BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

COMPLAINANT'S POST-HEARING REPLY BRIEF

The sole issue in this case is what the General Assembly intended by the phrase "shall, upon reasonable request, make available." This issue has been fully briefed by the parties and Complainant Metropolitan St. Louis Sewer District ("MSD") has already addressed each of the points raised in the Post-Hearing Briefs filed by Complainant Missouri-American Water Company ("MAWC"), the Office of the Public Counsel ("OPC") and the Staff of the Commission ("Staff").[1] However, a number of unfounded assumptions and erroneous statements asserted by both MAWC and Staff[2] in their Post-Hearing Briefs merit further comment.

I. Principles of Statutory Construction Underscore MSD's Interpretation of Section 249.645.

The primary rule of statutory construction is to ascertain the General Assembly's intent from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Wolff Shoe Co. v. Dir. of Rev.*, 762 S.W.2d 29, 31 (Mo. banc 1988). If a statute's language is clear and unambiguous, statutory construction is unnecessary.

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[1] MSD incorporates by reference the arguments and authorities set forth in its Motion for Summary Determination and Suggestions in Support, filed December 15, 2006; its Reply Brief, filed January 26, 2007; and its Post-Hearing Brief, filed March 19, 2007.

[2] Notably, Staff neglected to file any briefs in connection with MSD's Motion for Summary Determination.

Id. The standard used to determine whether the language is clear and unambiguous is "whether the statute's terms are plain and clear to one of ordinary intelligence." *Id.* The Commission cannot read words into the statute: "the plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." *Id.*

Section 249.645 states that MAWC "shall, upon reasonable request, 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." § 249.645, RSMo. The plain and ordinary language of that provision does not authorize MAWC to charge MSD a fee for gaining access to MAWC's books and records. Indeed, unlike the previous two sentences of the statute, which expressly permit MSD to "*establish, make and collect charges for sewer service*" and set forth the types of charges that MSD may set, the provision at issue in this proceeding does not similarly permit MAWC to a charge a fee for access to its data. As a result, the language of Section 249.645 unambiguously precludes MAWC from charging MSD a fee for access to its data and is not subject to construction.

Acknowledging that Section 249.645 does not expressly authorize MAWC to charge MSD a fee for gaining access to MAWC's books and records, both MAWC and Staff assert that the phrase "upon reasonable request" must mean "at reasonable charge" and then balk at MSD's reliance on statutory construction principles to disprove their manipulation of the statutory language. Their transparent attempts to avoid MSD's arguments are unpersuasive.

First, neither MAWC nor Staff can avoid the fact that their interpretation of Section 249.645, which equates "upon reasonable request" with "authority to charge a fee," renders the "at reasonable charge" language found in Section 250.233 superfluous, which is contrary to

statutory construction principles. *See, e.g., Hyde Park Housing Partner v. Dir. of Rev.*, 850 S.W.2d 82, 84 (Mo. 1989) ("It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.").

Notably, MAWC ignores this argument altogether. Staff argues that the phrase "at reasonable charge" was simply added to Section 250.233 to "emphasize the legislature's intent that a 'reasonable request' may include a requirement that the municipality pay a 'reasonable charge.'" Staff's argument assumes that the General Assembly believed that the phrase "upon reasonable request," as used in Section 249.645, required clarification or emphasis. Yet if that were the case, why wouldn't the legislature have similarly amended Section 249.645? Indeed, as set forth in MSD's Post-Hearing Brief, House Bill 371, which enacted Section 250.233, also amended the language of Section 249.645. *See* MSD Hearing Exh. B, Tab 2.

In fact, the legislature has had the opportunity to revisit the "shall, upon reasonable request, make available" language found in Section 249.645 *three times* since the enactment of Section 250.233 in 1983, and has never elected to extend the application of the "at reasonable charge" language found in Section 250.233 to public sewer districts. *See* MSD Hearing Exh. B. Because the legislature is presumed to know the state of the law, and clearly knows how to insert language to require payment of a fee if it so desires, the absence of the "at reasonable charge" language in Section 249.645 is dispositive.

