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
POST-HEARING BRIEF

The unreasonableness of the stance taken by the Metropolitan St. Louis Sewer District ("MSD") in this complaint case was magnified at the March 7, 2007 hearing. Attempting to back-track on its long-standing practice of paying Missouri-American Water Company ("MAWC") and its ratepayers a fee for provision of water usage data, MSD now argues that:

- in adopting §249.645 RSMo, the Missouri legislature intended to force water companies and water districts to turn over the data for free, even though it costs millions to collect that information – in MAWC's case, $1.9 million in annual operating expenses, and $35 million over the years to install the meters;
- the Missouri Public Service Commission (the "Commission") violated §249.645 RSMo – that is, the Commission acted illegally – in 2002 when it approved an agreement and tariffs that required MSD to pay a fee for the water usage data; and
- MSD itself violated §249.645 – that is, acted illegally – in paying a fee for the water usage data.

In contrast to it current position for the purposes of this litigation are MSD's actions for more than a decade: MSD has voluntarily paid half of MAWC's meter reading costs in

St. Louis County, including $5 million since 1999, when §249.645 became applicable to MSD. And MSD's own attorneys are on record as acknowledging that MAWC has a right to a fee for the information.

The result currently sought by MSD is clearly unreasonable – it wants the Commission to conclude that MAWC, a private company, must do all the costly work to install and read meters while MSD, a government entity, gets the fruit of MAWC's labor for free. Surely the legislature did not intend this result.

Intent of the Legislature

The fundamental principle of statutory construction is determination of the intent of the legislature. Courts "generally seek to ascertain the intention of the lawmakers by giving the words used their ordinary meaning, by considering the entire act and its purposes, and by seeking to avoid unjust, absurd, unreasonable, confiscatory or oppressive results."[1] *State ex rel. Killingsworth v. George*, 168 S.W.3d 621, 623 (Mo.App. E.D. 2005).

When the language of a statute is clear, resort to rules of statutory construction is impermissible. "We have a duty to read statutes in their plain, ordinary, and usual sense. (citation omitted) Where there is no ambiguity, we cannot look to any other rule of construction." *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. 1996).

MSD contends that the language of §249.645 at issue in this case – "shall, upon reasonable request, make available" – is clear and unambiguous: "Simply put, the

[1] Avoidance of "unjust, absurd, unreasonable, confiscatory or oppressive results" is not a "vague concept" in statutory interpretation, as MSD asserts (Complainant's Post-Hearing Brief, p. 7). The most cursory of research reveals a multitude of Missouri cases discussing this basic starting-point of construction. *See, e.g., State ex rel. Fred Weber, Inc. v. St. Louis County, Mo. Bd. of Zoning Adjustment*, 205 S.W.3d 296, 299 (Mo.App. E.D. 2006); *In Interest of D.M.*, 849 S.W.2d 698, 699 (Mo.App. E.D. 1993); *ARO Systems, Inc. v. Supervisor of Liquor Control*, 684 S.W.2d 504, 508 (Mo.App. E.D. 1984); *Taylor v. McNeal*, 523 S.W.2d 148, 152 (Mo.App. 1975); *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934, 939 (Mo. 1960); *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 832, 835 (Mo. 1953).

language in the statute speaks for itself and does not call for a deeper level of analysis" ... (Complainant's Post-Hearing Brief, p. 2).

And according to MSD, what is the clear, unambiguous meaning of that language? "This phrase is nothing more than a reasonableness prescription as to the manner in which public sewer districts, such as [MSD], are required to request Data. ... For example, the statute *suggests* that MSD cannot make a request for voluminous amounts of information on short notice." (Complainant's Post-Hearing Brief, p. 1, emphasis supplied).

"Suggestions" are hardly indications of clarity, however. Furthermore, the words "reasonableness prescription as to the manner" – which do not appear in the statute – do not make the phrase "upon reasonable request" more clear, but less so. Who determines what the "manner" of the request is, or whether the "prescription" of that manner is "reasonable"? And why can't a reasonable "manner" include a reasonable fee? MSD begs the question, and does not explain why it is reasonable under §249.645 to force a water company or water district to turn over usage information for free.

But why does MSD refuse to admit that the language "upon reasonable request" is ambiguous and needs interpretation? Because that opens the door to the conclusion that a "reasonable request" includes payment of a reasonable fee for the information.

