (Mo. App. E.D. 2002) ("It is presumed that every word, clause, sentence and provision of a statute have effect and that idle verbiage or superfluous language was not inserted into a statute"). In fact, in one of the cases cited by MSD in its brief, *State ex rel. Womack v. Wolf*, 173 S.W.3d 634, 638 (Mo. banc 2005), the Missouri Supreme Court clearly stated

---

rates fixed by the commission shall be in full force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." The Commission has not found the tariff unlawful or unreasonable, so MAWC's tariff sheet, P.S.C. Mo. No. 6, Fourth Revised Sheet RT 16.0, remains in full force. MSD's argument that the tariff is not in effect was rejected by the St. Louis County Circuit Court, which dismissed MSD's petition for declaratory judgment regarding MAWC's right to charge a fee for the data for lack of jurisdiction. *St. Louis County Circuit Court Judgment of Dismissal*, Cause No. 05CC-003671, April 24, 2006 attached hereto as Exhibit 13.

that each "'word, clause, sentence and section of a statute should be given meaning.' Courts will reject an interpretation of a statute that requires ignoring the very words of a statute."

MSD's interpretation of §249.645.1 RSMo should be rejected because it ignores the very words of the Statute – "upon reasonable request." These words are not "idle verbiage or superfluous language," and must be given effect.

The effect given to the words should be the effect given to them by MSD, MAWC and the Commission for years: MAWC may charge a fee in connection with the provision of the water usage data.

MSD's own legal counsel has acknowledged in Commission proceedings that MAWC has a right to charge a fee under the Statute, because the charging of a fee is reasonable. For example, at an April 19, 2004 hearing on MAWC tariffs, MSD's attorney Paul S. DeFord stated: "The company [MSD] is statutorily entitled to the data that we're seeking here upon reasonable request. And I think that it's appropriate to compensate the company [MAWC] for that data ... ." *In the Matter of Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, Case No. WR-2003-0500, p. 2904 of transcript, attached hereto as Exhibit 14. Again, DeFord said: "We'd love to have it for free, but I do think a reasonable request would include compensation to the company." *Id.* at 2905-2906. Later in the hearing, Commissioner Connie Murray had the following exchange with Randy Hayman, MSD's General Counsel:

> COMMISSIONER MURRAY: And the history is that there has been a contractual agreement including a fee for doing so?

> MR. HAYMAN: That's correct. That's correct. And as long as it's reasonable, we're in line with that.

Id. at 2911.

These acknowledgements by counsel are reinforced by internal MSD documentation. For example, Theresa Bellville, MSD's Assistant Director of Finance, stated in a November 19, 2003 e-mail: "Our legal counsel has advised us that since the Statute does not prohibit them from charging us [for] the data it is assumed they can charge us a reasonable amount." *MSD Bates No. 00407*, attached hereto as Exhibit 15.

The Commission's approval of the 1993 Agreement and 2002 Agreement, together with its approval of the relevant tariffs, show that the Commission also understood that MAWC was properly charging a fee for the water usage data. MSD's current contention that a charge violates Missouri law necessarily means that the Commission violated Missouri law in approving the charging of a fee..

In addition to ignoring words in the Statute, MSD's interpretation would violate the principle that statutory construction should not have confiscatory results. *See State ex rel. Jackson County v. Spradling*, 522 S.W.2d 788, 791 (Mo. banc 1975), *quoting Suburbia Gardens Nursery, Inc. v. County of St. Louis*, 377 S.W.2d 266, 271 (Mo. 1964) ("In determining the meaning of an ordinance or statute ... the courts generally seek to ascertain the intention of the lawmakers by giving words their ordinary meaning, by considering the entire act and its purposes, and by seeking to avoid unjust, absurd, unreasonable, confiscatory or oppressive results").

