

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
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6 TRANSCRIPT OF PROCEEDINGS
7 Oral Argument
8 March 7, 2007
9 Jefferson City, Missouri
Volume 2

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12 Metropolitan St. Louis)
13 Sewer District,)
14 Complainant,)
15 v.) Case No. WC-2007-0040
16 Missouri-American Water Company,)
17 Respondent.)
18 KENNARD L. JONES, Presiding,
19 REGULATORY LAW JUDGE.
20 STEVE GAW,
21 COMMISSIONER.

22 REPORTED BY:

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1 P R O C E E D I N G S

2 (EXHIBIT B WAS MARKED FOR IDENTIFICATION.)

3 JUDGE JONES: This is Case No.
4 WC-2007-0040, Metropolitan St. Louis Sewer District,
5 Complainant vs. Missouri-American Water Company,
6 Respondent. My name is Kennard Jones. I'm the judge
7 presiding over this matter. At this time we will hear
8 oral argument from Missouri St. Louis Sewer District. You
9 can argue either from there or from the podium, wherever
10 you feel most comfortable.

11 MS. LEVEY: Your Honor, pursuant to
12 4 CSR --

13 JUDGE JONES: Wait. Before you get
14 started, let's take entries of appearance. You can go
15 ahead and give yours.

16 MS. LEVEY: Sure. On behalf of Claimant
17 Metropolitan St. Louis Sewer District, my name is
18 Jacqueline Ulin Levey. I also have with me Kent Lowry
19 from the law firm of Armstrong Teasdale, and the General
20 Counsel of MSD, Randy E. Hayman.

21 JUDGE JONES: What was your last name
22 again?

23 MS. LEVEY: Jacqueline Levey.

24 JUDGE JONES: Levey. L-e-v-y?

25 MS. LEVEY: L-e-v-e-y.

1 JUDGE JONES: And who did you have with
2 you? I'm sorry.

3 MS. LEVEY: Sure. Kent Lowry and Randy
4 Hayman.

5 JUDGE JONES: And for Missouri-American
6 Water?

7 MR. JONES: For Missouri-American Water,
8 I'm Ken Jones, and with me is General Counsel of
9 Missouri-American Water, Martin Kerckhoff. That's
10 K-e-r-c-k-h-o-f-f.

11 JUDGE JONES: And Staff of the Commission?

12 MR. KRUEGER: Keith R. Krueger. My address
13 is P.O. Box 360, Jefferson City, Missouri 65102, for the
14 Staff of the Commission.

15 JUDGE JONES: You can go ahead and proceed
16 with your opening.

17 MS. LEVEY: Your Honor, pursuant to the
18 regulations, we would like to reserve ten minutes or so
19 for rebuttal argument, if that is permissible.

20 JUDGE JONES: What regulations?

21 MS. LEVEY: 4 CSR 240 dash --

22 JUDGE JONES: That's fine.

23 MS. BAKER: Your Honor, before we begin,
24 can I go ahead and enter an appearance for Public Counsel?

25 JUDGE JONES: I'm sorry. I didn't

1 recognize you. I saw you sitting there, but there are
2 other people here that didn't say anything either. Go
3 right ahead.

4 MS. BAKER: Christina Baker, P.O. Box 2230,
5 Jefferson City, Missouri 65102, here appearing for the
6 Office of Public Counsel and for the ratepayers.

7 JUDGE JONES: Okay.

8 MS. LEVEY: Your Honor, thank you. The
9 dispositive issue in this case and the sole issue
10 submitted to the Commission by way of Complainant
11 Metropolitan St. Louis Sewer District's motion for summary
12 determination is a very narrow question of law, mainly
13 whether Respondent Missouri-American Water Company's
14 imposition of a fee for the provision of water usage and
15 customer information data to MSD constitutes a violation
16 of Section 249.645.

17 Because of the plain and unambiguous
18 language of that statute, we believe that the imposition
19 of a fee is precluded under that statute and that the
20 answer to that issue is undoubtedly yes.

21 As stated in MSD's motion for summary
22 determination and as further reflected in the parties'
23 recently filed statements in response to the Commission's
24 February 26, 2007 order, there is no genuine issue as to
25 material fact in this case. Moreover, because MSD is

1 entitled to judgment as a matter of law under the plain
2 language of Section 249.645, and because it is clearly in
3 the public interest for Respondent Missouri-American to
4 comply with Missouri State law, summary determination in
5 favor of the MSD is warranted in this case pursuant to
6 4 CSR 240-2.117.

7 Accordingly, MSD seeks an Order from the
8 Commission determining that Mo-Am's conduct in mandating a
9 fee for the provision of water usage data constitutes a
10 violation of Section 249.645, and that pursuant to that
11 statute Missouri-American is required to provide the water
12 usage data to MSD or to make that information available to
13 MSD free of charge.

14 A brief summary of the material facts
15 underlying this case will help frame the parties' dispute,
16 although I know that you have received a copy of the
17 parties' Joint Statement of Undisputed Facts. That
18 statement listed 62 separate undisputed facts, and only a
19 handful of those are actually material to this dispute.

20 JUDGE JONES: Let me ask you this, because
21 this was a question I had when I received those facts and
22 with the disclaimer that was at the bottom. Why did you
23 file so many facts if the majority of them, overwhelming
24 majority are immaterial?

25 MS. LEVEY: Well, we felt that was

1 necessary to come to an agreement with Missouri-American
2 Water to be able to provide the Commission with that
3 statement. The facts that are enumerated in that
4 statement are undisputed, but we question the validity of
5 those to our statement. And I guess it would be akin to,
6 if we did have an evidentiary hearing today,
7 Missouri-American would likely try to put on evidence,
8 albeit through testimony or documents, reflecting those
9 facts, and we would likely object on relevancy or
10 materiality grounds, and it would be up to the
11 Commission's discretion as to whether or not they would
12 take these facts into consideration.

13 JUDGE JONES: So it's MSD with regard to
14 certain facts that you don't agree they're relevant and
15 Missouri-American with regard to others that they don't
16 think they're relevant?

17 MS. LEVEY: Yes. Or Missouri-American
18 would think they're relevant to their defenses, and we
19 don't think that, et cetera.

20 JUDGE JONES: I thought it was a joint
21 statement that you-all made.

22 MS. LEVEY: It is. I mean, they are a
23 joint statement reflecting what we believe is undisputed.
24 Those facts are not in dispute at this time.

25 On or about June 21st, 1993, and again in

1 February of 2002, MSD and Missouri-American's predecessor
2 in interest, St. Louis County Water Company, entered into
3 agreements whereby, in exchange for a fee, St. Louis Water
4 Company agreed to provide to MSD certain water usage and
5 customer information data which I called jointly as water
6 usage data to be used by MSD in calculating its customers'
7 billing statements. True and accurate copies of both of
8 those agreements are attached to the Joint Statement of
9 Facts as Exhibits 1 and 8 respectively.

10 The water usage data provided to MSD under
11 the terms of both the 1993 and 2002 agreement was
12 accumulated through water meter readings and estimates
13 conducted by St. Louis County Water Company for its own
14 billing purposes. In those agreements, the parties agreed
15 that the price to be charged to MSD by St. Louis Water
16 Company for providing that data would approximate
17 50 percent of St. Louis Water Company's cost of obtaining
18 data and would be set by a rate tariff to be approved
19 subsequently by the Commission.

20 On April 9, 2002, the Commission approved
21 the 2002 agreement and the proposed rate tariffs filed
22 therein. Specifically, the Commission approved Fourth
23 Revised Sheet No. RT 16.0 for service effective April 11,
24 2002. That tariff sheet authorized a rate of 54 cents per
25 account read for the provision of all water usage data

1 under the terms and conditions of the 2002 agreement.

2 By way of correspondence, in September
3 2003, the parties jointly terminated the 2002 agreement
4 effective December 31st of '03. To date, the parties have
5 been unable to finalize a new agreement concerning the
6 provision of water usage data. However, during the
7 pendency of the parties' dispute and the previous ongoing
8 negotiations between the parties, Missouri-American has
9 continued to provide the water usage data to MSD, and MSD
10 has continued to pay Missouri-American for such data as
11 per the rate tariff reflected in the 2002 agreement
12 subject, however, and without waiver of M-- subject to and
13 without waiver of MSD's right to challenge
14 Missouri-American's charging of a fee for such
15 information.

16 MSD has advised Missouri-American that
17 pursuant to Section 249.645, it believes that
18 Missouri-American is required to provide the water usage
19 data to MSD or to permit MSD to otherwise inspect such
20 data free of charge.

21 However, Missouri-American refuses to do
22 so. Missouri-American has advised the MSD that, based on
23 a number of factors, any change in the nature of or a
24 reduction in the water usage data provided to MSD will not
25 decrease the overall amount that Missouri-American charges

1 for such data because MSD is requesting 50 percent of
2 Missouri-American's quarterly meter reads and should
3 therefore be required to pay 50 percent of Mo-Am's
4 expenses.

5 If MSD does not pay the fee required by
6 Missouri-American, it has no other way of calculating its
7 charges for sewer services other conducting its own water
8 meter readings and estimates. In its last rate
9 proceeding, Missouri-American submitted a revised tariff
10 to the Commission seeking approval for a flat annual rate
11 of \$760,000 for the provision of water usage data to MSD.

12 Because Missouri-American and MSD were
13 still negotiating and had not yet reached a new agreement
14 concerning the provision of such data, MSD objected to the
15 submitted tariff and filed an application for
16 reconsideration in April of 2004 requesting that the
17 Commission reject the new water usage data tariff.
18 Missouri-American withdrew its proposed tariff after
19 hearing of MSD's objection on April 19, 2004, and the
20 transcript from that hearing is included as Exhibit 17 to
21 the Joint Statement of Facts.

22 The parties subsequently advised the
23 Commission that they were unable to reach a new agreement
24 considering the provision of such data, and on October
25 15th of '04 the Commission issued an Order closing the

1 case.

2 On August 19th, 2005, MSD filed a petition
3 for declaratory relief against Missouri-American in the
4 Circuit Court of St. Louis County, Missouri, in which MSD
5 asserted that despite the plain language of
6 Section 249.645, Missouri-American was requiring MSD to
7 pay a substantial fee for the provision of water usage
8 data and, therefore, a justiciable controversy was in
9 existence and right for judicial determination.

10 Missouri-American moved to dismiss MSD's
11 petition on the grounds of both the filed rate doctrine
12 and primary jurisdiction, arguing that this Commission had
13 exclusive jurisdiction with respect to that dispute. The
14 Commission also intervened in the St. Louis County Circuit
15 Court action and moved to dismiss the petition on primary
16 jurisdiction grounds as well.

17 On April 24, 2006, the Circuit Court of
18 St. Louis County issued a four-sentence judgment of
19 dismissal finding that primary jurisdiction of the matter
20 rested with this Commission, and that until such time as
21 the Commission hears the matter, the court lacks
22 jurisdiction to act.

23 MSD filed its complaint and initiated this
24 proceeding before the Commission on July 28th, 2006, and
25 on December 15, 2006 filed its motion for summary

1 determination which serves as the basis for today's
2 proceeding.

3 The Supreme Court of Missouri has stated
4 time and time again that the cardinal rule of statutory
5 construction is to ascertain the plain and ordinary
6 meaning of the Legislature's intent in the words that it
7 uses in the statutes it enacts. The plain language of
8 Section 249.645, which by way of an amendment in 1999
9 became applicable to the MSD, expressly authorizes MSD to
10 establish, make and collect charges for sewage services,
11 but does not similarly permit Missouri-American to charge
12 a fee for the provision of water usage data to MSD.