In fact, before this litigation, MSD acted reasonably by voluntarily agreeing to pay half of MAWC's costs to collect the data, because MSD needed half of MAWC's quarterly meter reads for its billing purposes (but actually has been receiving all the data). It is only when MSD unilaterally decided in 2004 that it did not want to pay for half the costs, even though it still wanted at least half the reads, that this litigation arose.

The long-standing practice of the parties, including the Commission, is a better indicator of the meaning of §249.645 than MSD's current arguments in the context of litigation. The parties' conduct since the enactment of §249.645 in 1999 is a significant aid in interpreting the intent of the statute. The Commission's approval of the 2002 agreement between MAWC and MSD, and accompanying tariffs, evidences the construction that the Commission has placed upon §249.645.[2] As the Missouri Court of Appeals stated in *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 182-183 (Mo.App. 1960): "Our courts consistently observe the principle that the construction placed upon a statute by a governmental agency charged with its execution and enforcement is entitled to great consideration and should not be disregarded or disturbed, unless clearly erroneous – particularly when that construction has been followed and acted upon for many years."

Similarly, MSD's practice for many years of paying a fee for the usage data is evidence of the reasonableness of such interpretation. One can analogize to the situation in which a court is called upon to interpret an ambiguous provision of a contract – the conduct of the parties is evidence of its meaning: "In a breach of contract action, where the terms of a contract are ambiguous and in dispute, we may consider the interpretation or

[2]Contrary to MSD's assertion during oral argument that the Commission had authority to approve the usage data agreement and accompanying tariffs only because "MSD agreed to the Commission's authority" (Transcript of March 7, 2007 Oral Argument, p. 80), the Application for Approval of the agreement (filed March 11, 2002, in Case No. WO-2002-431) clearly states the basis for the Commission's authority: "The statutory provisions under which MAWC makes this Application are §393.140 and §393.150, RSMo 2000. Section 393.140 gives the Commission general jurisdiction over and access to the company books and records, and §393.150 states in pertinent part: '393.150. **Commission may fix rates after hearing – stay increase – burden of proof.** Whenever there shall be filed with the commission by any ... water corporation or sewer corporation ... any new form of contract or agreement ... relating to ... any privilege ... the commission shall have, and it is hereby given, authority, ... to enter upon a hearing concerning the propriety of such ... form of contract or agreement ...; and after full hearing, whether completed before or after the ... form of contract or agreement ... goes into effect, the commission may make such order in reference to such ... form of contract or agreement ... or practice as would be proper in a proceeding ...' Case law indicates that the Commission may act upon such an application without a hearing under the file and suspend provisions of §393.150, if and when it so determines."

understanding placed upon the contract by the parties, as shown by their acts and conduct." *North Cent. County Fire Alarm System, Inc. v. Maryland Heights Fire Protection Dist.*, 945 S.W.2d 17, 20 (Mo.App. E.D. 1997). MSD understood that §249.645 contemplated payment of a fee, as it has paid over $5 million since 1999.

Clearly, the meaning of §249.645 is the same meaning that the Commission, MSD and MAWC have all given to the statute for the past eight years – that MSD should pay a fee for obtaining the data.

Such an interpretation is the only way "to avoid unjust, absurd, unreasonable, confiscatory or oppressive results." *State ex rel. Killingsworth,* 168 S.W.3d at 623. 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 $1.9 million annually to read the meters of its St. Louis County customers and collect the water usage data. In addition, MAWC has spent approximately $35 million to install and maintain its meters throughout St. Louis County. Requiring MAWC to give away its data for free would be a confiscation of its property.

To underscore the unreasonableness of its argument, MSD even contends that a charge would not permissible under §249.645 to reimburse MAWC's incremental costs – "expenses that MAWC would not otherwise incur in connection with its own necessary operations and data collection efforts" – to provide the data to MSD, however large those costs may be.[3] (Complainant's Post-Hearing Brief, p. 9).

Interpreted this way, §249.645 would result in an unconstitutional taking of MAWC's property without any compensation, which would violate another principle of

[3] This argument is so absurd that MSD itself feels the need to waffle on the issue – it offers to pay incremental costs "voluntarily," even though the statute does not require payment. (Complainant's Post-Hearing Brief, p. 9).

statutory interpretation – the legislature should not be presumed to have enacted unconstitutional laws. ("An act of the legislature carries a strong presumption of constitutionality. This Court resolves all doubts in favor of the procedural and substantive validity of legislative acts. Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored. An act of the legislature must clearly and undoubtedly violate a constitutional procedural limitation before this Court will hold it unconstitutional." *Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. 2006)). Section 249.645 should be interpreted in such a way that it is constitutional – that it provides for compensation.