The result would certainly be confiscatory if MAWC and its ratepayers were forced to turn over usage data information for free to MSD. MAWC spends approximately $1.8 million annually to read the meters of its St. Louis County

customers and collect the water usage data. *Deters Affidavit*, Exhibit 7, ¶ 4. In addition, MAWC has spent approximately $35 million to install and maintain its meters throughout St. Louis County. *Deters Affidavit*, Exhibit 7, ¶ 4. MAWC reads the meter of each residential customer in St. Louis County four times per year. MSD needs at least two reads each year to obtain a measurement of a customer's water usage for the winter quarter (although MSD has requested and has been receiving more usage data than simply two reads per year for each customer). Accordingly, MSD obtains half the usage data each year that MAWC collects.[7] Requiring MAWC to give away its data for free would be a confiscation of its property.

Taking MAWC's proprietary information would not only be confiscatory, it would undermine the reason for the 50% cost-sharing arrangement between MAWC and MSD – benefit to the joint customers of both parties:

> The Staff has reviewed the Agreement that the Company submitted with its Application and does not object to the Commission authorizing the Company to enter into the Agreement with MSD. ... The Agreement is to the benefit of all affected parties. The Company benefits in that it is compensated for the meter reading service it provides for the MSD, which reduces the meter reading costs that are paid for by its customers. The MSD benefits in that it does not have to incur costs to read meters and perform duplicative

[7] This 50 percent cost sharing arrangement is reflected in both the 1993 Agreement and the 2002 Agreement. In addition, the Commission has acknowledged the arrangement numerous times in approving the two agreements and the relevant MSD tariffs. For example: "Staff states that the data furnished by the Company shows that the rate requested is based on one half the cost of providing two meter readings for a residential customer. ... The Commission is of the opinion that the revenue generated for Company from the proposed original tariff will offset the Company's own costs of meter reading, and will to that extent, benefit Company's customers." *Order Approving Agreement and Tariff*, Case No. WO-93-349, August 15, 1993, attached hereto as Exhibit 2. *See also Memorandum of Wendell R. Hubbs, Staff Recommendation Regarding Application for Approval of Agreement and Tariff*, Case No. WO-2002-431, April 2, 2002, attached hereto as Exhibit 16 ("Contained in the proposed Agreement is the provision that the Company will bill the MSD to recover certain monies, which are to represent 50% of the Company's meter-reading costs. ... This new recovery mechanism and rate [in the 2002 Agreement] will generate approximately $228,000 greater revenue than the existing MSD rates. This additional amount of revenue serves to bring the MSD's contribution to the meter reading costs to a figure that is more currently representative of approximately one-half of the Company's total meter reading costs.")

> reading functions for its billing system. The Company's customers who receive service from both systems benefit from the economies generated by not having to pay the costs of two meter-reading systems and benefit from having a more equitable sewer billing system.

Memorandum of Wendell R. Hubbs, Staff Recommendation Regarding Application for Approval of Agreement and Tariff, Case No. WO-2002-431, April 2, 2002, attached hereto as Exhibit 16. Currently, the revenue MAWC receives from MSD is "above-the-line" – that is, it serves to reduce MAWC's operating expenses and therefore reduces its revenue requirement and corresponding rates to customers. *Deters Affidavit*, Exhibit 7, ¶ 5. If that income stream stops because MSD no longer pays for the usage data, MAWC's revenue requirement, and rates to customers, would increase.[8] Furthermore, there is no guarantee that MSD would pass along its savings to its customers. In fact, MSD has refused to state that it would decrease its rates correspondingly. In response to data requests, MSD objected to and refused to answer the following question: "If MSD is successful in eliminating or reducing the charges it pays to MAWC for water usage data, will MSD pass those savings along to its customers by decreasing its rates?" *Response to Data Request No. 8*, attached hereto as Exhibit 17. Requiring MAWC to give away its usage data for free would cause MAWC's rates for water service to increase and would therefore force MAWC's ratepayers to subsidize MSD.

To the extent that the word "reasonable" as used in the Statute requires a definition, a dictionary should be consulted. See *Tendai v. Missouri State Bd. Of*

[8] Contrary to MSD's assertion, there is no "windfall" to MAWC from MSD's payment for the usage data. *Suggestions* at 9. MAWC's customers directly benefit from MSD's payments through a reduction in rates for water service. MSD's payment compensates MAWC for the information and service that MAWC provides.