To avoid this result, MAWC and Staff claim that adhering to the plain terms of both statutes would lead to an unreasonable result. They argue that a "harmonious reading" of Section 249.645 and 250.233 "require[s] that a charge must be paid by sewer districts under Section 249.645 just as a charge must be paid by municipal systems under Section 250.233—

there is no basis in fact for requiring a charge of one but not requiring it of the other." MAWC Post-Hearing Brief at 7; Staff Post-Hearing Brief at 6. The burden is on MAWC and Staff to establish, and not merely conclude, that the General Assembly did not have any basis for treating public sewer districts and municipal water systems differently under both statutes. MSD is not aware of, and neither MAWC nor Staff have cited to, any rule of statutory construction that states where two similar entities are treated differently in two otherwise identical statutes, we are to presume that the General Assembly made a mistake. Indeed, the fact that the legislature amended Section 249.645 three times since it enacted Section 250.233 with the "at reasonable charge" language belies the argument that the General Assembly unintentionally omitted such language from Section 249.645.

Moreover, MAWC's and Staff's purportedly "harmonious" interpretation of Sections 249.645 and 250.233 completely ignores other well-settled rules of statutory construction—namely, the prohibition against adopting an interpretation of a statute that impermissibly adds language to it, such as adding the "at reasonable charge" language to Section 249.645 (*see, e.g., BHA Group Holding, Inc. v. Pendergast*, 173 S.W.3d 373, 379 (Mo. App. 2005); *State Dept. of Social Services, Div. of Medical Services v. Brundage*, 85 S.W.3d 43, 49 (Mo. App. 2002)), and the prohibition against adopting an interpretation that renders certain language in a statute superfluous, such as the "at reasonable charge" language in Section 250.233, if "upon reasonable request" is deemed to mean "at reasonable charge". *Hyde Park*, 850 S.W.2d at 84.

Had the legislature intended to permit MAWC to charge public sewer districts for access to MAWC's data, it has had ample opportunity to amend Section 249.645 to replicate the "at reasonable charge" language found in Section 250.233, but has never done so. As a result,

MAWC and Staff's "harmonious reading" argument ignores the intent of the General Assembly, and therefore fails as a matter of law.[3]

II. Irrelevancy of the Parties' Prior Course of Conduct in Ascertaining the Meaning of Section 249.645.

Both MAWC and Staff argue that the parties' previous agreements wherein MSD agreed to pay MAWC a fee for the provision of water usage data, as well as the Commission's conduct in approving such agreements are "a significant aid in interpreting the intent of the statute." *See* MAWC Post-Hearing Brief at 4; Staff Post-Hearing Brief at 3.[4] Notably, neither MAWC nor Staff have cited to a single case supporting their claim that the conduct of the parties is to be considered in assessing the meaning of a statute or the General Assembly's intent in enacting such statute.

In addition to the lack of support for MAWC's and Staff's position, MSD's prior course of conduct is immaterial to this proceeding and MSD's motion for summary determination. First, MSD's conduct in entering into such agreements in the past instead of challenging MAWC's authority to charge a fee under Section 249.645 does not constitute an acknowledgment by MSD that the statute authorizes the imposition of a fee. Because MAWC's authority to impose a fee under Section 249.645 had never been considered by the courts in this State (until this litigation), MSD was willing to pay a reasonable fee for the provision of the data

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[3] The confiscatory results/unconstitutional taking argument, reiterated in MAWC's and Staff's Post-Hearing Briefs, has been fully addressed by MSD in all of its previously-filed briefs. Again, neither MAWC nor Staff set forth any case law in their Post-Hearing Briefs supporting their claim that MSD's interpretation of Section 249.645 rises to the level of an unconstitutional taking.