13 The statute, a copy of which is included
14 behind Tab 5 as Exhibit 15 to the MSD Exhibit B binders
15 that I circulated prior to the commencement of this
16 hearing, states as follows: Any private water company,
17 public water supply district or municipality supplying
18 water to the premises located within a sewer district
19 shall, upon reasonable request, make available to such
20 sewer district its records and books so that such sewer
21 district may obtain therefrom such data as may be
22 necessary to calculate the charges for sewer service.

23 There is no language in Section 249.645
24 suggesting that Missouri-American's provision of water
25 usage data to MSD or its obligation to make such data

1 available to MSD is optional or in any way permitted to be
2 contingent on payment by MSD. To the contrary, the
3 Legislature's use of the term shall denotes a mandatory
4 obligation on the part of Missouri-American to make its
5 water usage data available regardless of payment.

6 Despite that manifest language in
7 Section 249.645, Missouri-American premises its entire
8 opposition to MSD's motion on its argument that the phrase
9 upon reasonable request as used in the statute means
10 authorization to impose a fee. It is Missouri-American's
11 position that absent payment of a fee, Mo-Am is not
12 obligated to provide the water usage data to MSD.

13 This argument fails for several reasons.
14 First of all, the plain terms of the statute state upon
15 reasonable request and not for reasonable charge. The
16 plain and ordinary meaning of the phrase upon reasonable
17 request goes to the reasonableness of the manner in which
18 public sewer districts such as MSD request that
19 information from public water companies, including
20 Missouri-American.

21 For instance, MSD cannot contact
22 Missouri-American at 10 a.m. on Monday morning and tell
23 them that they're bringing ten members of their staff over
24 to their offices after noon to start going through all
25 their books and records. Similarly, too voluminous of a

1 request at the last minute would be overly burdensome and
2 thus not constitute a reasonable request.

3 However, it does not grant public water
4 companies like Missouri-American the affirmative right to
5 charge a fee for the provision of such data just because
6 such water companies deem the charging of a fee to be
7 reasonable.

8 JUDGE JONES: Let me ask you this. Might a
9 reasonable request include a check?

10 MS. LEVEY: A check meaning a fee? No, we
11 do not believe that the statute indicates that any fee
12 would be provided.

13 JUDGE JONES: But it doesn't say free of
14 charge either.

15 MS. LEVEY: Right. And if I can skip to
16 the final argument that I wanted to make and the reason
17 why I did circulate the Exhibit B binders, if you look at
18 the legislative history of Section 249.645 and its
19 companion statute, it's clear that the General Assembly
20 had no intention of allowing public water companies to
21 charge public sewer districts like the MSD a fee for the
22 provision of that data.

23 Section 249.645 became effective in 1969.
24 That's the year that it was enacted. A copy of that
25 statute as it appeared on the books in 1969 is included in

1 MSD's Exhibit B binder behind Tab No. 1. That provision
2 was a one-paragraph provision dealing with charges for
3 sewage services. It didn't have the remaining three
4 subsections that we've come to review in the current
5 statute.

6 In 1983, Section 250.233 was enacted via
7 House Bill 371. A copy of that bill is included on page 2
8 of our demonstrative exhibit, Tab 2, page 2. Section 2 --

9 JUDGE JONES: I just quickly read this
10 statute. You mean the one you have highlighted in yellow?

11 MS. LEVEY: Which tab? Tab 1?

12 JUDGE JONES: Behind Tab 1.

13 MS. LEVEY: Yes. That was the way the
14 statute appeared as of 1969.

15 JUDGE JONES: It looks the same as it does
16 today.

17 MS. LEVEY: It's actually a bit different.

18 JUDGE JONES: What's the difference?

19 MS. LEVEY: Well, the issue is, the reason
20 why we have this exhibit is that the companion statute
21 that is identical, essential identical to Section 249.645,
22 which is that Tab 2, page 2, 250.233, if you look at that,
23 that was enacted in 1983 via House Bill 371.

24 Similar to Section 249.645, the statute
25 governing our case today, the relevant language of that

1 section authorizes cities, towns and villages operating
2 sewage systems to establish, make and collect charges for
3 sewage services.

4 JUDGE JONES: Before you go on, do you have
5 another copy of this exhibit?

6 MS. LEVEY: May I approach?

7 JUDGE JONES: Yes.

8 MS. LEVEY: That statute is essentially
9 identical to the statute at issue here, but it deals with
10 municipal sewer districts, sewer systems. Unlike
11 Section 249.645, however, Section 250.233 expressly states
12 that private water companies like Missouri-American can
13 charge municipalities for the provision of water usage
14 data.

15 Section 250.233 -- and if you want to read
16 along with me, I'm on page 2 of Tab 2 -- states, any
17 private water company or public water supply district
18 supplying water to the premises located within said city,
19 town or village shall at reasonable charge upon reasonable
20 request make available to such city, town or village its
21 records and books so that such city, town or village may
22 obtain therefrom such data as may be necessary to
23 calculate the charges for sewer service.

24 JUDGE JONES: Does 250.234 post date 249
25 statute?

1 MS. LEVEY: Well, that's what I'm getting
2 at. So 250.233 was enacted 14 years after 249.645.
3 250.233, the statute I was just reading, was enacted via
4 House Bill 371, and that was 14 years after our statute.

5 JUDGE JONES: Maybe that was the
6 Legislature trying to say, oops, we meant they may
7 charge. Maybe they meant to say charge.

8 MS. LEVEY: And so if that would be
9 correct, your Honor, take a look at the next paragraph.
10 The next paragraph was Section 250.234, and that was also
11 another subsection dealing with municipal sewer systems,
12 and that was enacted via the same House Bill 371 at the
13 same time that 250.233 was enacted.

14 That dealt with delinquent payments of
15 sewer services. It provides -- and you can read along. I
16 have the whole section highlighted. It provides that if
17 there are delinquent sewer system payments, the public --
18 or excuse me -- the municipal sewer systems are allowed to
19 charge interest on such payments or impose a lien on the
20 land as a result of such delinquencies.

21 Notably, in 1983 that same Section 371, the
22 General Assembly went ahead and amended our statute,
23 249.645. So if you turn to page 1 of Tab 2, this now
24 reflects the state of the governing statute in our case as
25 of 1983. That same house bill, House Bill 371, amended

1 Section 249.645, adding almost an identical provision as
2 250.234 to deal with delinquent payments. Yet notably no
3 where in subsection 1 did it make any amendment to allow
4 for the reasonable charge language that's included in
5 Section 250.233. They amended the statute, yet they must
6 have purposefully left that amendment out.

7 Again, and this was not the last time --
8 1983 was not the last time that the amendment governing
9 today's proceeding was amended. Again, in 1991, the
10 General Assembly amended Section 249.645, adding
11 subsections 3 and 4 of that statute. The version of
12 249.645 or at least the amendments from 1991 are included
13 behind Tab 3 of MSD's Exhibit B, and they're marked with a
14 red tabbed flat. That indicates that those new
15 subsections 3 and 4 were added.

16 Again, the General Assembly did not modify
17 subsection 1 of that statute to replicate the at
18 reasonable charge provision found in Section 250.233.

19 Finally, the General Assembly once again
20 amended Section 249.645 in 1999 to apply to sewer
21 districts established pursuant to Article 6, Section 38 of
22 Missouri's constitution, including MSD. But again it
23 chose not to add the at reasonable charge language to the
24 statute, thus by implication precluding private water
25 companies like Missouri-American from charging MSD a fee

1 for water usage data.

2 It has to be deemed -- the case law is
3 clear on this that the Legislature is presumed to know the
4 state of the law when it passes legislation, that the case
5 this I'm referring to is a Supreme Court of Missouri en
6 banc case, Nicholi vs. City of St. Louis, 762 SW 2nd 423,
7 where it specifically makes that holding.

8 And accordingly, the General Assembly has
9 had the opportunity to revisit the shall upon reasonable
10 request language three times since the enactment of
11 Section 249.645 since the enactment of that statute in
12 1969 and has never elected to extend the application of
13 the at reasonable charge language to public sewer
14 districts.

15 In addition to that legislative history,
16 Missouri-American's argument would have -- would have this
17 Commission impermissibly interject nonexistent language
18 into the statute in violation of well-settled principles
19 of statutory construction. It is clear under Missouri law
20 that generally courts do not strain to interpret a statute
21 where such an interpretation impermissibly adds language
22 to that statute.

23 So based on the plain and unambiguous
24 language, the legislative history and all of the arguments
25 that we've made this morning, summary determination in

1 this case in favor of MSD is warranted. MSD seeks an
2 order from the PSC based on these arguments and based on
3 the plan, unambiguous and mandatory language of
4 Section 249.645, determining that Missouri-American's
5 conduct in seeking to impose a fee for the provision of
6 water usage data constitutes a violation of
7 Section 249.645, and that pursuant to the statute and upon
8 receipt of a reasonable request from MSD, one that is not
9 too voluminous, not too burdensome, not left to the last
10 minute, Missouri-American is required by law to provide
11 the water usage data to MSD or to otherwise provide -- to
12 otherwise make it available to MSD at no cost.

13 At this time my initial argument is
14 concluded, unless you have any further questions.

15 COMMISSIONER GAW: Thank you, Judge. I
16 want to ask about 249.645 for a moment. In regard to the
17 language that follows, and I'm on your Exhibit 15 that's
18 in your No. 5 tab, after your highlighted portion upon
19 request, the language that states, make available to such
20 sewer district its records and books so that such sewer
21 district may obtain therefrom such data as may be
22 necessary to calculate the charges for sewer service.

23 What does that -- what are you arguing that
24 that means? Is that -- does that require more than just
25 saying you can come in and retrieve this data from us in

1 our offices?

2 MS. LEVEY: The way that we read that, that
3 would be correct, that they would just make it available
4 at a convenient time for the parties.

5 COMMISSIONER GAW: What -- go ahead.

6 MS. LEVEY: And History reflects and the
7 previous agreements between the parties reflect that they
8 have done more than just make it available, that they have
9 provided that information to us in a reasonably
10 ascertainable, usable format. Mr. Hayman is here. He can
11 probably speak more to that.

12 And what we would suggest, although we
13 believe that the statute under any circumstance would not
14 require -- does not allow the payment of a fee or the
15 imposition of a fee, to the extent that Missouri-American
16 is taking any extra steps to make that information more
17 easily available to us, that then obviously, as stated
18 before in 2004, MSD would be responsible for paying the
19 incremental costs involved in them having to do that.

20 If there's a program they have to set up,
21 if there's additional labor or manpower that's necessary
22 to, you know, make that information available, then we
23 would be most likely willing to pay a fee for that. We
24 believe that it's most likely just hitting a button on
25 their computer system and sending us that information

1 electronically, but that is something that's a technically
2 that the mechanics of it would have to be explored. We do
3 agree with your interpretation of that.

4 COMMISSIONER GAW: So if that -- if we get
5 past the argument that you've already made in regard to
6 charges, I want to come back to that in a moment, but if
7 we get beyond that and there is a dispute about how much
8 is the appropriate charge for them to do more than just
9 allow you access to the books and records, who -- who do
10 you believe is the appropriate entity to make that
11 determination if there is a disagreement between MSD and
12 Missouri-American?

13 MS. LEVEY: That's a very tricky question.

14 COMMISSIONER GAW: I didn't mean to try and
15 trick you. I do think it's an important yes.

16 MS. LEVEY: Well, I mean, that is -- it's a
17 difficult question because obviously we're dealing with
18 two different entities that have different governing
19 bodies, and as you are well aware, the MSD is not a public
20 utility that is regulated by the Commission.

