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 BRIEF

I. INTRODUCTION

As set forth during the March 7, 2007 hearing in this matter, the dispositive issue in this case is whether Respondent Missouri-American Water Company's ("MAWC's") imposition of a fee for the provision of certain water usage and customer identification data ("Data") to MSD is a violation of Missouri law.

This determination is not a complicated one; it turns on a simple reading of the phrase "shall, upon reasonable request, make available" found in Section 249.645, RSMo. This phrase is nothing more than a reasonableness prescription as to the manner in which public sewer districts, such as Complainant Metropolitan St. Louis Sewer District ("MSD"), are required to request Data.[1] It cannot be interpreted to grant private water companies, such as MAWC, the affirmative right to charge a fee for providing access to such Data.

This principal issue has been fully briefed and argued by the parties in connection with

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[1] For example, the statute suggests that MSD cannot make a request for voluminous amounts of information on short notice.

MSD's Motion for Summary Determination.[2] However, in an effort to accommodate MAWC's request to submit additional briefs and to address issues raised during the hearing, MSD respectfully submits this Post-Hearing Brief.

II. DISCUSSION

A. The Plain and Unambiguous Language of Section 249.645 Does Not Require MSD to Pay a Fee to Gain Access to the Data.

Missouri courts have consistently held that the first port of call in statutory construction is to ascertain the legislature's intent by considering the plain and ordinary meaning of a statute's words. *See State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005). The standard to be applied to determine if further analysis is required is "whether [a] statute's terms are plain and clear to one of ordinary intelligence." *Wolff Shoe Co. v. Dir. of Rev.*, 762 S.W.2d 29, 31 (Mo. banc 1988).

There is absolutely no need to look beyond a simple reading of Section 249.645 in this case. The plain and ordinary meaning of the statute's language expressly authorizes MSD "to establish, make and collect charges for sewage services," but does not similarly authorize MAWC to charge a fee for the provision of Data to public sewer district such as the MSD. Simply put, the language in the statute speaks for itself and does not call for a deeper level of analysis; it states that MAWC "shall, upon reasonable request, make available to [MSD] its records and books." § 249.645, RSMo.

In spite of this manifest language, MAWC has staked its entire opposition on the argument that the statutory phrase "upon reasonable request" implies that MSD must subsidize half of MAWC's data collection efforts to gain access to the Data. In addition to flying in the

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[2] MSD incorporates by reference the arguments and authorities set forth in its Motion for Summary Determination and Suggestions in Support, filed on December 15, 2006, and its Reply Brief, filed on January 26, 2007.

face of common sense, there is nothing in the statute's language to suggest that MAWC's obligation to make such Data available to MSD is optional or in any way permitted to be contingent upon payment by MSD. The logical consequence of MAWC's argument is that absent payment of a fee, MAWC is not obligated to provide MSD with access to its Data.

At the March 7th hearing, MAWC argued that MSD's interpretation of Section 249.645 is inconsistent. MAWC asked why MSD had to rely on previous versions of the statute and an analysis of Section 250.233, a companion statute to Section 249.645, if the language of Section 249.645 is clear and ambiguous. The answer is simple—MSD resolutely maintains that the Commission need not look any further than the plain and ordinary meaning of the legislature's words in Section 249.645 to understand the General Assembly's intent. Indeed, a simple reading of the words "upon reasonable request" cannot be a grant of authority to charge a fee. Yet given MAWC's arguments to the contrary, MSD is forced to rely upon statutory construction principles to demonstrate that MAWC's interpretation of the statute is not the one that the General Assembly intended. In any event, these principles of statutory construction underscore MSD's interpretation of the plain language of the statute.

1. Consideration of Section 250.233 Confirms MSD's Interpretation of Section 249.645.

In determining legislative intent, the Commission is "to read the statute as a whole and *in pari materia* with related sections." *Miller v. Miller*, 210 S.W.3d 439, 443 (Mo. App. 2007). "In construing a statute it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times…[w]hen the legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge

of that judicial or legislative action." *Citizens Elec. Corp. v. Dir. of Dept. of Rev.*, 766 S.W.2d 450, 452 (Mo. banc 1989).

