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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION

Respondent Missouri-American Water Company's ("MAWC's") Opposition to Complainant Metropolitan St. Louis Sewer District's ("MSD's") Motion for Summary Determination ("Opposition") is a classic study in obfuscation. Throughout the bulk of the filing, MAWC intentionally conflates the wholly different concepts of "upon reasonable request" and "imposition of a fee." This conflation is without any foundation, however, as the words "imposition of a fee" do not appear in § 249.645 RSMo (the "Statute"). This is because the Missouri General Assembly did not authorize private water companies to impose a fee for the provision of Water Usage Data to public sewer districts.

As much as MAWC tries to distort the Statute's plain language into something more than it is, the words "upon reasonable request" merely connote a standard of reasonableness to be applied to the manner in which MSD and other public sewer districts request Water Usage Data from private water companies. Despite the common sense meaning of the statutory language, MAWC brazenly twists the General Assembly's reasonableness prescription as to the *manner of a request* for Water Usage Data directed at the public sewer districts into an affirmative right to impose fees for the provision of such Data to be enjoyed by private water companies.

The Statute does not provide for such a right.

To further muddy the waters, MAWC makes an irrelevant appeal to equity considerations (Opp. at 1, 9, 10-11) by, in effect, asking the Public Service Commission ("PSC") to consider the fairness of requiring MAWC to bear all of its sunk costs related to the data collection of its own customers' information. The central issue in this case is the statutory interpretation of the phrase "shall, upon reasonable request, make available," *not* the fairness of making MAWC bear its own data collection costs.

Interestingly, MAWC does not suggest that MSD is not entitled to summary determination because there are genuine issues of material fact or that MAWC's affirmative defenses are applicable. Rather, MAWC suggests that MSD is not entitled to summary determination because its interpretation of the Statute is wrong and its counsel has acknowledged as much. Setting this mischaracterization aside for the moment, a final determination of this issue is not dependent upon what MAWC's counsel, MSD's counsel, or anyone else *thinks* the Statute's language *should* mean, but rather it is dependent upon what the General Assembly *did mean* by the words "shall, upon reasonable request, make available."

Accordingly, MSD seeks an Order from the PSC determining that MAWC's conduct in seeking to impose a fee for the provision of Water Usage Data constitutes a violation of Section 249.645, and that pursuant to the Statute, and upon receipt of a request from MSD that is reasonable in manner, MAWC is required by law to provide the Water Usage Data to MSD free of charge or is otherwise required to make its water meter reading information and other pertinent records available to MSD at no cost.

I. MAWC Impermissibly Reads Language into the Statute.

Contrary to MAWC's suggestion (*see* Opp. at 7), MSD does not wish to read the words "upon reasonable request" out of the Statute.[1] Indeed, MAWC and MSD are in absolute agreement that the cardinal rule of statutory interpretation is to ascertain the legislature's intent by considering the plain and ordinary meaning of the words used in the statute and that each "word, clause, sentence and section of a statute should be given meaning." *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005).

MSD does not believe, however, that the cannons of statutory interpretation permit the leap of faith that MAWC takes when it reads the words "imposition of a fee" into the Statute. Generally, courts do not strain to interpret a statute "where [s]uch an interpretation impermissibly adds language to the statute." *BHA Group Holding, Inc. v. Pendergast*, 173 S.W.3d 373, 379 (Mo. App. 2005). Likewise, the PSC should not "engraft upon [a] statute provisions which do not appear in explicit words or by implication from the words in the statute." *State Dept. of Social Services, Division of Medical Services v. Brundage*, 85 S.W.3d 43, 49 (Mo. App. 2002). The inclusion of the words "shall impose a fee" in the Statute would violate the most basic tenets of statutory interpretation.

The plain language of Section 249.645.1, designed primarily for the purpose of authorizing public sewer districts in certain counties "to establish, make and collect charges for sewage services," does not similarly permit MAWC to impose a fee for the provision of Water Usage Data. The portion of the Statute that speaks to the statutory obligations of private water companies provides:

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[1] MSD has no interest in avoiding these words "as if they were radioactive" (Opp. at 16), as evidenced by MSD's italicized use of these very words in its prior filing with the PSC (*see* Suggestions in Support at 4). Any deletion of these words was for the sake of brevity, not a premeditated effort to "hide the ball."

