

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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

**STAFF'S POST-HEARING BRIEF**

COMES NOW the Staff of the Missouri Public Service Commission and, for its Post-Hearing Brief, states to the Missouri Public Service Commission as follows.

**I. Section 249.645 does not unambiguously require Missouri-American Water Company to provide meter-reading data to Metropolitan Sewer District at no charge.**

The statute at issue in this case, Section 249.645.1, RSMo<sup>1</sup>, provides, in relevant part:

Any private water company, public water supply district, or municipality supplying water to the premises located within a sewer 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.

The parties agree that this statute governs the relationship between Complainant Metropolitan St. Louis Sewer District (“MSD”) and Respondent Missouri-American Water Company (“Missouri-American”). The parties also agree that this statute requires Missouri-American to make available to MSD its meter-reading data, and that MSD must make a “reasonable request” therefor. MSD contends that the “plain, unambiguous, and mandatory”

---

<sup>1</sup> Unless otherwise indicated, all statutory references are to RSMo 2000, as currently supplemented.

language of the statute requires Missouri-American to make this data available to MSD at no charge. Missouri-American, on the other hand, contends that MSD's "reasonable request" must include the payment of a "reasonable charge" for the data it receives.

Section 249.645 was first enacted in 1969, and was amended in 1983, 1991, and 1999. The statute did not cover MSD until the 1999 amendment. However, the language quoted above has not changed since it was first enacted, nearly 40 years ago. It has always provided that a private water company must make its books and records available to a sewer district "upon reasonable request." It has never explicitly stated whether the private water company may impose a charge for providing data, or whether it must provide the data for free.

The parties who are affected by this statute have never had any doubt about its meaning, until Complainant MSD initiated the instant case. The sewer districts have uniformly understood that they were required to pay a reasonable charge for the data that the water company provided to them.

MSD itself executed agreements with Missouri-American in 1993 (before it became subject to the statute) and again in 2002 (after it became subject to the statute), by terms of which it agreed to pay a reasonable charge for the data that Missouri-American provided. And MSD clearly understood that it was obligated to do so.

MSD's assistant director of finance stated that MSD's legal counsel advised that since the statute does not prohibit Missouri-American from charging MSD for the data, MSD assumed that Missouri-American could charge a reasonable amount. MSD's attorney, Paul DeFord, stated in Missouri-American's 2004 rate case that he thought it was appropriate to compensate Missouri-American for the data, and that a "reasonable request" would include compensation for the

company. Randy Hayman, MSD's general counsel concurred, stating: "As long as [the fee for providing data] is reasonable, we're in line with it."

If MSD's own lawyers – who are paid to understand and interpret laws – understand the statute to authorize Missouri-American to charge a reasonable fee, how could the Commission find that it *unambiguously* prohibits Missouri-American from doing so?

Other sewer districts, who are governed by this law, also believe they are required to pay a reasonable charge for the data they receive from water companies. Missouri-American currently has contracts with Duckett Creek Sewer District, East Central Missouri Sewer Authority and Platte County Regional Sewer District, under which the sewer districts pay Missouri-American for the meter-reading data that Missouri-American provides.

Furthermore, in 2002, the Commission itself approved an agreement and tariffs that required MSD to pay a fee for the meter-reading data. Clearly, the Commission would not have done so unless it believed that Missouri-American was legally authorized to require MSD to pay for such data.

There is no evidence in this case, whatsoever, that, until this case arose, *anyone* had *ever* contended that a private water company could not charge a sewer district for the meter-reading data that the water company provides to them.

The way in which water companies and sewer districts have interpreted and applied the statute may not be proof of what the legislature intended when it enacted the statute. But it is certainly relevant to ascertaining the unambiguous meaning of the statute. If the meaning of the statute is unambiguous, as MSD contends, it is not possible that every single affected entity has – until now – understood it to mean something else. One cannot logically conclude that "the statute was unambiguous, but none of us has ever understood it in the last 35 years."

Section 249.645 clearly does not unambiguously prohibit Missouri-American from imposing a charge for the data it provides to MSD. The most that MSD can argue is that the statute is ambiguous, and that the Commission must turn to other means to interpret the legislative intent.

**II. MSD's construction of Section 249.645 is unjust and unreasonable, and would be confiscatory.**

The constitutions of both the United States and the State of Missouri prohibit the taking of private property for public use without just compensation<sup>2</sup>.

The meter-reading data that Missouri-American collects is its property. It is an asset and it is valuable, and Missouri-American has expended significant sums to acquire this asset. Missouri-American has spent \$35 million to install its meters throughout its water distribution system in St. Louis, and it spends \$1.9 million annually to collect the meter-reading data. This property cannot be constitutionally taken away from Missouri-American for public use without just compensation. MSD contends that it should be permitted to deprive Missouri-American of this property without giving any compensation.