21 COMMISSIONER GAW: Right.

22 MR. LEVEY: And without speaking to my
23 client specifically to that issue, I'm not exactly sure
24 that I have the authority to say who we think would make
25 that decision.

1 COMMISSIONER GAW: Maybe if you'll have
2 time, you don't need to answer that question for me right
3 now, but it is a question I think that if we were to agree
4 with your interpretation, at some point in time somebody's
5 got to determine whether this matter in front of us goes
6 beyond just this initial determination of law and goes
7 into some sort of fact-finding about what the appropriate
8 charge is. I'm not sure whether that -- whether we get
9 there or not, but I do need to have that discussed at some
10 point.

11 MS. LEVEY: We do want -- I mean, and I
12 don't want to be deemed to be backtracking off of our
13 argument. I mean, we are here, your Honor, today. We
14 filed our case in circuit court. We felt that the
15 judiciary was the most appropriate place to bring that
16 dispute, and the Commission disagreed, Missouri-American
17 disagreed, and we were forced to file our complaint here
18 before the Commission.

19 But our position is strongly, and we have
20 spent a lot to make this argument to the Commission and
21 are ready, if necessary, whether we have to bring that
22 back to the judiciary for appeal purposes, we do not feel
23 that any fee as of right now under the terms of this
24 statute is permissible.

25 Now, to the extent that there's going to be

1 an issue of the Commission believes that the incremental
2 cost, that that's something that needs to be discussed,
3 and assuming that MSD is willing to pay those incremental
4 costs, then that is something that is going to take
5 further discussion. But for purposes of today, we are
6 looking for a ruling from the Commission that under the
7 terms of this statute no fee is allowed to be charged.

8 COMMISSIONER GAW: Sure. That's really a
9 question of law, an interpretation of the law, isn't it?

10 MS. LEVEY: Yes.

11 COMMISSIONER GAW: And I would think if we
12 were to answer that question, that any question about a
13 determination of an amount would be something to deal with
14 with your contract negotiations in regard to that amount
15 if you ask for something to be done more than what the
16 minimal access was as laid out in the statute.

17 I wouldn't think -- but that's why I'm
18 looking for this. Would there be any party here that
19 would believe that if we were to agree with you and say
20 there is no charge on this issue, as long as they're
21 allowing you -- they can allow you this access, there's no
22 charge for that, but as you said, there's been more that's
23 been done. If you jump over into that issue after
24 initially concluding that you're correct, if that were to
25 occur, would this Commission have anything to do with that

1 portion of it? And if you would think about that a little
2 bit. If you have an opinion of it later, that would be
3 fine.

4 I want to go over to 250.233 for a moment
5 and ask you the flip side of this. Under 250.233, the
6 language after the highlighted portion, at reasonable
7 charge upon reasonable request, is that language that
8 follows that basically the same language in regard to make
9 available the books and records?

10 MS. LEVEY: Yes. The entire provision that
11 I read into the record is identical except for the at
12 reasonable charge language and the provision dealing with
13 the municipalities, a city, town or village as opposed to
14 public sewer district.

15 COMMISSIONER GAW: What is your belief in
16 regard to the interpretation of 250.233 as to what
17 would -- what would the charge be that -- what would the
18 charge be for in allowing access to those books and
19 records? In other words, if all they're doing is saying
20 you can come in and look at these, why would there be a
21 charge for that? Help me to understand what that -- the
22 meaning of 250.233. Even though I know it doesn't apply
23 directly to you, it is relevant because of the comparison.

24 MS. LEVEY: Well, I would think it would
25 mean the same thing. To the extent that there is any kind

1 of an incremental fee that the public water companies need
2 to charge to be able to make that data available, I would
3 have to assume that, you know, perhaps that the manpower
4 to have someone sitting there with them. You know, I
5 can't -- I can't make a determination as to what that
6 means. We haven't fully assessed what is involved in them
7 having to provide this data to us or to even make it
8 available, and so to -- I know what you're saying, it's an
9 analogous situation, but in this case the statute
10 expressly states that a charge can be made. And I don't
11 have a -- I don't have a proper answer for that.

12 COMMISSIONER GAW: What I'm looking for is
13 what is it that's costing money to the entity that's
14 making that available? And you raised perhaps having
15 somebody be there while someone else is --

16 MS. LEVEY: Collecting information.

17 COMMISSIONER GAW: -- looking through their
18 books and records. Someone might have to make the time
19 available. Perhaps they might have to make some space
20 available, that sort of thing.

21 MS. LEVEY: Right. And collecting the
22 information from the systems, from the financial systems
23 and making sure that it's in some sort of readily, you
24 know, available format, that it's easy for the sewer
25 systems or districts to come in and be able to assess

1 what's there. Otherwise it's going to take too much time
2 on behalf of everyone.

3 COMMISSIONER GAW: Well, perhaps
4 Missouri-American can tell us what they think they --
5 since they're arguing that that language should be
6 inferred in 645, they must have some idea what it is that
7 they will be charging for. I'll ask them that question.

8 MS. LEVEY: Other than having us subsidize
9 half of their water meter maintenance.

10 COMMISSIONER GAW: Without comment on that,
11 I'll stop for now. Thank you, Judge.

12 JUDGE JONES: I just have one question.
13 Why don't 250.233 apply in this case?

14 MS. LEVEY: MSD is not a city, town or
15 village and doesn't fall under Chapter 250. It was a
16 public sewer district that was established pursuant to
17 Article 7, Section 30A of the Missouri constitution.
18 Thus, it falls under the purview of sewer districts and
19 certain counties, which is Chapter 249.

20 JUDGE JONES: Thank you.

21 COMMISSIONER GAW: I'm assuming -- just to
22 follow up, Judge, I'm assuming that 249.645, which appears
23 under a group of sections that deals St. Louis County,
24 that even though that heading might appear in the RSMo
25 books, that the fact that it is specifically stated in

1 249.645 that it applies to public sewer districts not just
2 created under through 245.660 but also established
3 pursuant to Article 6; is that right?

4 MS. LEVEY: Article 6. Sorry. I think I
5 said Article 7.

6 COMMISSIONER GAW: That's where your
7 argument exists if that's right statute, I assume.

8 MS. LEVEY: Yes, and that is an undisputed
9 fact that the parties have agreed to in our joint
10 statement.

11 COMMISSIONER GAW: Thank you.

12 MS. LEVEY: Thank you.

13 JUDGE JONES: Now we'll hear arguments from
14 Missouri-American Water.

15 MR. JONES: Thank you, your Honor and
16 Commissioner Gaw. I'm Ken Jones on behalf of
17 Missouri-American Water.

18 I think at the outset it's important to
19 keep in mind that the best way to interpret a statute, in
20 fact the most obvious way to interpret a statute is to
21 look at how the parties themselves, the parties who are
22 affected by that statute, have conducted themselves under
23 the statute, how they've acted under that statute for
24 years.

25 And here, as you know, for years MSD has

1 paid a fee to Missouri-American Water for the meter
2 reading data that they have obtained from
3 Missouri-American. They've paid that fee before Section
4 249.645 applied to them. They paid that fee since 1999
5 when that statute applied, become applicable to them.
6 Given that standard, the only reason interpretation of
7 Section 249.645 is that that statute allows for the
8 payment of a fee for the acquisition of the water usage
9 data.

10 And what you'll hear a lot and what is most
11 important in this case is the idea of reasonableness.
12 What is reasonable? We have to decide what the words upon
13 reasonable request mean. We have to decide what the
14 Legislature reasonably intended when it wrote this
15 statute. We have to decide the reasonableness of the
16 actions of all the parties, including the Commission here
17 in this case, since MSD first started obtaining this data
18 from Missouri-American in 1993.

19 The only conclusion that one can come to is
20 that MSD's current position in this case is highly
21 unreasonable, and I say the word current position because
22 MSD has only been arguing in the past couple years in the
23 context of this litigation that it should get the data for
24 free. All the facts show, all the admissions of the
25 parties show that MSD always understood that this statute

1 required the payment of a fee.

2 Now, what MSD is saying now is highly
3 unreasonable, and that's shown by a number of factors,
4 because for MSD to prevail in this case, the Commission
5 will have to conclude that the Commission itself in effect
6 violated the statute in approving an agreement and tariffs
7 that required MSD to pay a fee.

8 The Commission would also have to conclude
9 that MSD itself violated the statute by paying the fee,
10 that MSD acted illegally when it paid for the water usage
11 data after 1999.

12 And the Commission would also have to
13 conclude if MSD is to prevail here that the Legislature
14 intended to force private water companies and to force
15 water districts to turn over customer information although
16 it costs millions of dollars to collect that information,
17 that the Legislature intended to force water companies to
18 turn over this information for free.

19 And in this case, Missouri-American Water
20 spends \$1.9 million a year to collect this information,
21 after having spent \$35 million to install its meters
22 throughout its system in St. Louis. This result is
23 clearly unreasonable.

24 Shown by the actions of MSD itself, since
25 1999 MSD has paid over \$5 million for this water usage

1 information, and now they're saying they shouldn't have
2 paid that, they had no duty to pay that, they just paid it
3 voluntarily. And you'll see on the record MSD's own
4 attorneys have acknowledged that they have a duty to pay
5 for the water usage information.

6 Now, the meaning of the statute today is
7 the same meaning that the Commission, that MSD and that
8 Missouri-American have all attributed to the statute, have
9 all acted under the statute for the past eight years, that
10 MSD should pay a fee for obtaining this data.

11 Now, as Ms. Levey pointed out and as the
12 stipulated facts point out, MSD has been obtaining this
13 information since 1993 from Missouri-American Water
14 Company, and they are paying approximately 50 percent of
15 the cost of collecting the information, the cost to
16 Missouri-American, and the Commission has approved that
17 1993 agreement and approved various tariffs that
18 implemented the cost of obtaining that information.

19 Now, as you've heard, at that time
20 Section 249 did not apply to MSD. It only applied to
21 public water districts, not including MSD. But in 1999
22 the statute became applicable to MSD, and after 1999 MSD
23 continued to pay to Missouri-American the fee for
24 collection of the water usage data.

25 Not only did MSD continue to pay for the

1 data, it also entered into another agreement with
2 Missouri-American in 2002 and asked that that agreement be
3 submitted to the Commission and approved by the
4 Commission, and also submitted a tariff to the Commission
5 and asked that the Commission approve that tariff
6 implementing the agreement.

7 Now, the Commission in approving the 2002
8 agreement was acting on a Staff memorandum that said -- an
9 April 2nd, 2002 Staff memorandum that said, this new
10 recovery mechanism, that is the 2002 agreement and the
11 accompanying tariff, will generate approximately 228,000
12 greater revenue than the existing MSD rates.

13 This additional amount of revenue serves to
14 bring the MSD's contribution to the meter reading costs to
15 a figure that is more currently representative of
16 approximately one-half of the company's total meter
17 reading costs. So that 54 cent tariff which was enacted,
18 which was approved in order to implement the agreement was
19 a way of getting at half of the meter costs that
20 St. Louis -- that were incurred in collecting the data in
21 St. Louis County.

22 Now, why 50 percent of the meter reading
23 costs? Because MSD was getting at least two of the four
24 reads that it needed to establish winter usage data on
25 which it based its sewer bills, it was getting two of the

1 four reads that were done on every customer from St. Louis
2 County. Now, MSD is actually getting all their reads
3 right now. They are getting a lot more information. They
4 have access to all the information of usage that MS-- that
5 Missouri-American acquires through its meter reading
6 system. So it's not only this 50 percent of the reads.

7 Now, as I said, since 1999 when the statute
8 became applicable to MSD, MSD has paid over \$5.07 million
9 to Missouri-American Water. So MSD would have you believe
10 that it paid this \$5 million since 1999 even though they
11 didn't have to and really even though the payment of the
12 fee was illegal under the statute. This is just not a
13 credible position.