Rules of Construction

MSD claims that §249.645 is unambiguous. Accordingly, there should be no resort to rules of construction. *Bosworth v. Sewell*, 918 S.W.2d at 777 (Mo. 1996) ("Where there is no ambiguity, we cannot look to any other rule of construction.").

Contrary to this principle, however, MSD proceeds to cite a different chapter, §250.233, in its attempt to construe §249.645.[4] This separate chapter applies to sewer services provided by a city, town or village, that is, municipal sewer systems, while §249.645 applies to sewer districts, including MSD. Section 250.233 states that a private water company or public water supply district "shall, at reasonable charge upon reasonable request, make available to such city, town or village its records and books so that such city, town or village may obtain therefrom such data as may be necessary to calculate the charges for sewer service."

[4] MSD and the Office of Public Counsel also refer to the Sunshine Law as having some sort of relevance to the interpretation of §249.645. Of course, MAWC is a private company and is not subject to the public records requirements. Furthermore, the Sunshine Law does not contain the language that is at issue in this case – "upon reasonable request." Accordingly, whether or not government entities are entitled to a fee for making copies of public records is unhelpful in this complaint case. Similarly, discovery rules governing production of documents do not contain the "upon reasonable request" language, and do not shed light here.

According to MSD, because the phrase "at reasonable charge" appears in §250.233 but not in §249.645, the legislature intended that *municipal sewer systems* must pay a fee for a water company's data, but also intended that *sewer districts* do not have to pay a fee for a water company's data.

Again, this would be an absurd and unreasonable result, which violates the primary rule of statutory construction. *State ex rel. Killingsworth* at 623 (Mo.App. E.D. 2005) (Courts "generally seek to ascertain the intention of the lawmakers by giving the words used their ordinary meaning, by considering the entire act and its purposes, and by seeking to avoid unjust, absurd, unreasonable, confiscatory or oppressive results.") There is no difference between a municipal sewer system on the one hand and a sewer district on the other hand that would justify requiring a fee from a municipal system but precluding a fee from a sewer district. MSD does not even attempt to offer an explanation, because there is none. Section 249.645 does not prohibit a fee, and it should not be interpreted to lead to such an absurd result.

Two statutes that are read *in pari materia* should be harmonized. *Preston v. State*, 33 S.W.3d 574, 579 (Mo.App. W.D. 2000). ("'This court presumes that statutes *in pari materia* are intended to be read consistently and harmoniously.' ... Thus, where two statutes concerning the same subject matter are unambiguous when read individually but conflict when read together, we will attempt to harmonize them and give effect to both. ... However, if they cannot be reconciled, the more specific will control over the more general." (citations omitted)). Assuming that §249.645 and §250.233 are *in pari materia*, a harmonious reading would require that a charge must be paid by sewer districts under §249.645 just as a charge must be paid by municipal systems under §250.233 – there is no basis in fact for requiring a charge of one but not requiring it of the other. Furthermore, if

the more specific language in §250.233 ("at reasonable charge") is deemed to control the two statutes, a charge should be applicable in both situations.

In summary, the language of §250.233 undermines MSD's position, because it shows that the legislature intended payment of a fee to water companies for provision of usage data.

CONCLUSION

The polestar of statutory interpretation is the intent of the legislature – what did lawmakers reasonably intend in adopting a statute? In this case, there is no reason, and MSD has offered none, why the Missouri legislature would intend to require a private water company to turn over its proprietary information for free to a sewer district – information that costs tens of millions of dollars in capital and operational costs to collect. It makes sense that there should not be a duplication of meter reading systems, but it makes no sense – it is beyond reason – that MSD should get a free ride on the substantial expense and labor invested by MAWC.

Legislative intent is reflected in the fact that for years, all the parties understood that it was reasonable under §249.645 to charge a fee. MSD has paid over $5 million for the data since §249.645 became applicable to it in 1999. The Commission has approved the parties' agreements and several tariffs setting the amount of the fee that MSD must pay to acquire the data. Moreover, 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 §249.645.

For these reasons and the reasons in MAWC's Answer, its Response in Opposition to Summary Determination, and its oral argument on March 7, 2007, and based on the

parties' Joint Stipulation of Facts, the motion for summary determination should be denied, and an order in favor of MAWC should be entered in MSD's complaint case.

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CERTIFICATE OF SERVICE

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