The fact that this data may be viewed as a "sunk cost," or that the data has already been paid for, or that Missouri-American is required to obtain this data for its own operations, does not change the fact that the data is private property. A pharmaceutical company that has developed, manufactured and paid for a new drug, which it now holds in inventory, cannot be compelled to distribute the drug to patients at no charge, because the company would be deprived of private property without just compensation. An individual who uses his paid-for

---

<sup>2</sup> Amendment V to the U.S. Constitution includes the provision: "...nor shall private property be taken for public use without just compensation." Article I, Section 10 of the Missouri Constitution provides: "That no person shall be deprived of life, liberty or property without due process of law."

automobile in a seasonal business, but only in the summertime, cannot be compelled to let someone else use the automobile during the wintertime without just compensation, even if the owner then has no use for the automobile. Likewise, although the legislature can require Missouri-American to give the meter-reading data to MSD, it cannot require Missouri-American to do so without receiving just compensation.

The Commission does not have authority to determine that a statute is unconstitutional. But in this case, the Commission is required to construe Section 249.645 in order to render a decision. In such a situation, if there is any doubt about how the statute should be construed, the Commission should construe it in a way that is constitutional.

As Missouri-American has noted, when construing statutes, 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.”<sup>3</sup>

As noted above, MSD’s construction of Section 249.645 would result in a confiscatory result. In addition, it would result in an unjust and unreasonable result.

Both Missouri-American and MSD need the meter-reading data in order to correctly bill their clients for the services they provide. Under MSD’s proposal, Missouri-American would be forced to pay 100% of the cost of collecting this data; MSD would pay 0%. MSD has not suggested any reason why the legislature would desire such an allocation of the burden of collecting the data, and the Staff cannot think of any such reason. Why would the legislature wish to favor MSD over Missouri-American? There is no support for this interpretation in Section 249.645.

---

<sup>3</sup> See *State ex rel. Killingsworth v. George*, 168 S.W.3d 621, 623 (Mo. App. E.D. 2005).

MSD advances a rather esoteric and tortured argument to conclude that the Commission must look to the language of another statute, Section 250.233, which was enacted in 1983, to determine what the legislature intended in 1969, when it first enacted what has now become Section 249.645. MSD argues that because Section 250.233 specifically authorizes water companies to impose a reasonable charge for the meter-reading data that they provide to cities, towns, and villages, but since Section 249.645 does not specifically authorize such charges for the meter-reading data that they provide to sewer districts, that means that the legislature has specifically prohibited the water companies from doing so.

MSD's argument might have some merit, if it provided the only insight into the legislative intent, and were it not for the fact that the argument flies in the face of the fact that it results in an entirely unreasonable allocation of the cost of gathering the meter-reading data.

MSD's construction of the two statutes would result in treating municipal systems (under Chapter 250) in a different way than public sewer districts are treated (under Chapter 249). The municipal systems would have to pay Missouri-American or any other private water company for the meter-reading data, but Missouri-American would have to provide the data to MSD for free. What possible reason could there be for treating municipal systems differently, under Chapter 250, than public sewer districts are treated under Chapter 249? MSD has cited no reason why the legislature might have wished to discriminate against municipalities and in favor of public sewer districts, and the Staff knows of no such reason.

The Staff submits that it is much more reasonable to conclude that the legislature inserted the words "at reasonable charge" into Section 250.233 merely to make the meaning of Section 250.233, and not to change the meaning of Section 249.645. Those words are not meaningless in Section 250.233, because they emphasize the legislature's intent that a "reasonable request" may

include a requirement that the municipality pay a “reasonable charge.” And inserting those words in Section 250.233 does not in any way change the meaning of Section 249.645, which has always – until this case – been understood *by everyone* to authorize the imposition of a reasonable charge.

**III. The most reasonable construction of the legislature’s intent in enacting Section 249.645 is that it intended to permit Missouri-American to impose a reasonable charge for providing data to MSD.**

Both Missouri-American and MSD need the meter-reading data in order to properly bill their customers for the services they provide. If this data is not shared, then Missouri-American and MSD would both have to install water meters at every place where they provide service, and Missouri-American and MSD would both have to read the meters. There would be tremendous duplication of equipment and a tremendous duplication of meter-reading expense.

The Staff submits that the obvious reason the legislature enacted these statutes is to prevent this wasteful duplication of expense and effort. The Staff further submits that the obvious intent of the legislature was to ensure that there would be an equitable sharing of the cost of collecting this data that both the private water companies and the municipalities or sewer districts require. The Staff cannot think of any reason why the legislature would intend that these costs be “shared” by requiring Missouri-American to pay 100% of the cost to collect this data, while MSD would pay 0% of the cost to collect this data – especially where municipalities would be treated differently and might have to pay 50% of the cost to collect the data.