14 In interpreting a statute, we should not
15 pay attention to what parties might say now in the context
16 of litigation. We should pay attention to how the parties
17 acted under that statute for years and years.

18 We should also look at some things that
19 legal counsel for MSD has said about the requirement of
20 paying for the information. You'll see in the stipulated
21 facts that a 2003 -- November 2003 e-mail from MSD's
22 assistant director of finance stated that our legal
23 counsel has advised us that since the statute does not
24 prohibit them from charging us for the data, it is assumed
25 that they can charge us a reasonable amount.

1 In the context of the Missouri-American
2 2004 rate case, when there was a hearing before the
3 Commission about Missouri-American's tariffs, the attorney
4 for MSD, Paul DeFord, stated the company, that is MSD, is
5 statutorily entitled to the data that we're seeking here
6 upon request, and I don't think it's -- and I think it's
7 appropriate to compensate the company, that is
8 Missouri-American, for that data.

9 Mr. DeFord said a couple pages later in the
10 transcript, and that's an exhibit to the -- to the
11 stipulated facts, Mr. DeFord says, we'd love to have it
12 for free, but I do think a reasonable request would
13 include compensation for the company.

14 Later in the hearing Commissioner Murray
15 had an exchange with Mr. Hayman, the General Counsel for
16 MSD. Commissioner Murray said, assuming worst-case
17 scenario and there's no agreement and the parties can't
18 agree, can the company refuse to make available those
19 records?

20 Mr. Hayman: No, absolutely not, because
21 the language in the statute says they shall provide us
22 with that information.

23 Commissioner Murray: Okay.

24 Mr. Hayman: And while we do, you know, in
25 the past we have paid for it and we believe that it is

1 fair, when it says upon reasonable request that does not
2 necessarily state and I haven't seen case laws meaning
3 that that means we have to do this, in fact, pay for it.
4 Upon reasonable request means it's a timely request, not
5 too voluminous to be overwhelming and burdensome. So the
6 bottom line is they have to provide us with the
7 information.

8 Commissioner Murray: And the history is
9 that there has been a contractual agreement including a
10 fee for doing so?

11 Mr. Hayman: That's correct. That's
12 correct. As long as it's reasonable, we're in line with
13 that.

14 Now, the understanding of MSD in paying for
15 this information all these years is also confirmed by the
16 fact that other sewer districts in Missouri pay
17 Missouri-American for their -- Missouri-American's cost of
18 collecting the data. Missouri-American has contracts with
19 Duckett Creek Sewer District, with East Central Missouri
20 Sewer Authority and with Platte County Regional Sewer
21 District, in which these sewer districts pay, they
22 reimburse Missouri-American for their cost of data
23 collection.

24 This fact again shows a reasonable
25 interpretation of the statute is that a fee for providing

1 the data was intended by the Legislature.

2 Now, Missouri -- MSD's argument also
3 ignores several important principles of statutory
4 interpretation. First, MSD reads out of the statute the
5 reads upon reasonable request. The Missouri Supreme Court
6 has said in the 1993 opinion Hyde Park Housing Partnership
7 vs. Director of Revenue, it is presumed that the
8 Legislature intended that every word, clause, sentence and
9 provision of a statute have effect. Conversely, it will
10 be presumed that the Legislature did not insert idle
11 verbiage or superfluous language in the statute.

12 Furthermore, contrary to MSD's arguments,
13 principles of statutory construction require that
14 interpretation of the statute should not have confiscatory
15 results. That's exactly what would occur here if one were
16 to conclude that Missouri-American had to turn over
17 information that cost them almost \$2 million a year to
18 collect, after having spent \$35 million to install meters
19 throughout its system. It would clearly be a confiscation
20 of Missouri-American's property.

21 The Missouri Supreme Court said in 1975,
22 State ex rel Jackson vs. Spradling, in determining the
23 meaning of an ordinance or statute, the courts generally
24 seek to ascertain the intention of the lawmakers by giving
25 words their ordinary meaning, by considering the entire

1 act and its purposes and by seeking to avoid unjust,
2 absurd, unreasonable, confiscatory or oppressive results.

3 Furthermore, taking Missouri-American's
4 proprietary information not only would be confiscatory, it
5 would also violate the presumption that statutes are
6 constitutional, that the Legislature enacted
7 constitutional statutes.

8 Now, in this case, taking Missouri-
9 American's proprietary information without any
10 compensation is a confiscation, is a taking of its
11 property without any compensation. The statute should not
12 be read to allow that. The statute should be read to make
13 it constitutional, which would provide that
14 Missouri-American gets compensation for its services.

15 Furthermore, interpreting the statute not
16 to allow a fee undermines the whole reason for the
17 50 percent cost sharing program between the parties. As I
18 said before, in the 2002 Staff memo, which is part of the
19 exhibits, the Staff says that contained in the proposed
20 agreement is the provision that the company's -- the
21 company will bill the MSD to recover certain monies which
22 are to represent 50 percent of the company's meter reading
23 costs.

24 This additional amount of revenue serves to
25 bring MSD's contribution to the meter reading costs to a

1 figure that is more currently representative of
2 approximately one-half of the company's total meter
3 reading costs.

4 Now, MSD brings up the issue of
5 Section 250.233, supposedly in support of this argument,
6 but Section 250.233 actually supports Missouri-American's
7 argument in this case. You have to think about it. What
8 Section 250.233 does is say that private water companies
9 and public water companies shall make available to
10 municipal systems its information at reasonable cost upon
11 reasonable request.

12 But there's nothing different between
13 municipal water systems which are governed by Chapter 250,
14 there's nothing different between those systems on the one
15 hand and public sewer districts on the other hand,
16 Section 249, which would lead one to believe that it's
17 permissible to charge a fee for providing information to
18 municipal systems but it's not permissible to charge a fee
19 to sewer districts or to constitutionally enacted sewer
20 districts.

21 There's no reason, there's no logical
22 explanation of why the Legislature would allow this.
23 That's because there is none, and to provide otherwise
24 would lead to an absurd result, the fact that a water
25 district could charge a fee to municipal sewer systems but

1 cannot charge a fee to public -- to public sewer
2 districts.

3 Now, as I said at the beginning, the key
4 idea in this complaint is reasonableness. The parties all
5 understood throughout the years that it was reasonable
6 under the statute to charge a fee. This is a reasonable
7 interpretation of what the Legislature intended. They've
8 shown by the fact that MSD has been paying a fee to
9 acquire water usage data from Missouri-American since 1999
10 even though the statute has been enacted. This shows that
11 all the parties interpret the statute to reasonably intend
12 the payment of a fee.

13 The Commission has also approved the
14 parties' agreements even though this statute is in
15 existence. Certainly the Commission did not act illegally
16 when it approved a fee.

17 Furthermore, other sewer districts
18 throughout the State of Missouri pay a fee to
19 Missouri-American for its collection of water usage data.
20 None of these districts has ever contested
21 Missouri-American's right to charge a fee under the
22 statute.

23 Furthermore, the principles of statutory
24 construction require that a fee be allowed in this case.
25 It would certainly be confiscatory to Missouri-American

1 and its ratepayers, after having expended \$1.9 million aa
2 year to obtain this information, after having spent
3 \$35 million in capital costs to install its meters
4 throughout the system, it would certainly be confiscatory
5 to Missouri-American and its ratepayers to take this
6 information away from them without any compensation.

7 Furthermore, this would be an
8 unconstitutional reading of the statute because it would
9 be a taking of Missouri-American's property without any
10 compensation.

11 So for these reasons and for the reasons in
12 the pleadings and the reasons in the stipulated facts that
13 have been filed by the parties, an Order in favor of
14 Missouri-American Water should be entered and MSD's
15 complaint dismissed.

16 JUDGE JONES: Thank you, Mr. Jones.
17 Commissioner Gaw, questions?

18 COMMISSIONER GAW: I guess my first
19 question is, you made the argument that because the
20 parties have been interpreting the statute a certain way,
21 that that somehow means that the statute means the same
22 thing that the parties have been interpreting it as. Now,
23 tell me, do you have some case law that says that? Have
24 you got some cases out there that follow that same logic?

25 MR. JONES: No. The case law says, your

1 Honor, there's no case in point on this, but that the --
2 we have to look at what the Legislature reasonably
3 intended, and --

4 COMMISSIONER GAW: Just to stop you for a
5 moment, how is the -- how is it that the actions of the
6 parties subsequent to the enactment of the legislation has
7 anything whatsoever to do with what the Legislature
8 intended to begin with?

9 MR. JONES: I think it's actually -- it's
10 the best evidence you could have, Commissioner Gaw, as to
11 what the Legislature intended, because the parties who are
12 subject to it, the parties who have to abide by it
13 interpret it the same way.

14 COMMISSIONER GAW: I'm sorry, but I'm
15 trying to understand here. There are some -- there are a
16 number of cases on interpretation of legislative intent.
17 I'm looking for any case that you can cite to me that says
18 that how parties interpret a statute subsequent to the
19 enactment of a particular bill is relevant to the
20 intention of the Legislature in passing the statute and
21 what they meant when they wrote what they wrote.

22 MR. JONES: Right. I think the point is
23 that it's so obvious that it's never been raised here,
24 Commissioner Gaw.

25 COMMISSIONER GAW: In other words, there is

1 no case law that you can cite to?

2 MR. JONES: I have not seen any.

3 COMMISSIONER GAW: Okay. Now, back to your
4 argument in regard to 250.233 that -- well, let me back up
5 a minute.

6 First of all, when you're dealing with what
7 occurs under the current practice between the parties of
8 sharing expenses, are you-all intending today to put on
9 testimony about that? Is that part of what we're
10 anticipating?

11 MR. JONES: Commissioner, that's been
12 submitted as part of the stipulated facts.

13 COMMISSIONER GAW: All right. Tell me,
14 then, what it is that Missouri-American does for MSD in
15 presenting this information to them, if you would,
16 according to the stip.

17 MR. JONES: Right. We didn't get into that
18 much detail in the stip, but my understanding of what goes
19 on, all of the meter reading data that Missouri-American
20 collects throughout the year is uploaded -- is downloaded
21 to a system to which MSD has access. They go in there by
22 themselves and take whatever they want.

23 COMMISSIONER GAW: So that mechanism, is
24 there anything in the stip -- and I can look at it, of
25 course, but is there anything in the stip that says what's

1 involved in that process as far as personnel or any
2 additional information about the work or the computers
3 that are involved or the software that's involved or the
4 cost for all of those things?

5 MR. JONES: Not, not in the stip.

6 COMMISSIONER GAW: The practice that's
7 currently ongoing is more than just Missouri-American
8 opening its doors up to MSD and saying, you-all are
9 welcome to come in and pull this information off of our
10 books?

11 MR. JONES: The current practice under the
12 current agreement is to provide electronic form.

13 COMMISSIONER GAW: So they don't have to
14 come down to Missouri-American's offices and go through
15 the books and records and sort through all of those things
16 in order to come up with whatever the amount of usage is
17 for customers for a particular month?

18 MR. JONES: Correct, which brings up an
19 interesting point. Ms. Levey admitted that, in fact,
20 well, in fact, the statute does contemplate a payment of a
21 fee. She says that MSD should be required to pay at least
22 for the incremental cost of the data, but where does the
23 statute say that? Why is that fee allowed but not the fee
24 for collecting the usage information? It's contrary to
25 their argument, their internal argument where they say,

1 well, the statute says no fee, but you can have a fee for
2 incremental costs, but you can't have a fee for collection
3 of the data

4 COMMISSIONER GAW: Doesn't the statute in
5 249.645 specifically talk about what it is that is to be
6 made available under 645 where it says make available to
7 such sewer district its records and books so that such
8 school district may obtain therefrom such data as may be
9 necessary to calculate charges for sewer service?