As set forth in MSD's Reply Brief, when Sections 249.645 and 250.233 are considered side-by-side, it becomes apparent that MAWC's interpretation of the "upon reasonable request" language in Section 249.645 is contrary to the General Assembly's intent. Section 250.233 is almost identical to 249.645—it authorizes cities, towns, and villages operating sewage systems "to establish, make and collect charges for sewage services." § 250.233, RSMo. However, unlike Section 249.645, Section 250.233 expressly provides that private water companies, such as MAWC, can charge municipal sewer systems for the provision of Data: "Any private water company . . . supplying water to the premises located within said city, town, or village 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." *Id.* (emphasis added).

"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." *Hyde Park Housing Partner v. Dir. of Rev.*, 850 S.W.2d 82, 84 (Mo. banc 1989). When Sections 249.645 and 250.233 are read together, MAWC's interpretation of Section 249.645, which construes the phrase "upon reasonable request" to mean "authority to charge a fee," renders the "at reasonable charge" language found in Section 250.233 mere surplusage, and is therefore improper under well-settled principles of statutory construction.

2. A Review of the Respective Legislative Histories Reveals the General Assembly's Intent.

Further, the Commission need only take a cursory look at the legislative histories of both statutes to recognize that had the General Assembly intended to permit MAWC to charge public sewer districts, like MSD, for access to MAWC's Data, it had ample opportunity to amend Section 249.645 to replicate the "at reasonable charge" language found in Section 250.233, but neglected to do so.

Section 249.645 became effective in 1969. *See* MSD Hearing Exh. B, Tab 1. In 1983, the General Assembly enacted Section 250.233 via House Bill 371 (*see id.*, Tab 2, p. 2); it has never been amended. *See id.*, Tab 5. Notably, the General Assembly has amended Section 249.645 three times since 1983 and has never inserted the "at reasonable charge" language found in Section 250.233.

In 1983, when Section 250.233 was enacted, the General Assembly also enacted Section 250.234, dealing with delinquent payment for municipal sewer services and authorization to charge interest and impose a lien as a result of such delinquencies. *See id.*, Tab 2, p. 2. House Bill 371—the same legislation that implemented Sections 250.233 and 250.234 in 1983—added language to Section 249.645 that was essentially identical to Section 250.234 with respect to delinquent payments. Specifically, House Bill 371 added subsection 2 to Section 249.645, authorizing the payment of interest and the imposition of a lien for delinquent public sewer district service payments. *See id.*, Tab 2, p. 1. Yet despite the corresponding amendment to Section 249.645 for delinquent sewer service payments and additional amendments to the language of subsection 1, the General Assembly chose not to add the "at reasonable charge" language in Section 250.233 to subsection 1 of Section 249.645.

In 1991, the General Assembly again amended Section 249.645, this time adding

subsections 3 and 4, but again, it did not modify subsection 1 of the statute to replicate the "at reasonable charge" language found in Section 250.233. *See id.*, Tab 3. Moreover, in 1999, the General Assembly amended subsection 1 of Section 249.645 yet again to make the statute applicable to sewer districts established pursuant to Article VI of the Missouri Constitution. Tellingly, the General Assembly once again chose not to add the "at reasonable charge" language to the Statute. *See id.*, Tab 4.

When the legislative histories of the two statutes are compared, there can be no dispute that the General Assembly intended to preclude private water companies, such as MAWC, from charging MSD a fee for access to the Data. The General Assembly has had the opportunity to revisit the "shall, upon reasonable request," language of 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 to public sewer districts. Thus, because the General Assembly is presumed to know the state of the law, and clearly knows how to insert language to require payment of a reasonable charge when it so desires, the obvious interpretation of Section 249.645 is that a private water company is required to make its records and books available to public sewer districts without charge.

B. The Plain Language of Section 249.645 Does Not Lead to "Confiscatory" Results.

As a further distraction from the dispositive issue, MAWC maintains that MSD's interpretation of Section 249.645 would lead to "confiscatory" results. This line of argument, of course, presupposes that MAWC is *entitled* to have MSD defray half of its total costs to install, maintain, and read the water meters of MAWC's *own customers*. Aside from the fact that the costs of doing business as a private company are of no consequence to the interpretation of the statute, nowhere has the legislature indicated that a public sewer district must share or help

defray a private water company's sunk costs. One simply cannot interpret entitlement to cost-sharing out of a reasonableness prescription as to the manner of a request.