Registration for the Healing Arts, 161 S.W.3d 358, 366 (Mo. banc 2006) ("When a term is undefined, the legislature is presumed to intend that the term be used in its plain and ordinary meaning according to the dictionary.") BLACK'S LAW DICTIONARY (5th ed. 1983) defines "reasonable" as follows: "Fair, proper, just, moderate, suitable under the circumstances. ..." In no way would it be "fair" or "proper" or "just" to require MAWC to give half its annual water usage data to MSD for free, after having spent $1.8 million each year to collect it and $35 million to install the necessary meters.

MSD's discussion of the meaning of the word "shall" in the Statute (Suggestions at 4-5) begs the question, because once again it leaves out the crucial words "upon reasonable request." MAWC "shall" make its records and books available, but only if MSD makes a "reasonable request" for them. As shown above, a reasonable request includes payment of a fee. Absent payment of a fee, which MSD has been paying and the Commission has approved for over 13 years, MAWC has no obligation to provide the water usage data.

Furthermore, MSD's assertion that presence of the word "shall" in a statute connotes an obligation misstates the law. The Missouri Supreme Court has held that "shall" does not necessarily impose an obligation unless the statute also prescribes the consequences for a party's failure to take the specified action. *See State v. Tisius*, 92 S.W.3d 751, 770 (Mo. banc 2002) ("Although the rule states that notice 'shall' be given to all parties, where a statute or rule does not state what results will follow in the event of a failure to comply with its terms, the rule or statute is directory [i.e., discretionary] and not mandatory"); *see also State ex rel. Fischer v.* Brooks, 150 S.W.2d 284, 285 (Mo. banc 2004) ("Substantial authority demonstrates, however, that the use of 'shall'

in a statute does not inevitably render compliance mandatory, when the legislature has not prescribed a sanction for noncompliance"); *Bauer v. Transitional School District of the City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003) ("Whether the statutory word 'shall' is mandatory or directory is primarily a function of context and legislative intent").

In the present case, because the Statute does not state "what results will follow in the event" MAWC does not make its books available to MSD, this factor tends to show that the Statute does not impose a blanket obligation on MAWC to provide the data. In addition, and more significantly, there is clearly no intent to impose an unconditional duty, because the Statute expressly conditions provision of the data upon the making of a "reasonable request" by a sewer district. And as the parties' and the Commission's course of conduct shows, a reasonable request includes payment of a fee.

Requiring payment of a fee does not allow a private water company to "hold such Data hostage," notwithstanding MSD's overheated protestation to the contrary. *Suggestions* at 6. The actual facts show that MAWC and MSD have worked amicably for over 13 years in the provision of water usage data, including for eight years after the Statute became applicable to MSD. The parties have agreed from the outset of their relationship that payment of 50% of MAWC's St. Louis County meter reading costs is a reasonable fee for provision of the data. There has never been a time when MAWC has held the data "hostage" by refusing to provide the data.

Indeed, MAWC provides water usage data for a fee to other sewer districts throughout Missouri under the Statute and to municipal water systems – including City

of Mexico, City of O'Fallon, City of Platte Woods, City of St. Charles, City of St. Peters, Duckett Creek Sewer District, East Central Missouri Sewer Authority, and Platte County Regional Sewer District. *Deters Affidavit*, Exhibit 7, ¶ 6. As the Statute contemplates, and as all these other sewer districts understand and agree, the charging of a fee for the data is appropriate.

MSD's "hostage" metaphor (Suggestions at 6) is particularly inapt in this case. Hostage situations occur when a wrongdoer seizes something of value from a person and holds it in order to extort a concession from the person. The present case does not involve a hostage situation – MAWC has not wrongfully seized property; MAWC has spent millions of dollars to collect the water usage data that MSD seeks. If MSD insists on using a metaphor, a more appropriate one might be theft – MSD is attempting to take MAWC's property without paying reasonable compensation for it.

In an attempt to locate some authority to bolster its position, MSD mischaracterizes the facts and holding of *Carpenter v. King*, 679 S.W.2d 866 (Mo. banc 1984). *Carpenter* has no relevance at all to the present case, as it involved the issue of whether the City of St. Louis could tax the State of Missouri absent express statutory authority to do so. Not surprisingly, the Missouri Supreme Court said no.