10 MR. JONES: Right. It just says, make
11 available its records and books.

12 COMMISSIONER GAW: I mean, arguably, again,
13 it's just purely argument, but arguably the statute only
14 requires you to open up the doors of the company,
15 figuratively speaking, so that those records would be
16 available, doesn't it? It doesn't require you to do any
17 more than just making it available.

18 MR. JONES: Correct, but it requires us to
19 collect the information in the first place that we're
20 making available.

21 COMMISSIONER GAW: You have to do that
22 anyway, don't you? If MSD were not in existence and you
23 didn't have any -- we had never heard of MSD, and I won't
24 make any comments about that, but if that were the case,
25 what would you be doing differently in regard to reading

1 the meters of your customers and what you do right now in
2 the MSD territory?

3 MR. JONES: We don't. We would collect the
4 same data, the same method. But also MSD is not
5 installing meters. MSD is not hiring meter readers in
6 order to collect the information. That's the basis.

7 COMMISSIONER GAW: I understand what you're
8 saying to me in your argument, but I think you've answered
9 my question. In regard to this issue of the arrangement
10 that's between MSD and Missouri-American, that you said
11 was done as a result of some order, the latest one was
12 done in some order from the Commission?

13 MR. JONES: The 2002 agreement and the 1993
14 agreement was submitted to the Commission and approved by
15 the Commission.

16 COMMISSIONER GAW: Okay. Do you know what
17 authority was used for that to be brought before the
18 Commission? Are you familiar with that?

19 MR. JONES: You know, I know in the
20 petition, in the application there was a section cited. I
21 think it was just the general authority. I don't have it
22 with me. I know there was --

23 COMMISSIONER GAW: That's okay. I'm asking
24 questions a little bit out of what you-all probably came
25 in front of us anticipating to talk about.

1 MR. JONES: Right. Right.

2 COMMISSIONER GAW: Okay. So let's go back
3 then to this distinction between 250.233 and 249.645. Is
4 there any explanation that you can proffer as to why 645
5 does not have the language at reasonable charge that is
6 included in 250.233?

7 MR. JONES: Yes. I think the explanation
8 is the simplest one. 249.645 was enacted in 1969.
9 Section 250.233 was enacted in 1983, and they're separate
10 statutes, and the Legislatures didn't think it was
11 necessary to insert any other language in the statute that
12 had been enacted 14 years previously.

13 COMMISSIONER GAW: Well, why do you think
14 they felt it necessary to put in the at reasonable charge
15 language in 233?

16 MR. JONES: If they intended to preclude a
17 fee, the thing they would have done was to go back to 249
18 and say, upon reason request at no charge, and that's what
19 they didn't do.

20 COMMISSIONER GAW: But they did exactly
21 explicitly require a reasonable charge in 233. Why didn't
22 they go back and amend 645? I'm not asking you to read
23 their minds, but arguably why would you say they would not
24 have gone back and similarly amended 645 when they had
25 opened up the same provisions?

1 MR. JONES: Without legislative history in
2 Missouri, it's difficult to tell, but I think it's just
3 the fact that they didn't think it was necessary to do
4 that in Section 249.

5 COMMISSIONER GAW: Can you offer me some
6 sort of a rationale why they would have believed it
7 necessary for cities, towns and villages and those sewer
8 districts operating within them, within their territory?
9 Is there something specific going on different about those
10 areas that would have caused the Legislature to believe
11 they needed to add addition protection?

12 MR. JONES: No, I don't think so. I
13 pondered that in preparing, and that's the thing, there's
14 no difference between a municipal sewer system and a sewer
15 district or MSD that would -- would justify such a
16 distinction, would justify payment to one and not payment
17 to the other, any other case.

18 COMMISSIONER GAW: Now, your argument in
19 regard to the matter being confiscatory, is that a purely
20 a constitutional argument or is it more than that?

21 MR. JONES: It's more. They're separate.
22 First of all, the Missouri Supreme Court says statutes
23 cannot have confiscatory results. That's what's going on
24 here. We're spending almost \$2 million a year to collect
25 information, after having 35 million to install the

1 meters. To require -- for the Legislature to require that
2 proprietary information to be turned over at no cost is a
3 confiscation of our property.

4 Now, you've got the other question, you've
5 got the constitutional question, both under the Missouri
6 constitution and the US constitution that it's taking not
7 only without just compensation, with no compensation.
8 It's clearly unconstitutional. We have to presume that
9 the Legislature would not have enacted a statute that
10 would lead to a clearly unconstitutional result.

11 COMMISSIONER GAW: So are you saying that
12 if a government entity required customer information that
13 had been collected by a utility to be turned over to a
14 government entity, that that should never be allowed
15 without compensation?

16 MR. JONES: Yes, where the other government
17 entity, the other party is using it for their own billing
18 purposes, their own revenue-generating purposes.

19 COMMISSIONER GAW: Well, what difference
20 does it make if they're using it for revenue-generating
21 purposes or not?

22 MR. JONES: I'm not sure it does, but I
23 mean especially if that's the case, especially when the
24 other entity is using the labor that the primary entity
25 has expended in order to generate revenue.

1 COMMISSIONER GAW: I guess what I'm asking
2 is what difference does it make in that case if it's
3 confiscatory or not, what they're using the --

4 MR. JONES: You're absolutely correct.

5 COMMISSIONER GAW: Do you have some cases
6 on that that you -- that you've cited somewhere?

7 MR. JONES: Yeah. Confiscatory is --
8 Commissioner, it is in the -- our response to summary
9 judgment.

10 COMMISSIONER GAW: That's okay if it's in
11 there. You don't need to look for it.

12 I think that's all I have right now. Thank
13 you very much.

14 JUDGE JONES: I don't have any questions.
15 Does the Office of Public Counsel wish to make an
16 argument?

17 MS. BAKER: Yes, your Honor.

18 JUDGE JONES: Please do.

19 MS. BAKER: My clients, the ratepayers of
20 the public utilities, look to this Commission for
21 protection. The ratepayers of Metropolitan Sewer District
22 are not the same as the ratepayers of the
23 Missouri-American Water Company. My clients are from all
24 over -- my clients are from all over Missouri, and they
25 will be asked to bear the burden of MSD's request that

1 Missouri-American provide water use data for free.

2 We've talked about the revised statute
3 249.645 stating that the private water condition shall
4 upon reasonable request make available to the sewer
5 district its records and books so that the sewer district
6 may obtain data as may be necessary to calculate the
7 charges for sewer service. The issue before us is
8 basically what does make available mean.

9 In State ex rel Remy v Alexander the court
10 determined that the plain meaning of the word is generally
11 derived from the dictionary meaning and, therefore, a
12 document is available when it is ready for use, readily
13 obtainable and accessible.

14 JUDGE JONES: Do you have a citation for
15 that?

16 MS. BAKER: I do. It's State ex rel Remy,
17 R-e-m-y, v. Alexander, 77 SW 3D 628.

18 We've looked at the other statute, 250.233,
19 which goes further in its directive in that a private
20 water company shall at reasonable charge upon reasonable
21 request make available to a city, town or village its
22 records and books.

23 Looking to the state's premiere public
24 records statutes, the Sunshine Law, can shed light on what
25 make available means in Missouri statutes. Statute

1 610.011.2 states that public records are to be open for
2 inspection and copying. Statute 610.024.1 also states
3 that nonexempt material in public record are available for
4 examination and copying. And statute 610.026 states that
5 each public governmental body shall provide access to and
6 upon request furnish copies of public records subject to
7 reasonable fees, such as per page copying fees, as well as
8 staff assistance, duplicating and research.

9 Therefore, Missouri has a long precedence
10 of requiring that data be made accessible for examination
11 and copying, but any additional research, manipulation or
12 copying of the data from the original document by the
13 entity that created the document is subject to reasonable
14 fees.

15 It is not fair that the burden should be
16 shifted to the ratepayers of the public utility who look
17 to this Commission for their protection. Applying the
18 historical precedent to this case would ensure that my
19 clients, the ratepayers of Missouri-American, would not
20 bear the burden of increased rates due to MSD's potential
21 windfall. Thank you very much.

22 JUDGE JONES: Commissioner Gaw?

23 COMMISSIONER GAW: Thank you. Thank you
24 for that. Let me -- I'm not sure I'm -- I understand what
25 you're saying. I'm not sure how it applies based upon

1 what I've heard so far. Maybe you can help me with that.

2 I thought that I heard MSD saying that the
3 statute just requires them to have access to data that has
4 been accumulated by Missouri-American without any
5 additional manipulation or additional work. That's
6 different than what the practice is, as I understand.

7 MS. BAKER: That's my understanding as
8 well.

9 COMMISSIONER GAW: So are you saying that
10 if -- as long as it's just made available, as long as the
11 doors are to be opened for their inspection of the records
12 that are gathered as a matter of business course for
13 Missouri-American and what it would do regardless of
14 whether MSD was there or not, that there should be no
15 charge for that kind of access?

16 MS. BAKER: There are precedents throughout
17 the Sunshine Law, throughout some other cases that show
18 that that is perfectly acceptable to do. I did not find
19 anything that said that it was not acceptable to charge a
20 reasonable fee, especially if it took people there to
21 prepare the document for viewing, if it took more than
22 just here are our volumes of books, you can look through
23 it, you can copy out what you want. That is what I saw
24 through the precedents of the statute.

25 COMMISSIONER GAW: Right. So I'm not clear

1 whether you're agreeing or disagrees with MSD on its
2 position as I heard it this morning.

3 MS. BAKER: I believe that MSD has come and
4 stated that the way that they have been receiving the data
5 so far, they should not be required to pay for it.

6 COMMISSIONER GAW: I'm not hearing that
7 from them. Maybe I'm misunderstanding. I'm hearing them
8 say that if access is provided to the books and records,
9 that they shouldn't be charged, but that if the current
10 situation of having this data actually transferred to them
11 and manipulated and put into a form where they can see it
12 off of some sort of a download to their computer system
13 were done, that that perhaps should be something that's
14 subject to charge, if that additional amount of work was
15 done.

16 MS. BAKER: I believe we are probably
17 saying the exact same thing, yes.

18 COMMISSIONER GAW: Okay.

19 MS. BAKER: The precedents show this
20 minimal amount of access that is available, but apparently
21 that is not how the data has been sent between the two
22 companies.

23 COMMISSIONER GAW: Yes.

24 MS. BAKER: So that's what we have to go on
25 so far is what is reasonable based on that.

1 COMMISSIONER GAW: Okay. I think I'm
2 following you. Thanks. Thanks, Judge.

3 JUDGE JONES: I just had a quick -- I heard
4 you mention Chapter 600. Were you trying to draw some
5 distinction between governmental bodies and
6 Missouri-American Water?

7 MS. BAKER: I was not. I was trying to
8 determine how the statutes dealt with records being made
9 available, and certainly the Sunshine Law is where there
10 are a lot of statutes on what the Legislature had saw or
11 had seen as how do we make things available, what is a
12 minimal availability, and several times through there they
13 showed what a minimal availability is, and that has been
14 inspection and copying, available for inspection and
15 copying.

16 So without a lot of case law, we haven't --
17 we have not seen so far -- I know Commissioner Gaw has
18 asked for some and there's not been much available, to
19 looking more to what is make available in terms of the
20 statutes.

21 JUDGE JONES: And I hear you say you agree
22 that MSD should pay whatever incremental costs are
23 involved in providing that information?