> Any private water company...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.

§ 249.645.1, RSMo (emphasis added).

MAWC's provision of Water Usage Data or the accessibility thereto free of charge is an explicit statutory obligation. Yet despite the Statute's manifest language, MAWC reads into it the right to impose a fee for complying with its statutory duty. Such an interpretation impermissibly injects language into the Statute and has the undesired effect of rendering MAWC's statutory duty a nullity. This is not the General Assembly's intent. Had the General Assembly intended the meaning MAWC advocates, it would have inserted language expressly providing for the imposition of such a fee.

In fact, one must strain to explain how the words "upon reasonable request" could even *imply* the "imposition of a fee." The reasonableness prescription is directed toward the public sewer districts of Missouri. It mandates the manner in which they can request Water Usage Data from private water companies. It does not grant an affirmative right to private water companies, authorizing them to impose "reasonable" fees for the provision of Water Usage Data. MAWC's reading of the Statute conveniently reads the word "request" out of the Statute. As MAWC so aptly points out, "[c]ourts will reject an interpretation...that requires ignoring the very words of the statute." *State ex rel. Womack*, 173 S.W.3d at 638; Opposition at 8. Moreover, the interpretation MAWC espouses necessarily implies that the reasonableness prescription is intended to modify the *size or amount* of any fees imposed, rather than the request for Data. What is amazing about this interpretation is that there are no fees mentioned in the Statute to be modified by the reasonableness prescription. The PSC should not sanction such manipulation.

Orthwein v. Germania Life Ins. Co. of City of New York, 170 S.W. 885, 891 (Mo. 1914) ("Courts should not torture or twist [a] statute...").

II. The General Assembly Has Elected Not to Grant the Right to Impose a Fee for the Provision of Water Usage Data.

The Statute that MAWC contends authorizes it to impose a fee for the provision of Water Usage Data was enacted in 1969. Fourteen years later, the Statute was amended by the very same legislation that enacted Section 250.233, a companion statute. Section 250.233 was designed for the purpose of authorizing cities, towns, and villages operating sewage systems "to establish, make and collect charges for sewage services." *See* § 250.233 RSMo; L. 1983, H.B. No. 371, pp. 497, 502, § 1. The language of the companion statute, directed at cities, towns, and villages operating sewage systems, is almost identical to that of Section 249.645, but for one fundamental difference – it expressly authorizes the imposition of a fee *in addition to* the "reasonable request" requirement. Section 250.233 provides:

> 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.

§ 250.233, RSMo (emphasis added).

Notably, the older Statute has been amended twice—once in 1983 (when the companion statute was enacted) and then again in 1999—yet, the General Assembly has never altered the "shall, upon reasonable request, make available" phrase contained therein. *Compare* L.1969, S.B. No. 320, p. 371, § 1. Amended by L.1983, H.B. No. 371, p. 497, § 1; L.1991, H.B. No. 299, § A, eff. May 29, 1991; L.1999, H.B. No. 450, § A; L.1999, S.B. No. 160 & 82, § A *with* L.1983, H.B. No. 371, p. 502, § 1. The legislature is presumed to know the state of the law when

it passes legislation. *See Nicolai v. City of St. Louis*, 762 S.W.2d 423 (Mo. banc 1988).

Accordingly, the General Assembly has had the opportunity to revisit the "shall, upon reasonable request, make available" language at least twice and yet has elected not 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 the statute at issue is that private water companies are required to make their records and books available to sewer districts without charge.[2]

III. The General Assembly's Intent is that the Statute's Use of "Shall" Connotes a Mandatory Duty.

MAWC's interpretation of the Statute also manipulates the common sense connotation of the word "shall." MAWC asserts that the word "shall" in Section 249.645.1 is directory and not mandatory because the Statute lacks an express penalty provision for the failure to provide Water Usage Data to sewer districts. Opposition at 12-13. However, there is nothing in the Statute to suggest that MAWC's provision of Water Usage Data or its obligation to make such Data available is discretionary or in any way permitted to be contingent upon payment by MSD.