At page 10 of its Post-Hearing Brief, MSD said “the statute does not authorize the water company to force a sewer district to *subsidize* the procurement of this already-collected Data.” (Emphasis supplied.) And in its argument to the Commission, MSD said Missouri-American

was asking the Commission require MSD to *subsidize* the installation, maintenance, repairs and readings that Missouri-American *has to do anyway* to calculate its own customers' billing statements.”<sup>4</sup>

MSD tries to make it sound like these readings are something that Missouri-American must do anyway, and that it is therefore equitable for them to give the readings away to MSD at no charge. But these are also readings that MSD would otherwise “have to do anyway.” The Staff knows of no just reason to require Missouri-American to bear the full burden of obtaining these readings, when MSD has just as great a need for the data.

Furthermore, it is inaccurate to characterize the payments as a subsidy. It would be more apt to refer to the payments as an equitable sharing of the cost of collecting the meter-reading data.

MSD stated in oral argument that it “has been willing to pay a reasonable fee for the provision of the water usage data instead of pursuing costly litigation regarding the meaning of Section 249.645 up until this point.”<sup>5</sup> And that probably explains what has finally led to this litigation. MSD is willing to pay a “reasonable fee,” as its counsel, Jacqueline Levey stated in oral argument, and as Paul DeFord and Randy Hayman stated in the hearing before the Commission in 2002. But it is not willing to pay an “unreasonable fee.”

The Staff submits that Section 249.645 authorizes Missouri-American to impose only a *reasonable* charge for the data that it provides to MSD. It does not authorize an unreasonable charge. If Missouri-American seeks to impose an unreasonable fee, that should not be allowed. But the mere fact that the parties cannot agree on what charge is reasonable does not change the

---

<sup>4</sup> T-82, lines 15-22. Emphasis added.

<sup>5</sup> T-81, lines 10-18.



meaning of Section 249.645, and does not prohibit Missouri-American from imposing any fee at all.

Section 249.645 does not specify how the amount of a “reasonable fee” is to be determined, but then neither does Section 250.233. Missouri-American reads the meters of its customers four times a year. MSD only has use for two of those readings. It is therefore reasonable to conclude that Missouri-American should bear the full cost of obtaining the other two readings, if it does not provide the meter-reading data to MSD. For the two readings each year that both entities rely upon, Missouri-American and MSD make approximately equal use of the meter-reading data. It is therefore reasonable to conclude that Missouri-American and MSD should each bear one-half of the cost of obtaining those two readings. Thus, the Staff believes that it would be “reasonable” for Missouri-American to impose upon MSD a fee equal to about one-fourth of Missouri-American’s total annual meter-reading cost – which would include not only the salaries of the meter readers, but also a return of and a return on Missouri-American’s investment in meter-reading equipment.

The Commission should find that Missouri-American may impose a reasonable charge for the meter-reading data, and the parties should then attempt to negotiate the exact amount of this reasonable charge.

**IV. Even if Missouri-American is not permitted to charge a fee for providing raw data to MSD, it should be permitted to impose a reasonable charge for any work it does in making the data usable by MSD.**

If the Commission does accept MSD’s argument that Missouri-American must provide meter-reading data to MSD at no charge, the Commission should turn again to the language of Section 249.645. The statute requires only that Missouri-American “make available to [MSD]

its records and books so that [MSD] may obtain therefrom such data as may be necessary to calculate the charges for sewer service.”

It may thus be said that the statute requires Missouri-American only to open its records and to allow MSD to see the unmanipulated data. There is nothing in the statute that arguably compels Missouri-American to manipulate the data for MSD’s benefit. Accordingly, Missouri-American can charge whatever it chooses to charge for any manipulation that MSD requests. MSD can then either take the unmanipulated data at no cost,<sup>6</sup> or pay a reasonable fee to Missouri-American for the manipulated data.

**WHEREFORE**, the Staff submits its Post-Hearing Brief for the consideration of the Commission.

Respectfully submitted,

**/s/ Keith R. Krueger**

Keith R. Krueger  
Deputy General Counsel  
Missouri Bar No. 23857

Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-4140 (Telephone)  
(573) 751-9285 (Fax)  
[keith.krueger@psc.mo.gov](mailto:keith.krueger@psc.mo.gov)

### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 29th day of March 2007.

**/s/ Keith R. Krueger**

---

<sup>6</sup> This assumes, of course, that the Commission rules that MSD is entitled to receive the meter-reading data at no charge, which the Staff opposes.