In *Carpenter*, a state statute (§144.380 RSMo) provided that the Director of Revenue "may file for record in [a county] recorder's office" a notice of lien against a county resident owing a tax, interest or penalty. Another statute (§59.313 RSMo) provided in general that the St. Louis Recorder of Deeds could assess fees on the filing of instruments. When the Director refused to pay a fee for filing lien notices in the St. Louis City Recorder of Deeds office, the Recorder filed a declaratory judgment action.

The Cole County Circuit Court entered judgment for the Director of Revenue, and the Missouri Supreme Court affirmed.

The Supreme Court stated:

> It is well-established in this state that "[t]he state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." *Hayes v. City of Kansas City,* 362 Mo. 368, 241 S.W.2d 888 (1951), *quoting* 59 C.J. *Statutes* § 653 (additional citations omitted).
>
> The rule reflects the notion that the state is a unique entity in our society as the reservoir of the power and rights of all people. Narrowly construing the general provisions of a statute in favor of the state serves to preserve the state's sovereign rights and protect its capacity to perform necessary governmental functions. (citation omitted).

Id. at 868. The Supreme Court in *Carpenter* could see "no clear indication that the legislature intended to permit a fee" against the state. "We decline to permit an agent of a subdivision of the state to tax the state for performing a proper governmental function in the absence of express statutory authority." *Id.* The Court rejected the City's argument that the statute's silence regarding fees overcame the well-established law prohibiting the imposition of taxes on the state without explicit authority.

Carpenter, which stands for the proposition that a subdivision of the state may not tax the state without express authority, clearly has no relevance to the present case. Furthermore, the statutes at issue in each case are completely different – §144.380 RSMo contains no language similar to "upon reasonable request" and therefore is not helpful in determining what the phrase "upon reasonable request" means in the Statute.

Similarly, MSD makes no attempt at all in its Motion or Suggestions to shed light on the meaning of "upon reasonable request." In fact, MSD avoids the words as if they were radioactive. Its refusal to address the primary issue in the case should be taken for what it is – an acknowledgement that a reasonable request for water usage data includes payment of a reasonable fee for receipt of the data. The consistent practice of the parties both before and after 1999, and the Commission's approval of the parties' agreements and applicable tariffs, show that the Statute contemplates payment of a fee.

II. Affirmative Defenses

Affirmative defenses become relevant only after the complaining party has established its case in chief. In the context of a motion for summary judgment, that means accepting the truth of the allegations for the sake of argument:

> An affirmative defense seeks to defeat or avoid the plaintiff's cause of action, and avers that ***even if the allegations of the plaintiff's petition are taken as true,*** he or she cannot prevail because there are additional facts that permit the defendant to avoid the legal responsibility alleged.

Rodgers v. Threlkeld, 22 S.W.3d 706, 710 (Mo. App. W.D. 1999) (emphasis supplied). Accordingly, the following discussion assumes only for the sake of argument that MSD has established its case in chief; the discussion assumes that, even if MSD's allegations are taken as true, it still cannot prevail because of MAWC's affirmative defenses. (In reality, it is not even necessary to consider the affirmative defenses, because MSD has not established its case in chief).

MSD's argument concerning the viability of the affirmative defenses pleaded by MAWC is unavailing. First, as MSD itself recognizes in its Suggestions (at 3), the "rules of

civil procedure by their very terms of promulgation apply only to civil actions in judicial courts." *Johnson v. Mo. Bd. Of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App. 2004). To that extent, MSD's reliance on Missouri Rule of Civil Procedure 55.08 is irrelevant.

Furthermore, the purpose of Rule 55.08 is to ensure that the defendant's pleading does not "fail to inform the plaintiff of the facts relied on. ..." *ITT Commercial Finance Corp.* v. *Mid-America Marine Supply Corp*, 854 S.W.2d 371, 383 (Mo. banc 1993). MAWC's answer in fact informs MSD of the facts relied on in MAWC's affirmative defenses. As paragraphs 15 and 32 of MAWC's answer state: "that MSD has been paying for water usage data and customer billing information provided by MAWC since 1993; that Section 249.645.1 RSMo has been applicable to MSD since at least 1999; that MSD has continued to pay for water usage data and customer billing information provided by MAWC since 1999, when Section 249.645.1 RSMo became applicable to MSD; that the parties have shown, by their conduct, their understanding and agreement that it is reasonable for MSD to pay fees and for MAWC to charge fees for water usage data and customer billing information; and that MSD did not assert that it should receive MAWC's water usage data and customer billing information for free until 2004." MSD's payment of a fee for the water usage data since 1999, as pleaded, establishes the basis for the affirmative defenses of waiver, estoppel and laches.