24 MS. BAKER: If there is anything more than
25 just opening up the books and they come in, they look at

1 the books, they write down what they need to from the
2 books, that I see as a minimal make available. Anything
3 more beyond that, such as as they're doing, downloading it
4 into the database so that they can view it at their
5 offices, that is additional action that's being done to
6 that data beyond the minimal make available.

7 JUDGE JONES: And Missouri-American should
8 be compensated for that?

9 MS. BAKER: I do believe that the statutes
10 show that that is a common precedent, yes.

11 JUDGE JONES: Do you think they should --
12 that Missouri-American Water should be compensated at the
13 rate it's currently being compensated for that
14 information?

15 MS. BAKER: I'm afraid that would be a
16 contract issue between the two of them on what is a
17 reasonable fee.

18 JUDGE JONES: You mentioned earlier that
19 there are ratepayers and Missouri-American Water service
20 territory that are outside of MSD's territory.

21 MS. BAKER: That's correct.

22 JUDGE JONES: Are you inferring that
23 they're subsidizing somehow MSD's customers?

24 MS. BAKER: They are. They will be asked
25 to pay for additional rates based on the amount of income

1 that Missouri-American gets or does not get based on this
2 data.

3 JUDGE JONES: In light of that, what's your
4 position?

5 MS. BAKER: My position is that a minimum
6 accessibility is a precedent through the statutes, but
7 anything more than that is certainly MSD's to bear at a
8 reasonable amount.

9 JUDGE JONES: Okay. Thank you. I don't
10 have any other questions.

11 MS. BAKER: Thank you.

12 JUDGE JONES: And now we'll hear from the
13 Staff of the Commission, Mr. Krueger.

14 MR. KRUEGER: Thank you, your Honor. Good
15 morning. May it please the Commission?

16 The statute Section 249.645 does not
17 explicitly mention the payment of a fee for the provision
18 of these records. It does not expressly authorize
19 Missouri-American to charge a fee, nor does it prohibit it
20 from doing so.

21 In it's Reply Brief, MSD argued that
22 Missouri-American reads the words imposition of a fee into
23 the statute. I submit it's just as reasonable to argue
24 that MSD reads the words free of charge into the statute.
25 They've argued that the records need to be provided free

1 of charge, and that's not in the statute either. The
2 statute does not mention imposition of fee and it does not
3 mention free of charge. It's simply silent on the matter.

4 In her argument this morning Ms. Levey
5 stated that it's clear that the Legislature had no
6 intention to allow Missouri-American to charge a fee, and
7 she made reference to the unambiguous language of the
8 statute. I think that it's not that clear. I don't think
9 the language is that -- is unambiguous as she states. I
10 think it's no better than an inference at the best.

11 One thing that I cannot understand is why
12 the legislative scheme would allow for the charging of --
13 would allow Missouri-American to charge for the records
14 that it provides to cities, towns and villages, but would
15 not allow Missouri-American to charge for the records that
16 it provides to the sewer district. There's simply no
17 readily apparent reason why one would be treated
18 differently from the other.

19 What then was the legislative purpose in
20 amending Section 249.645? The Staff submits that the
21 purpose was to prevent the wasteful duplication of
22 services. There's no reason for the two entities,
23 Missouri-American and MSD, to separately bear the cost of
24 obtaining essentially the same data.

25 What public policy purpose would it serve

1 to require Missouri-American to provide this data to MSD
2 free of charge? I can think of no public service it would
3 serve. If Missouri-American is required to provide this
4 data free of charge, it will be deprived of the revenue
5 and this cost would ultimately have to be borne by its
6 ratepayers. As a result, Missouri-American's ratepayers
7 would be subsidizing MSD or its customers.

8 The language of the statute does not
9 prohibit Missouri-American from charging a reasonable fee
10 for providing the data, and there's no reason to believe
11 that that was the legislative intent either. The
12 complaint should be dismissed. Thank you.

13 JUDGE JONES: Dismissed? You mean under --
14 I mean, why dismissed?

15 MR. KRUEGER: I think the ruling should be
16 against the sewer district.

17 JUDGE JONES: Okay. Commissioner Gaw?

18 COMMISSIONER GAW: Thank you. Mr. Krueger,
19 I want to understand your legal analysis of legislative
20 intent here, and if you would -- would you agree that the
21 language in 645 and 233 that follows upon reasonable
22 request in both sections is basically the same in regard
23 to making available records and books?

24 MR. KRUEGER: Yes, I believe it is.

25 COMMISSIONER GAW: Okay. Now, if I use

1 your interpretation that 645 allows a reasonable charge to
2 be assessed, what is the meaning of 233's language at
3 reasonable charge?

4 MR. KRUEGER: I think the meaning of that
5 language is that Missouri-American can impose a reasonable
6 charge on cities, towns and villages.

7 COMMISSIONER GAW: Okay. So in other
8 words, if I read 645 sub 1 as though it includes that
9 language at reasonable charge, then doesn't it render at
10 reasonable charge in 233 a meaningless addition?

11 MR. KRUEGER: I don't know whether it does
12 or not. I think that possibly the Legislature just
13 believed in 193 that this was a more reasonable way to
14 express the same intent that they -- that they had when
15 they enacted the statute in 1969.

16 COMMISSIONER GAW: Aren't we supposed to
17 under the rules of statutory construction give meaning to
18 the words that are in a statute?

19 MR. KRUEGER: Certainly.

20 COMMISSIONER GAW: And aren't you rendering
21 those words meaningless?

22 MR. KRUEGER: Which words?

23 COMMISSIONER GAW: By interpreting -- at
24 reasonable charge. By interpreting 645 as though they're
25 there, aren't you rendering the addition of those words in

1 233 meaningless?

2 MR. KRUEGER: Am I rendering the words that
3 are not there?

4 COMMISSIONER GAW: No. The words that are
5 there in 233. If you interpret 645 as though they are
6 there, then they were not necessary in 233. So aren't you
7 rendering them meaningless?

8 MR. KRUEGER: I think we have to consider
9 the meaning of those words when we're interpreting 233,
10 but I don't think we necessarily have to interpret that
11 into 645 just because it appears in 233.

12 COMMISSIONER GAW: You don't think that
13 it's meaningless, at reasonable charge in 233?

14 MR. KRUEGER: No, I don't think that's
15 meaningless.

16 COMMISSIONER GAW: What does it mean, then,
17 that's different than your interpretation of 645 without
18 them? What is the distinction?

19 MR. KRUEGER: I think the two statutes both
20 authorize Missouri-American to impose a reasonable charge
21 for providing --

22 COMMISSIONER GAW: Aren't you arguing that
23 645's interpretation upon reasonable request means exactly
24 the same thing as at reasonable charge upon reasonable
25 request in 233?

1 MR. KRUEGER: I think so.

2 COMMISSIONER GAW: And aren't you rendering
3 at reasonable charge a meaningless addition in 233?

4 MR. KRUEGER: I don't think it's
5 meaningless. I think it's just a clearer way to express
6 the same intent.

7 COMMISSIONER GAW: If it's not meaningless,
8 then what is the difference between 233 and 645?

9 MR. KRUEGER: I've said I don't think
10 there's a difference.

11 COMMISSIONER GAW: That's what I thought
12 you said. If I -- if I hear you say that, then you also
13 say you don't think it's meaningless, to me those are
14 inconsistent. What is it that meaning -- what is the
15 meaning of at reasonable charge in 233 that renders those
16 words meaningful?

17 MR. KRUEGER: As I've said, I think it's
18 just a clearer way to express what was -- what was stated
19 in the statute that was enacted 14 years earlier.

20 COMMISSIONER GAW: Then why didn't the
21 Legislature choose to go ahead and amend 645 when they
22 opened the same section in the same -- some of the same
23 time frames 233 was opened?

24 MR. KRUEGER: I can't answer that. You
25 know, I think we'd have to infer and speculate, and --

1 COMMISSIONER GAW: I'm not looking for
2 necessarily speculation. I'm looking for case law on
3 statutory construction that would agree with your
4 position.

5 MR. KRUEGER: I don't have a case to cite.

6 COMMISSIONER GAW: Okay. Would you agree
7 that MSD has cited some cases in regard to statutory
8 interpretation that would support their position?

9 MR. KRUEGER: Oh, sure, they've cited
10 cases.

11 COMMISSIONER GAW: I think that's all.
12 Thank you, Mr. Krueger.

13 JUDGE JONES: Thank you, Mr. Krueger. And
14 MSD wanted to do some rebuttal argument.

15 MS. LEVEY: Thank you. I would just like
16 to clarify and address some of the issues that have been
17 raised in some of the subsequent arguments that have been
18 made since our initial argument this morning.

19 The first thing that I would like to
20 address is this issue that Missouri-American has been
21 raising about how parties interpret a statute subsequent
22 to its enactment can be used somehow to help construe the
23 in General Assembly's legislation in enacting that
24 statute, and I'd like to address some mischaracterizations
25 that have been made with respect to how that argument

1 deals with our case.

2 The water usage data agreements that Mo-Am
3 is relying on terminated as of December 31st, 2003.
4 Commissioner Gaw, you had asked previously for what
5 authority the Commission had to act to approve the tariffs
6 that were reflected in those two agreements. The
7 authority was that MSD agreed to the Commission's
8 authority by way of entering into these two agreements.
9 MSD and Mo-Am entered that the agreements, and pursuant to
10 the terms and conditions of those agreements, a rate
11 tariff that was attached to both of these agreements as
12 Exhibit A was to be submitted. The parties were to
13 cooperate in presenting that to the Commission, and the
14 Commission thereafter approved those rates.

15 As of January 1st, 2004, and even prior to
16 that date in the communications between the parties in
17 this room, Mo-Am has been made aware of MSD's reliance on
18 Section 249.645. So we're talking for over three years
19 now they have made this argument. Any conduct that was --
20 any of MSD's conduct with respect to those two previous
21 agreements cannot be deemed any kind of a waiver with
22 respect to the litigation as it now stands because those
23 agreements were terminated, and I fail to see how that is
24 at all relevant when the parties have yet to enter into
25 some sort of new agreement.

1 Now, if there had been some sort of an
2 agreement after 2004, MSD anticipatorily repudiated that
3 agreement prior to its terms and claimed that based on
4 Section 249 it was not going to proceed under the statute,
5 then maybe there would be issue of waiver because the
6 parties had entered into a new agreement and had entered
7 into negotiations wherein MSD had said we're willing to
8 relinquish that right with respect to this new set of
9 facts and circumstances.

10 However, that's not the case. Now,
11 although the statute requires Missouri-American in our
12 belief, in MSD's belief, to provide such data free of
13 charge, MSD recognizes that this issue has never been
14 considered or resolved the courts in this case. As a
15 result, MSD has been willing to pay a reasonable fee for
16 the provision of the water usage data instead of pursuing
17 costly litigation regarding the meaning of Section 249.645
18 up until this point.

19 However, in its most recent negotiations
20 subsequent to the termination of the 2002 agreement,
21 Missouri-American has demanded an unreasonably high fee
22 for the provision of water usage data, notwithstanding
23 MSD's request for a reduction in the amount of data that
24 it was having downloaded onto its system.

25 Specifically, going into the past, I just

1 want to make note that from 2001 to 2002, as set forth in
2 the statement of facts, the annual water usage data
3 charges paid by MSD to Mo-Am increased by almost \$250,000.
4 Now, according to the direct testimony of Thomas Deeter
5 submitted by Mo-Am on January 17, 2007, along with what
6 Mr. Jones has indicated to the Commission this morning,
7 Mo-Am has budgeted 1.9 million to collect water usage data
8 in St. Louis County and claims that under the 50 percent
9 arrangement MSD would now be required to pay
10 Missouri-American \$963,105, which amounts to a \$2,000
11 increase from what MSD paid Missouri-American last year.