MAWC sets up this vague line of argument by grasping for a single word in one of its citations. In its Response in Opposition to MSD's Motion for Summary Determination, MAWC cites *State ex rel. Jackson County v. Spradling* for the proposition that "in determining the meaning of an ordinance or statute . . . 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." 522 S.W.2d 788, 791 (Mo. banc 1975) (emphasis added).

Based on this vague concept, MAWC argues that it has spent millions installing, maintaining, and reading the water meters of its customers, that the collected Data is "proprietary," and that requiring MAWC to give away such Data to MSD free of charge would constitute a "confiscation" of MAWC's property interest. As MSD has persistently argued and as Commissioner Gaw suggested and MAWC acknowledged at the recent hearing, MAWC is required to collect the Data through water meter readings for its own billing purposes and it will continue to conduct water meter readings, compile such Data, and thereby incur the cost of such collection regardless of whether MSD ever requests it. *See* Transcript at 61:18-62:4.

Although MSD agrees that *Spradling* and its progeny stand for the proposition that the words contained in an ordinance or statute should be given their plain and ordinary meaning and should be interpreted to avoid absurd results, what could be more "unjust, absurd, unreasonable, confiscatory or oppressive," than to interpret the statute in such a way so as to force a public entity to share a private entity's total data collection costs – *particularly when the statute makes no reference to such an arrangement*. The only "confiscation" that would occur if the

Commission were to endorse the plain and ordinary meaning of the statute would be to do away with the undeserved windfall that MAWC has been enjoying in clear contravention to the language of the statute – the added benefit of additional funds to defray the costs associated with its own necessary data collection.[3]

C. The Parties' Previous Course of Conduct is Irrelevant to Ascertaining the General Assembly's Intent.

The two prior agreements between the parties for the provision of Data have now all expired. The 2002 Agreement was terminated by mutual agreement as of December 31, 2003. Thus, any discussion regarding the parties' previous conduct in connection with these prior agreements is moot, and is yet another attempt by MAWC to lead the Commission astray from what is the central issue in this case – a simple reading of the statute.

These prior agreements that provided MAWC with a windfall to defray its own necessary data collection costs were voluntary and not mandated by the General Assembly. MSD cannot now be deemed to have relinquished its right to rely on the statute with respect to the provision of Data from January 1, 2004 forward as a result of its conduct in connection with agreements that expired prior to that date. Since January 2004, MSD has unmistakably asserted that the statute precludes the charging of a fee in connection with the provision of Data. Although MSD has continued to pay MAWC for Data consistent with the terms of the expired 2002 Agreement during the pendency of this proceeding, it has only done so subject to and without waiver of its right to challenge the imposition of a fee for access to such Data as evidenced by this litigation.

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[3] At the hearing, MAWC analogized its "confiscatory results" argument to that of an unconstitutional taking. It is important to note that nowhere in MAWC's Response in Opposition to MSD's Motion for Summary Determination did it assert that the provision of Data to MSD without just compensation rises to the level of an unconstitutional taking, nor can MSD fathom how the Data constitutes a property interest protected by the United States or Missouri Constitutions.

D. The Incremental Costs Incurred by MAWC in Providing the Data to MSD Exceed the Statutory Mandate of Making the Data Available under Section 249.645.

During his surrebuttal argument at the March 7th hearing, counsel for MAWC took aim at MSD's willingness to voluntarily reimburse MAWC for the incremental costs incurred by MAWC in providing the Data to MSD in a usable format. Specifically, counsel for MAWC argued that counsel for MSD initially indicated that Section 249.645 requires MSD to pay incremental costs, then asserted that MSD would only pay the incremental costs if forced to do so by the Commission, and then indicated that MSD might voluntarily pay such costs. *See* Transcript at 99:21-100:1-3.

MAWC's surrebuttal misconstrues MSD's arguments at the hearing and its consistent position throughout this litigation. MSD's sole basis in commencing this proceeding is that the plain and unambiguous language of Section 249.645 does not require MSD to pay a fee in order to gain access to the Data in MAWC's possession. As addressed above, Section 249.645 does not contain the "at reasonable charge" language set forth in its companion statute, Section 250.233. In fact, Section 249.645 does not authorize MAWC to impose any fee whatsoever – incremental or otherwise – in making its Data available to MSD.