In addition, MSD's Motion and Suggestions make clear that MSD understands the nature of the claimed affirmative defenses of waiver, estoppel and laches. MSD sets forth extensive arguments (*Suggestions* at 8-10) attempting to explain why its payment of a fee since 1999 does not constitute waiver, estoppel or laches. For example, MSD states: "Foregoing (sic) the added benefit of another party defraying one's own collection costs

and expenses, does not constitute the detrimental reliance necessary to invoke the waiver doctrine." *Suggestions* at 9. "For similar reasons, the doctrine of estoppel must fail as a matter of law. ... The past agreements between the parties [in which MSD agreed to pay a fee] have provided MAWC with an additional windfall of defraying costs that would exist with or without a statutory obligation to provide Water Usage Data to MSD." Suggestions at 9-10. "Because MSD could have been receiving Data from MAWC free of charge pursuant to MAWC's statutory obligation under Section 249.645.1, MSD's delay in the assertion of its claim was a benefit to MAWC rather than a detriment." *Suggestions* at 10.

Accordingly, it is clear that the factual basis for the affirmative defenses of waiver, estoppel and laches has been properly pleaded, and that MSD has been informed of such factual basis. To the extent that MSD desires that the factual basis be inserted in paragraph 2 of MAWC's affirmative defenses, MAWC respectfully requests that the Commission grant leave to amend paragraph 2 of the affirmative defenses by interlineation by inserting the words "on the grounds" at the end of paragraph 2 and then inserting the text from paragraphs 15 and 32 quoted above.[9]

A. Waiver

Contrary to MSD's assertion, a waiver does not require detrimental reliance on the part of the party asserting it. MSD conflates the law of waiver into the law of estoppel,

[9] As a result of the interlineation, paragraph 2 of the affirmative defenses would read: "In further answer and by way of affirmative defense, MAWC states that the doctrines of waiver, estoppel and laches preclude MSD from claiming that Section 249.645.1 RSMo requires MAWC to provide water usage data and customer billing information to MSD free of charge on the grounds that MSD has been paying for water usage data and customer billing information provided by MAWC since 1993; that Section 249.645.1 RSMo has been applicable to MSD since at least 1999; that MSD has continued to pay for water usage data and customer billing information provided by MAWC since 1999, when Section 249.645.1 RSMo became applicable to MSD; that the parties have shown, by their conduct, their understanding and agreement that it is reasonable for MSD to pay fees and for MAWC to charge fees for water usage data and customer billing information; and that MSD did not assert that it should receive MAWC's water usage data and customer billing information for free until 2004."

which does require detrimental reliance. MSD's confusion is shown by its quote from a 1959 Missouri Court of Appeals case (*Suggestions* at 8): "In order to establish a waiver ***based upon estoppel*** it is essential that the party asserting it show that he has done or omitted to do some act or changed his position to his detriment in reliance upon some representation or conduct of the person against whom the waiver is sought." *Conservative Federal Sav. And Loan Ass'n v. Warnecke*, 324 S.W.2d 471, 481 (Mo. App. 1959) (emphasis supplied).

The Missouri Supreme Court discussed the distinction between the two defenses in a 1989 case:

> To state the obvious, waiver and estoppel are different legal doctrines.
>
> Waiver involves the act or conduct of one of the parties to the contract[10] only. An estoppel involves the act or conduct of both parties to a contract. A waiver ... involves both knowledge and intent. Estoppel may arise when there is no intent to mislead. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position. An estoppel always involves this element.
>
> ***
>
> *Goffe* [*v. National Surety Co., 321 Mo. 140, 9 S.W.2d 929, 938 (1928)*] lies at the heart of the confusion by proclaiming that prejudice is an element of waiver. Prejudice is an element of estoppel. Prejudice plays no part in long-accepted definitions of waiver; it is the voluntary relinquishment of the right to rely on the contractual provision which forms the basis of the waiver. Insofar as it infers that prejudice is an element of waiver, *Goffe* is incorrect.