12 This increase is exacerbated by the fact
13 that Mr. Hayman has repeatedly requested less information
14 from Mo-Am in his correspondence.

15 Now, it also brings up the point, and I
16 think there's some confusion here and I just want to make
17 sure that it's clarified, there is clearly a difference
18 between make available and subsidizing the installation,
19 maintenance, repairs and readings that Missouri-American
20 has to do anyway to calculate its own customers' billing
21 statements.

22 I don't want to be in a position where
23 we've made a statement here on the record saying MSD has
24 agreed to pay an incremental cost. I don't know what
25 those -- to the extent there are incremental costs, I

1 think they should be very minimal. I don't think they get
2 to the -- would be anywhere neither the \$1 million mark
3 that they're claiming now that they would have MSD
4 subsidize. And I don't want to be in a position where the
5 PSC says, okay, MSD, you prevail and we agree with you
6 that there is no -- there is no right for
7 Missouri-American under Chapter 249 for them to impose a
8 fee.

9 However, to the extent you're asking for
10 additional information, you know, a different format in
11 which that information be provided, then Missouri-American
12 has complete authority to decide that that incremental
13 cost is going to be because then we're going to be back
14 here in the same situation where Missouri-American is
15 going to hold that information over MSD's head and say,
16 you know what, we believe what's reasonable for the
17 incremental cost is 50 percent subsidy, and then we're
18 back to square one again.

19 So I want to make sure that when we leave
20 here today, MSD's position is clear on this issue. While
21 we feel that possibly an incremental cost would be
22 reasonable, we are here today asking the Commission to
23 order that no fee be provided under -- or that the
24 Commission agree that no fee is permissible under that
25 statute.

1 And so there was just some confusion over
2 that, and I wanted to make sure we clarified that
3 position.

4 The other issue is this whole -- the
5 unlawful taking, the constitutional challenge argument
6 that Mr. Jones was alluding to and the confiscatory
7 results that he was using as part of the statutory
8 construction analysis. The fact that Missouri-American
9 claims to have spent significant capital to install,
10 maintain and read the water readings of its own customers
11 should be of no consequence in the interpretation of this
12 statute.

13 Those expenditures were part of the cost of
14 Missouri-American's doing business here in St. Louis and
15 in the state of Missouri as a private company, and nowhere
16 has the General Assembly indicated that public sewer
17 districts must share or help to defray such company's
18 costs in conducting its own water meter readings that it
19 needs to do for its own billing purposes. And I wanted to
20 bring that to your attention.

21 And the final issue, and this came up more
22 in Mr. Krueger's testimony on behalf of the Staff of the
23 Public Service Commission, is that there's no reason why
24 Missouri-American should be treated differently -- or
25 excuse me -- why Missouri-American should be able to treat

1 the municipal sewer systems differently than it does the
2 public sewer districts under 249.

3 And whether -- there's been some issue as
4 to whether or not it's logical to read the statutes that
5 way or if it's fair or equitable. The fact of the matter
6 is, a statute is a statute. And as you were questioning
7 Mr. Krueger, it's clear that to read Section 249 the way
8 that Missouri-American and the Staff of the Public
9 Service -- the Staff of the Public Service Commission is
10 asking the Commission to read that statute would render
11 the at reasonable charge language in Section 250.233
12 completely meaningless.

13 And we argue that the basis and the logic
14 is that the General Assembly has said that is so, and so
15 the Commission has to follow the dictates and the mandates
16 of Section 249 and the General Assembly's clear intent in
17 distinguishing those two statutes. Thank you.

18 JUDGE JONES: Just a moment. Commissioner
19 Gaw?

20 COMMISSIONER GAW: Just some brief
21 follow-ups. In regard to the confiscatory argument, is
22 there -- aside from the question of whether or not there
23 is some confiscatory nature regarding the expenses that
24 Missouri-American might incur in putting in its own
25 meters, reading its own meters, et cetera, et cetera, in

1 actually incurring any costs of making the data available,
2 is there -- is there a -- give me your perspective on the
3 legal issues from MSD's standpoint of interpreting that
4 there should be free access to those books and records in
5 light of the confiscatory argument, if you've seen -- if
6 you've got any cases that you want -- that you pointed out
7 or that you can refer me to that address when that is an
8 issue that could cause a statute to be interpreted in
9 light of that confiscatory issue.

10 For instance, if you're getting to the
11 point, is there a degree of -- can you get to the point
12 where there's an amount of expense that the company would
13 have to incur without getting reimbursed that would cause
14 that to be relevant either to the interpretation of the
15 statute so that it's not confiscatory or as a
16 constitutional argument in regard to the statute itself
17 even though we -- I don't believe we can interpret the
18 constitutionality of statutes here.

19 Have you done any work on that, any
20 research that much would be helpful.

21 MS. LEVEY: I think I'm a little bit
22 unclear.

23 COMMISSIONER GAW: I'm sorry.

24 MS. LEVEY: So the question is -- can you
25 maybe try to rephrase that a little bit?

1 COMMISSIONER GAW: Let me see if I can
2 shorten it. I think I put too much background in there.
3 You've already addressed the question of whether there's
4 anything confiscatory in your opinion in regard to the
5 reading of meters, the placement of meters, et cetera,
6 et cetera.

7 But if you get to the point of just your
8 interpretation that it means that you should -- that
9 Missouri-American has to make available this data that
10 they collect, if there is some cost and expense that
11 Missouri-American is incurring in making people available
12 to ensure that you can get to those documents and perhaps
13 providing a room for you to look at the documents, for MSD
14 to look at that, is there a confiscatory argument here
15 that needs to be addressed by the Commission in its
16 interpretation of the statute?

17 MS. LEVEY: So with respect to is there a
18 confiscatory or undue takings argument with respect to any
19 incremental costs that would be charged --

20 COMMISSIONER GAW: Yes.

21 MS. LEVEY: -- for making information
22 available? I have not assessed that, but I think that
23 that issue would somewhat be moot because, to the extent
24 Missouri-American can show MSD what would be involved in
25 those incremental costs and to the extent we believe that

1 they're reasonable, that they can back up and support
2 that, we think that they would be fairly minimal. We
3 would likely agree to pay, you know, those incremental
4 costs.

5 We recognize that they would be taking a
6 step beyond what they have to do in their normal routine
7 course of business, and to the extent that there are
8 costs, minimal costs or expenses involved in that, MSD
9 would be willing to compensate for that.

10 COMMISSIONER GAW: Now, I want to follow
11 up, because if what you're referring to is the actual
12 practice that's occurring now, I understood -- I
13 understand your response. If your -- if your
14 interpretation has to do with the minimal requirements
15 under the statute, then I'm not sure I'm following you,
16 because if you're -- are you suggesting to me that we
17 should interpret the statute to allow some compensation?

18 MS. LEVEY: No. No. I'm saying that MSD
19 had -- it would be moot because MSD would agree to that,
20 not as -- not necessarily as a reading, but because the --
21 we're very clear here today that there is no charge that
22 would be permissible for making the information available.
23 I'm simply saying that MSD if forced to have to pay for
24 the incremental costs, it would be willing to do that
25 provided that there's sufficient backup.

1 COMMISSIONER GAW: What do you mean by
2 incremental costs when you're saying that?

3 MS. LEVEY: Anything in excess, to the
4 extent there's anything in excess of Missouri-American's
5 normal routine costs to be able to -- to have to provide
6 that information to us in some sort of reasonably readily
7 ascertainable format. So I'm making a distinction between
8 making available and subsidizing their water meter reading
9 collection efforts.

10 COMMISSIONER GAW: So let me give you an
11 example, then. Let's assume that we're just talking about
12 access to those books and records in their offices, and
13 that they as a part of making those books and records
14 available also believe it is required that they have an
15 employee to be there to observe and supervise while
16 those -- while that access is being granted.

17 Is that a cost to the company that you
18 believe is above the minimum requirements in the statute?

19 MS. LEVEY: I want to make sure we're not
20 confusing. Under the statute, the statute specifically
21 says upon reasonable request shall make available. So
22 under -- if I'm reading the statute strictly, and as we've
23 argued today, we would not have to pay that fee. But what
24 MSD's position is, is that we would agree beyond the terms
25 of the statute to pay for any incremental costs.

1 COMMISSIONER GAW: I'm really narrowly
2 focusing right now on this confiscatory argument, and
3 without having at this point looked at the case law on
4 this question, I don't know if there is a threshold that
5 you have to cross before you get into the legitimacy of
6 that argument, of having to interpret the statute so that
7 it's not confiscatory.

8 If you get to the point where anything that
9 is done that incurs expense on behalf of the company could
10 arguably throw the interpretation into taking into account
11 any expense that Missouri-American might incur, including
12 putting some employee out there to observe what was being
13 done while the access to records were being granted,
14 should this Commission interpret the statute so as to
15 not -- not provide for that employee to be -- for that
16 expense of that employee to be incurred by
17 Missouri-American in interpreting the statute?

18 MS. LEVEY: Having that employee there
19 would be beyond just simply making that information
20 available. I think that the Commission would have to have
21 a bright line rule that simply making it available under
22 the statute, there could be no charge for that. And that
23 furthermore, to the extent there's going to be any charge
24 for doing anything in addition and above, that there's
25 going to have to be some support and that that's going to

1 have to be provided or presented to some third party,
2 objective third party.

3 COMMISSIONER GAW: Okay. I think I'm
4 following what you're saying. Have you got -- do you have
5 case law on this particular argument?

6 MS. LEVEY: Well, as far as the takings
7 provision, I would argue their affirmative defense on the
8 constitutional challenge was lacking under at least
9 Missouri civil procedure rules and it has not been fully
10 examined. So, you know, I don't have anything in addition
11 to what we've already put in our Briefs on that argument.

12 COMMISSIONER GAW: Okay. In regards to the
13 Commission's ability to look at this argument, is it a
14 constitutional question or is it a question of statutory
15 interpretation?

16 MS. LEVEY: It's an issue of statutory
17 construction. I don't see how there can be any kind of
18 argument with that, especially in light of the legislative
19 history that we've presented this morning.

20 COMMISSIONER GAW: So that would be an
21 issue we should look at instead of it being a
22 constitutional issue, which is I think more than arguably
23 outside of our jurisdiction?

24 MS. LEVEY: The analysis of the statute?

25 COMMISSIONER GAW: In light of whether it's

1 confiscatory or not.

2 MS. LEVEY: I think that their argument
3 that it's confiscatory I think is their constitutional
4 challenge.

5 COMMISSIONER GAW: That's what I'm asking.
6 If it's a constitutional challenge, is it beyond our
7 authority to examine that issue here, or is it a matter of
8 statutory interpretation that lies within our authority?

9 MS. LEVEY: Well, I think that we need to
10 have some decision from this Commission because we've
11 already filed in circuit court and the parties have --
12 both Missouri-American and the Public Service Commission
13 filed motions to dismiss saying that the judiciary which
14 would have the ability to assess the constitutionality
15 lacked jurisdiction.

16 So we need a ruling as far as the
17 interpretation here. While we -- and let the record
18 reflect we didn't feel that the Commission had the
19 authority to be assessing this statute in the first place,
20 but we were forced to file and initiate our complaint,
21 which we've done, and we're here before you in light of
22 that.

23 COMMISSIONER GAW: I'm not sure how much
24 weight is given to our interpretation of the law in either
25 event. Let's see. There was one more thing I had, and

1 that has to do with the issue I asked you earlier about
2 and that you touched upon just briefly. If there is some
3 interpretation of this that provides that there -- that
4 the charges should not be assessed on making available the
5 records and books, in the event that the discussion goes
6 beyond that on how much should be charged for additional
7 work that's being done, again, is that a matter that
8 should come before the Commission as far as MSD is
9 concerned or is it something that goes somewhere else?
10 And if you still don't have an answer, that's all right.