[4] Contrary to the arguments asserted by MAWC and Staff, MSD's previous agreements to pay MAWC a fee for such data, and the Commission's approval of such agreements, did not constitute a violation of Section 249.645. As set forth below, MSD agreed to pay MAWC a fee for such data notwithstanding the statute because it was more cost-effective to pay the fee than to challenge it. The Commission did not mandate that MSD pay such fee to MAWC nor did it ever sanction the charging of such fee out of its own accord; it merely approved the tariffs presented by MSD and MAWC in connection with their agreements. *See* Joint Statement of Facts, Exhs. 1-A, 8-A.

in the past instead of engaging in costly litigation to resolve the meaning of the statute.[5] However, while MSD was willing to pay MAWC a reasonable fee for the data, and has even agreed in this proceeding to pay the incremental costs incurred by MAWC in providing the data to MSD, MAWC's recent, increased fee demands forced MSD to initiate this proceeding seeking clarification of the statute.[6]

Second, MSD's prior conduct cannot constitute a waiver of MSD's right to challenge MAWC's authority to charge a fee under Section 249.645 in this proceeding. The last water usage data agreement between the parties was terminated by mutual agreement as of December 31, 2003, and since January 2004, MSD has unmistakably asserted that the statute precludes MAWC from charging a fee in order to gain access to its data. Thus, any discussion regarding the parties' previous course of conduct in connection with these agreements is moot.

Moreover, MAWC cannot prove that it changed its position to its detriment based upon MSD's conduct in entering into the prior agreements, and thus, as a matter of law, it cannot establish that MSD waived its right to challenge MAWC's fee under Section 249.645. *See Conservative Federal Sav. and Loan Ass'n v. Warnecke*, 324 S.W.2d 471, 481 (Mo. App. 1959); *see also Doss v. EPIC Healthcare Management Co.*, 901 S.W.2d 216, 221 (Mo. App. 1995).

MAWC regularly compiles its water usage data through water meter readings and related estimates for its own billing purposes and it would have continued to compile such data during the relevant time period for its own purposes regardless of any agreements between the parties.

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[5] The other sewer districts governed by Section 249.645, which pay MAWC a fee for the provision of water usage data were likely faced with the same dilemma.

[6] From 2001 to 2002, the annual water usage data charges paid by MSD to MoAm increased by almost $250,000. *See* Joint Statement of Facts at ¶ 33. According to the direct testimony of Thomas Deters submitted by MAWC on January 17, 2007, MAWC has budgeted $1.9M to collect water usage data in St. Louis County in 2007, and claims that MSD would now be required to pay MAWC $963,105, which amounts to a $200,000 increase from what MSD paid in water usage fees in 2006. *See id.*

The prior agreements between the parties simply provided MAWC with the added benefit of additional funds to defray the costs associated with its own necessary data collection – costs that would exist with or without a statutory obligation to provide data to MSD. Because MAWC was not prejudiced as a result of MSD's prior conduct in entering into the water usage data agreements, it cannot establish that by entering into such agreements, MSD waived its right to challenge MAWC's authority to charge a fee for providing access to its books and records under Section 249.645.

III. Conclusion

In light of the foregoing, and the arguments and authorities set forth in MSD's previously-filed briefs, summary determination in this case in favor of MSD is warranted.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

BY: _____

Byron E. Francis #23982
E.W. Gentry Sayad #42414
J. Kent Lowry #26564
Jacqueline Ulin Levey #51222
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070
(314) 621-5065 (facsimile)
bfrancis@armstrongteasdale.com
klowry@armstrongteasdale.com
gsayad@armstrongteasdale.com
jlevey@armstrongteasdale.com

ATTORNEYS FOR COMPLAINANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via email and/or pursuant to the Commission's electronic filing system (EFIS), this 6th day of April, 2007, upon the following parties/counsel of record:

Kenneth C. Jones
Missouri-American Water Company
727 Craig Road
St. Louis, MO 63141

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

Kevin A. Thompson
General Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102