To the extent MAWC exceeds the statutory mandate that it make its records available to MSD and incurs additional costs in affirmatively providing the Data to MSD in a readily ascertainable, usable format – expenses that MAWC would not otherwise incur in connection with its own necessary operations and data collection efforts – MSD is *voluntarily* willing to reimburse MAWC for such incremental costs.

MAWC claims that the distinction drawn by MSD between subsidizing half of MAWC's data collection efforts and paying incremental costs associated with MAWC's additional expenses incurred in affirmatively providing the Data to MSD is arbitrary. *See id.* at 100:4-9.

But that is not the case. This very same distinction is supported by both the plain language of Section 249.645 and other common information requests, such as those between parties engaged in discovery in civil litigation and those involving citizens making requests for records under Missouri's Sunshine Law, Section 610.010, *et seq.*

Section 249.645 presupposes that the Data mandated by the General Assembly to be made available to a public sewer district has already been collected by the private water company. Upon receipt of a reasonable request made by a sewer district, the water company is required to make the Data available to such sewer district. As addressed above, the statute does not authorize the water company to force a sewer district to subsidize the procurement of this already-collected Data and, unlike Section 250.233, it does not permit the water company to charge a sewer district for access to the water company's book and records.

The statute does not contemplate a sewer district seeking *additional* action from the water company beyond simply making its records and books available. Thus, should a sewer district request such additional action, including the provision of such Data in a format that can be easily read and used, it makes sense that the sewer district would reimburse the water company for this service. In taking affirmative steps to provide the Data to the sewer district in such a format, the water company is exceeding its statutory mandate and is incurring expenses that it would not otherwise incur as part of its own necessary operations.

Similarly, during the civil discovery process, a party is not required to subsidize the procurement of the underlying data reflected in documents it seeks from its opponent. However, if a party's document requests are extensive or seek voluminous amounts of material, it may be required to pay the copying costs pursuant to an appropriate cost-shifting order.

In addition, and as suggested by the Office of the Public Counsel at the hearing, record

requests under Missouri's Sunshine Law also support MSD's interpretation of Section 249.645. Pursuant to Section 610.026, RSMo, public governmental entities are required to "provide access to and, upon request, furnish copies of public records," subject to duplication fees and reimbursement costs for research time in connection with fulfilling these requests. *See* § 610.026, RSMo. Thus, a citizen seeking public records must pay a fee for a governmental entity's time in locating the record and the expenses it incurs in copying the record. Yet a citizen need not subsidize the work involved in preparing the actual record.

At the hearing, counsel for MAWC also claimed that there was a "substantial effort" involved in providing the Data to MSD. Counsel indicated that "[i]t's not just a computer download. It's a mammoth operation that takes a mammoth amount of time by our employees simply to provide the information and to communicate the information to MSD." *See* Transcript at 100:10-23. However, based on the previous course of conduct between the parties, the incremental costs involved in providing the Data to MSD, if any, are *de minimus*.

For several years, MSD has retrieved the Data from information downloaded by MAWC or one of its affiliated companies on an American Water website. Although MSD is willing to voluntarily reimburse MAWC for the incremental expenses incurred by MAWC in connection with its provision of the Data to MSD in a readily ascertainable format, the incremental expenses must be reasonable and supported by ample documentation. To date, the parties have not conducted an evidentiary hearing on the incremental expenses involved in maintaining the website currently used by the parties to transmit the Data at issue. As a result, any determination concerning either the amount of the incremental costs incurred by MAWC in providing the Data to MSD or the appropriate arbiter of any disputes between the parties regarding the

reasonableness of the incremental costs is premature.[4]

III. Summary Determination in this Case in Favor of MSD is Warranted.

Based on the plain, unambiguous, and mandatory language of Section 249.645, summary determination in this case in favor of MSD is warranted.

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[4] Indeed, since the inception of this dispute in January 2004, MSD has paid MAWC approximately $2.3M, purportedly constituting fifty percent of all the costs incurred by MAWC in reading and maintaining its water meters, collecting the Data, and providing such Data to MSD. This payment has been subject to and without waiver of MSD's claims in this litigation. Thus, should MSD prevail in this proceeding, the $2.3M paid by MSD from 2004 through 2006 should be applied as a set-off against any future incremental expenses incurred by MAWC in providing the Data to MSD.

Respectfully submitted,

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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 19th day of March, 2007, upon the following parties/counsel of record:

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