The word "shall" is well understood and should be given its plain meaning. Its use generally connotes a mandatory duty. *Bauer v. Transitional School District of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003). "The definition of 'shall' states that it is 'used in laws, regulations or directives to express what is mandatory.'" *U.S. Central Underwriters Agency v.*

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[2] MAWC also goes to great lengths to distinguish the facts and holding of *Carpenter v. King*, 679 S.W.2d 866 (Mo. banc 1984), from the instant case (Opp. at 14-15). While it is readily admitted that *Carpenter* involved a dispute between two political subdivisions, its holding declining to permit the imposition of a fee where there was "no clear indication" that this was what the Missouri General Assembly had intended is certainly germane to the instant dispute. *Id.* at 868; Opposition at 15.

Hutchings, 952 S.W.2d 723, 724-25 (Mo. App. 1997), citing Websters Third New International Dictionary.

MAWC points to the *Bauer* decision in support of its manipulated connotation. Opposition at 13. However, according to the *Bauer* Court, the absence or presence of a penalty provision is "*but one method* of determining" if a statute is directory or mandatory. *Id.* at 408. "Indeed, the absence of a penalty provision does not automatically override other considerations." *Id.* Whether the use of the word "shall" in a statute is mandatory or directory "is primarily a function of *context and legislative intent.*" *Id.* (emphasis added); Opposition at 13. Accordingly, the lack of a penalty provision is by no means dispositive.

The term "shall" is used *over eight hundred times* in Chapter 249 and *over one hundred times* in the provisions of the chapter that relate to the creation of public sewer districts (sections 249.430 to 249.660), and its meaning is consistently mandatory. The central mandate of the Statute authorizes public sewer districts "to establish, make and collect charges for sewage services." § 249.645, RSMo. In order to facilitate this mandate, the legislature places an express statutory obligation on the shoulders of private water companies, directing them to provide Water Usage Data to public sewer districts. This obligation is part and parcel of the privilege of operating as a private water company in Missouri and must be viewed in the context of the Statute's overall aim. In this sense, the "shall...make available" language acts as an unambiguous limit on a private water company's discretion in fulfilling its statutory obligation. Given the greater context of the Statute, and given the common sense connotation of the disputed language, the absence of a penalty provision cannot transform the General Assembly's clear mandate into a mere suggestion.

IV. An Appeal to Equity Considerations Does not Square with the General Assembly's Intent.

MAWC peppers its Opposition with multiple appeals to equity considerations in an effort to distract the PSC from the central issue in this case. Opposition at 1, 9, 10-11. It is important to remember that the PSC is not being asked to make a determination about the *fairness* of MAWC bearing its own data collection costs. Rather, the PSC is asked to make a determination about the statutory interpretation of the phrase "shall, upon reasonable request, make available."

MAWC's interpretation of the Statute to include equity considerations does not square with the legislative intent, as evidenced by the plain and ordinary meaning of the Statute. Resolution of this matter is not dependent upon the fairness of splitting data collection costs, but rather turns on principles of statutory interpretation. The PSC has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. *See Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo. banc 1998).

One must strain to squeeze cost-sharing requirements out of the words "upon reasonable request." The fact that MAWC claims to have spent significant capital to install, maintain, and read the water meters of its own customers is of no consequence to the interpretation of the Statute. Such expenditures are part of the cost of doing business as a private company in a capitalist society and nowhere has the General Assembly indicated that public sewer districts must share or help defray these companies' sunk costs.