Brown v. State Farm Mutual Automobile Insurance Company, 776 S.W.2d 384, 387-88 (Mo. banc 1989).

---

[10] Waiver applies to rights granted not only by contract, but also by law. *See, e.g., Sheehan v. Northwestern Mut. Life Ins. Co.*, 103 S.W.3d 121, 129 (Mo. App. E.D. 2002) ("It is a fundamental principle of law that one in possession of a right, conferred by law or contract, and *who has full knowledge of material facts* who does, or *fails to do,* something which is inconsistent with the existence of his right or of his intention to rely upon same, waives such right and is precluded from claiming anything by reason of it afterwards").

Accordingly, detrimental reliance is not an element of the doctrine of waiver. As stated in *Blake v. Irwin*, 913 S.W.2d 923, 935 (Mo. App. W.D. 1996): "Waiver and estoppel are separate doctrines. ... A waiver is the intentional relinquishment of a known right which may be implied from a party's conduct."

Here, MSD's conduct shows a clear and unequivocal purpose to relinquish any right to receive water usage data for free. As discussed in more detail above, the Statute has been applicable to MSD since 1999, but MSD has continued to pay MAWC a fee for water usage data since that time.[11] In addition, after 1999 MSD entered into the 2002 Agreement, in which MSD expressly acknowledged its obligation to pay for 50% of MAWC's meter reading costs, and expressly requested that the 2002 Agreement and relevant tariff be submitted to the Commission for approval. Moreover, MSD's counsel specifically acknowledged MAWC's right to charge a fee in proceedings before the Commission. Such conduct clearly shows a waiver on the part of MSD.

B. Estoppel and Laches

MSD correctly states the elements of estoppel and laches in its Suggestions, but erroneously asserts that MAWC has not detrimentally relied on MSD's long history of paying for acquisition of the water usage data. In sum, it contends that MAWC has not suffered because of MSD's failure to assert its alleged right to obtain the water usage data for free, but that MAWC actually has been the beneficiary of a "windfall."

There is no windfall to MAWC from MSD's payment of a fee for the data. As discussed above, the revenue paid by MSD serves to reduce MAWC's revenue requirement

[11] MSD is conclusively presumed to have known about the applicability of the Statute since 1999. *See Missouri Highway and Transportation Commission v. Myers*, 785 S.W.2d 70, 75 (Mo. banc 1990) ("Persons are conclusively presumed to know the law").

and therefore to reduce the rates paid by ratepayers. MAWC and its ratepayers have come to rely on this revenue stream for the past 13 years.

CONCLUSION

The Statute provides that a private water company shall make its books and records available to sewer districts "upon reasonable request." MSD's Motion attempts to write this language out of the Statute. By their long course of conduct, the parties and the Commission have shown that "upon reasonable request" means that MAWC may charge a fee for making available its records and books, as principles of statutory construction confirm. MSD's Motion should be denied.

Respectfully submitted,

MISSOURI-AMERICAN WATER COMPANY

By: /Kenneth Jones

Kenneth C. Jones, MBE#38498
727 Craig Road
St. Louis, MO 63141
kenneth.jones@amwater.com
(314) 996-2278 (telephone)
(314) 997-2451 (telefax)

RESPONSE OF MAWC TO MSD'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS

COMES NOW MAWC and for its Response to MSD's Statement of Uncontroverted Material Facts, states as follows:

1. Admit.

2. Admit, subject to the following: ¶ 3 of MSD's Complaint, referred to by MSD as support for this assertion of material fact, does not refer to "various agreements" between the parties, but only to the February 14, 2002 Agreement. To correct this deficiency, MAWC further states that that MAWC has been providing water usage data and customer billing information to MSD for a fee, pursuant to agreement, since 1993 (first agreement, between MSD and MAWC's predecessor St. Louis County Water Company, approved by the Commission on August 10, 1993; amended agreement approved by the Commission on January 25, 1994; subsequent agreement between MSD and MAWC approved by the Commission on April 9, 2002); that such agreements have been submitted for approval to the Commission, and have been approved by the Commission; that the Commission has issued tariffs and revised tariffs establishing the rate MSD must pay for receipt of such water usage data and customer billing information (tariff sheets and revised tariff sheets approved by the Commission on August 10, 1993; on February 25, 1994; as of January 9, 1997; as of January 1, 1998; and on April 9, 2002). ¶ 3 of MAWC's Answer; Agreements, tariffs and Commission orders attached hereto as Exhibits 1- 2, 4-6 and 8-10.

3. Admit, subject to the following: ¶ 4 of MSD's Complaint, referred to by MSD as support for this assertion of material fact, does not refer to "agreements" or "helping to defray costs"; ¶ 4 of MSD's Complaint simply states: "The Water Usage Data is accumulated through meter readings and estimates conducted by MAWC for MAWC's own billing purposes." To correct this deficiency, MAWC further states: MAWC has spent substantial amounts over the decades installing and maintaining its water meters, in addition to substantial amounts expended each year in operating costs

in order to collect the water usage data and customer billing information. ¶ 4 of MAWC's Answer; Affidavit of Thomas M. Deters, attached hereto as Exhibit 7, ¶ 4.

4. Admit.

5. Admit.

6. Admit.

7. Denied as incomplete. The parties terminated the agreement pending renegotiation, and have continued to abide by the agreement as MAWC continues to provide Water Usage Data and MSD continues to pay a fee for the Water Usage Data. ¶¶ 7, 9 and 10 of Complaint; correspondence attached hereto as Exhibit 11.

8. Admit.

9. Admit.

10. Admit.

11. Denied. MSD filed intervening litigation in the Circuit Court of St. Louis County, which the Circuit Court dismissed because jurisdiction lies with the Missouri Public Service Commission. ¶¶ 26 and 29 of Complaint; St. Louis County Circuit Court Judgment of Dismissal, attached hereto as Exhibit 13. The $0.54 tariff is still in effect. This rate was approved by the Commission on April 9, 2002, in Case No. WO-2002-431 (see Order Approving Agreement and Tariff, attached hereto as Exhibit 9), and MAWC's tariff sheet, P.S.C. Mo. No. 6, Fourth Revised Sheet RT 16.0 was approved for service effective April 11, 2002 (see tariff attached hereto as Exhibit 10. According to §386.270 RSMo, "all rates, tolls, charges, schedules and joint rates fixed by the commission shall be in full force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found

otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." The Commission has not found the tariff unlawful or unreasonable, so MAWC's tariff sheet, P.S.C. Mo. No. 6, Fourth Revised Sheet RT 16.0, remains in full force. MSD's argument that the tariff is not in effect was rejected by the St. Louis County Circuit Court, which dismissed MSD's petition for declaratory judgment regarding MAWC's right to charge a fee for the data for lack of jurisdiction. St. Louis County Circuit Court Judgment of Dismissal, Cause No. 05CC-003671, April 24, 2006, attached hereto as Exhibit 13.

12. MAWC admits that MSD has continued to pay MAWC for water usage data and customer billing information as per the Commission-approved tariff, but denies that the continued payment does not constitute a waiver.

Respectfully submitted,

MISSOURI-AMERICAN WATER COMPANY

By: /Kenn Jones/

Kenneth C. Jones, MBE#38498
727 Craig Road
St. Louis, MO 63141
kenneth.jones@amwater.com
(314) 996-2278 (telephone)
(314) 997-2451 (telefax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent electronically and mailed postage prepaid the 16th day of January, 2007, to:

Byron E. Francis
bfrancis@armstrongteasdale.com
E.W. Gentry Sayad
J. Kent Lowry
Jacqueline Ulin Levey
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740

Keith Krueger
keith.krueger@psc.mo.gov
Kevin A. Thompson
General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

and was mailed postage prepaid the 16th day of January, 2007, to:

Lewis R. Mills, Jr.
Public Counsel
Missouri Office of Public Counsel
P.O. Box 2230
Jefferson City, MO 65102-2230