Even if a reasonableness standard were applied to cost-sharing, which MSD denies is called for by the Statute, it would be patently *unreasonable* for MSD to bear half the cost of MAWC's data collection. MAWC regularly compiles its Water Usage Data through water meter readings and related estimates for its own billing purposes and it would have compiled and will

continue to compile such Data and to conduct water meter readings with or without the statutory obligation to provide such Data to MSD. If ever there were an "unreasonable, confiscatory, or oppressive result," as MAWC wisely cautions against (Opp. at 9), forcing a public entity to share a private entity's data collection costs, in contravention of the plain language of a statute and an express statutory duty, would take the cake. *See Suburbia Gardens Nursery, Inc. v. County of St. Louis*, 377 S.W. 2d 266, 271 (Mo. 1964) ("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...unreasonable, confiscatory, or oppressive results").

V. MAWC Mischaracterizes the Parties' Prior Agreements as an Acknowledgement that the Statute Authorizes the Imposition of a Fee.

While prior agreements between the parties, which have now all expired,[3] provided MAWC with the benefit of additional funds to defray the costs associated with MAWC's own necessary data collection, such agreements were voluntary and were not mandated by the General Assembly. Further, during the pendency of this proceeding and throughout MSD's previous litigation in state court, MSD has continued to pay money to MAWC for Water Usage Data consistent with the rate tariff in the last agreement, subject to and without waiver of MSD's right to challenge the imposition of a fee for the provision of such Data.

Though these events do not amount to an acknowledgement by MSD that the Statute authorizes the imposition of a fee, MAWC, as part of its pattern of obfuscation, nonetheless couples them with the mischaracterized and selectively-quoted testimony of MSD's legal

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[3] MAWC's submission that the tariff "remains in full force" is without merit (Opp. at FN 6). As MAWC is aware, the tariff terminated upon the expiration of the last Water Usage Data Agreement, effective December 31, 2003. In the same footnote, MAWC mischaracterizes the April 24, 2006 holding of the Circuit Court when it suggests that the "argument that the tariff is not in effect was rejected by the St. Louis County Circuit Court." Opposition at FN 6. The Circuit Court merely determined that primary jurisdiction of this dispute rests with the PSC.

counsel in an attempt to give just that impression. Opposition at 2, 8-9. Significantly, MSD never acknowledged that the Statute authorized the imposition of a fee, it merely agreed to pay a fee if it was reasonable—an important distinction that gets lost in MAWC's misdirection. However, this distinction is clear when one reads the words of the final exchange with Commissioner Murray – words conveniently omitted by Respondent in its Opposition:

> COMMISSIONER MURRAY: Assuming worst case scenario and there's no agreement and the parties can't agree, can the company refuse to make available those records?
>
> MR. HAYMAN: No. Absolutely not. Because the language in the statute says they shall provide us with the information.
>
> COMMISSIONER MURRAY: Okay.
>
> MR. HAYMAN: And while we do – you know, in the past we have paid for and we believe that that is fair, when it says upon reasonable request, that does not necessarily state, and I haven't seen case laws meaning that that means we do have to, in fact, pay for it. Upon reasonable request means it's a timely request, not too voluminous to be overwhelming and burdensome. So the bottom line is they do have to provide us with the information.

In the Matter of Missouri-America Water Company's Tariff to Revise Water and Sewer Rate Schedules, Case No. WR-2003-0500, pp. 2910-2911.

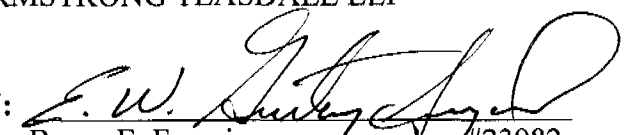
When Respondent MAWC's Opposition is stripped of its mischaracterization and hyperbole, the central point of MSD's Motion for Summary Determination returns into focus: the PSC's determination of this issue is not dependent upon what MAWC's counsel, MSD's counsel, or anyone else *thinks* the Statute's language should mean, but rather it is dependent upon the Missouri General Assembly's intent of the words "shall, upon reasonable request, make available."

VI. Conclusion.

Accordingly, because there is no genuine issue as to any material fact and the plain terms of the Statute demonstrate that MSD is entitled to judgment as a matter of law, MSD respectfully requests summary determination of this case be granted in its favor.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

BY: 

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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 PSC's electronic filing system (EFIS), this 26th day of January, 2007, upon the following parties/counsel of record:

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