11 MS. LEVEY: I still don't have the answer.
12 My -- you know, I think we want to get this resolved, and,
13 you know, we would like to have it resolved as far as this
14 order, but I don't know if the Commission has the
15 authority to make that additional step under -- based on
16 the fact that MSD is not a regulated public utility under
17 the Commission's jurisdiction.

18 COMMISSIONER GAW: Okay. Thank you.

19 JUDGE JONES: I just had a couple of
20 things. Do you agree that under statutory interpretation
21 or construction we're not to assume that the Legislature
22 intended an unreasonable result?

23 MS. LEVEY: That's correct.

24 JUDGE JONES: And Staff's argument was
25 based on reasonableness, and you seem to discount that

1 argument, but you would instead agree that if the
2 Commission finds that it's an unreasonable result, then we
3 should rule against you.

4 MS. LEVEY: Well, I think that the -- the
5 most cardinal rule is that the Commission needs to follow
6 the language that is set out in the statute and that
7 Missouri-American's and Staff Counsel's position would
8 rendering terms completely and utterly meaningless as far
9 as Section 250.233.

10 So based on the plain terms of the statute,
11 I think that there can be no other result than this
12 Commission finding that the imposition of a fee is
13 improper under the statute.

14 JUDGE JONES: You mentioned 250, but 249 is
15 the statute we're looking at.

16 MS. LEVEY: That's correct.

17 JUDGE JONES: And you looked to a different
18 chapter to interpret what's going on in 249.

19 MS. LEVEY: Well, we're forced to look at
20 that other chapter based on the argument that
21 Missouri-American has made that we have read -- that MSD
22 has read out of the statute upon reasonable request. We
23 believe that upon reasonable request based on any
24 dictionary you look at or upon the plain and ordinary
25 terms that the Commission -- or that the Commission or the

1 judiciary has to look at in construing statutes means a
2 request that is reasonable in manner.

3 It does not mean imposition of a fee. It
4 is not -- it is not -- it is something that is an
5 obligation of the sewer district. It is not an
6 affirmative grant or right of the providing authority
7 here, of the water company in the situation. It is saying
8 that if the sewer district is requesting this information,
9 it has to be reasonable. It is not an affirmative grant
10 of power or an affirmative right to charge a fee on the
11 part of Missouri-American as the public water company --
12 private water company.

13 JUDGE JONES: You said when you just began
14 that response the manner, it's the manner that has to be
15 reasonable?

16 MS. LEVEY: Yes.

17 JUDGE JONES: The words manner don't appear
18 in that statute.

19 MS. LEVEY: That's correct.

20 JUDGE JONES: So if we looked at the
21 statute, the statute is unclear as to whether there should
22 be a charge or not.

23 MS. LEVEY: I disagree with that.

24 JUDGE JONES: But there's no mention of a
25 charge. There's no mention that there shouldn't be a

1 charge.

2 MS. LEVEY: Right. And it's the
3 construction of upon reasonable request, that the request
4 be reasonable.

5 JUDGE JONES: And then we're back to the
6 question I posed to you earlier, that an unreasonable
7 request could be one that expects to get the information
8 for free.

9 MS. LEVEY: Not under the terms of the
10 statute.

11 JUDGE JONES: But the statute doesn't
12 discount what I just said. It just doesn't affirmatively
13 say that.

14 MS. LEVEY: It's a matter of opinion and
15 it's what brings us here in front of you today.

16 JUDGE JONES: The question I'm asking you
17 is not whether -- the question I'm asking you is that the
18 statute is ambiguous with regard to a fee, and you tend to
19 argue that it's not ambiguous.

20 MS. LEVEY: Well, and the reason why and
21 the reason why we look at 250.233 to say that it's
22 unambiguous is because when the General Assembly has
23 dictated that a fee should be charged, it has full well
24 added that provision into the statute by saying at
25 reasonable -- at reasonable charge upon reasonable

1 request, and the statute -- it's identical language. That
2 provision is identical in both statutes, yet in 249.645 it
3 does not say at reasonable charge. It just simply says
4 shall make available upon reasonable request. That's it.

5 JUDGE JONES: So what I hear you arguing,
6 then, is that when the Legislature passes 250, they went
7 back and looked at 249?

8 MS. LEVEY: They obviously were aware of
9 249 because they amended 249 via the same house bill.
10 They added subsection 2 for the same provision of 250.234
11 adding for delinquent payments. And they made three or
12 four other amendments to the statute as well in
13 subsection 1.

14 JUDGE JONES: Okay. I don't have any other
15 questions. Mr. Jones, no, I'm not going to let you do a
16 reply, otherwise she'll have the right to do a reply after
17 you, because they have the burden of proof. However, we
18 discussed earlier at the beginning whether or not you
19 wanted to file a brief. She's filed an exhibit, which by
20 the way do you have any objection to?

21 MR. JONES: No. It's just the statutes and
22 the statutory build. I have no objection.

23 JUDGE JONES: Then Exhibit B is admitted.
24 By the way, why is it Exhibit B?

25 MS. LEVEY: I'd like to clarify. We had

1 one other exhibit that I decided to withdraw at the last
2 minute.

3 JUDGE JONES: Exhibit B is admitted into
4 the record.

5 (EXHIBIT B WAS RECEIVED INTO EVIDENCE.)

6 JUDGE JONES: And Mr. Jones, did you-all
7 want to file a post-hearing brief?

8 MR. JONES: Yes, we would. And given as
9 you said in the beginning, your Honor, that there's no
10 procedural rules here, you wouldn't let me have the
11 opportunity to address a couple points right now?

12 JUDGE JONES: Would then you want to
13 respond to the points he might address?

14 MS. LEVEY: For sake of brevity and if
15 it --

16 JUDGE JONES: Just tell me what you feel.

17 MS. LEVEY: I don't think additional
18 briefing's necessary, so no, as long as that would
19 alleviate the briefing requirement and we'd get a
20 resolution.

21 JUDGE JONES: Is that what you're
22 attempting to do?

23 MR. JONES: No. I think the brief is still
24 applicable here.

25 MS. LEVEY: Then we would ask that we be

1 able to file a brief, then, as well.

2 JUDGE JONES: Well, sure, you can file a
3 brief. What I'm asking, are you going to want to say
4 something after he gets done?

5 MS. LEVEY: Not if we're filing briefs,
6 your Honor.

7 JUDGE JONES: Okay. You can go ahead,
8 Mr. Jones.

9 MR. JONES: Just a couple quick points.
10 Don't need to belabor anything, but a couple things that
11 came up in the rebuttal. And you hit on this a little
12 bit. On the one hand MSD is saying that the statute is
13 clear, and under the rules of interpretation, you don't
14 look to rules of construction if the statute is clear.
15 It's only if the statute is ambiguous.

16 So on the one hand MSD is saying, it's
17 clear so therefore we shouldn't use rules of construction
18 to interpret. On the other hand, they're using all these
19 rules of construction, going beyond the statute to look at
20 it. I think they're trying to have it both ways.

21 I think they're also trying to have it both
22 way on the issue of incremental costs. I think Ms. Levey
23 said different things depending on the question that was
24 asked of her. I'm still not clear. Is MSD saying the
25 statute requires them to pay incremental costs or not? I

1 think she said initially that they were required to. Then
2 she said only if they were forced to. Then she said,
3 well, MSD might voluntarily pay it.

4 I think what she said initially, what the
5 real issue is here, that MSD does have to pay incremental
6 costs. But if that's the case, if incremental costs are
7 not specifically expressed in the statute, why not the
8 cost of collecting the data in the first place? I think
9 that's what one of the problems is here.

10 Also, I think there's a misconception about
11 what is -- what has to be gone through in order to provide
12 this information to MSD. It's not just a computer
13 download. It's a mammoth operation that takes a mammoth
14 amount of time by our employees simply to provide the
15 information and to communicate the information to MSD.
16 It's not a question of, hey, come on in and take a look.
17 It takes a substantial amount of time, substantial amount
18 of technology in order to do this.

19 And I hope there's not a false impression
20 because Ms. Levey doesn't know it, and it's not part of
21 the stipulated facts, that it's a substantial effort on
22 the part of Missouri-American to provide this information
23 and to follow up on this information to MSD.

24 And a couple quick points about the
25 so-called termination of the agreement. The parties did

1 agree that the agreement would be ended at its term at the
2 end of 2003, but Missouri-American has continued to
3 provide the information and MSD has continued to pay for
4 the information. So the parties are acting under the
5 terms of the agreement. That's clear.

6 There has been a waiver here. Ms. Levey
7 says that the -- since 2004, since 2003 when this
8 agreement ended, MSD has made it clear that they are not
9 waiving any argument that the statute does not require a
10 fee, but from 19-- even given that, from 1999 to 2003,
11 2004, they waived their argument that there is no fee
12 required.

13 A waiver is an intentional relinquishment
14 of a known right. It doesn't require reliance by the
15 other party. There's been an intentional relinquishment
16 by the acts of MSD and by the statements of MSD. They've
17 relinquished the right to ask for a fee, assuming such fee
18 is not required, which obviously we disagree with.

19 Ms. Levey got into an issue of a reasonable
20 fee, that the reason why MSD paid for this information
21 voluntarily, paid hundred of thousand dollars, millions of
22 dollars up to 2003-2004 is because Missouri-American was
23 being reasonable somehow. Then after 2004 it was being
24 unreasonable.

25 Actually, the agreement of the parties

1 since 1999 was for MSD to pay for 50 percent of the costs.
2 Missouri-American was requesting nothing more than paying
3 for half the costs, which the parties had historically
4 agreed to for over a decade. Yes, the incremental costs
5 go up. Now they're \$1.9 million. Not the incremental
6 cost. The cost of the expense of gathering the
7 information goes up, and therefore, the cost goes up.

8 Missouri-American is saying nothing from
9 2004 on beyond you have agreed, you have requested at
10 least half the information. You should pay for it just as
11 you have in the past. That's the practice of the parties
12 is what's reasonable, and that's what Missouri-American
13 has been requesting. There's no -- there's no issue about
14 going back on terms of the agreement.

15 So I think you'll see that, as I said in
16 the beginning, that the whole issue here is
17 reasonableness. The parties have acted reasonably over
18 the years in providing this information. They've worked
19 amicably to provide this information. And it's only when
20 MSD does not want to pay for half the costs that they have
21 been agreeable to paying since 1993 that we've had this
22 litigation.

23 JUDGE JONES: No questions. Okay. The
24 Staff and Office of Public Counsel want to file briefs?

25 MR. KRUEGER: Yes, your Honor.

1 MS. BAKER: Yes, your Honor.

2 JUDGE JONES: And do you-all want to file
3 simultaneous briefs?

4 MR. JONES: Since they are the -- since
5 they are the Petitioner, I think it would be appropriate
6 for MSD to file theirs first and us two get a reply.

7 MS. LEVEY: If we're going to consider this
8 as a trial brief type situation, both parties typically
9 would file at the same time.

10 JUDGE JONES: Well, it's not a trial type
11 situation. We haven't heard any evidence. Do you have
12 some objection to -- in fact, turn your mic on.

13 MS. LEVEY: Well, if we're going to have
14 staggered briefing, then we would want an opportunity to
15 reply to Missouri-American's brief, of course.

16 JUDGE JONES: And where does Staff and the
17 Office of Public Counsel fall into this process? Do you
18 want to file after the initial brief or after the reply
19 brief, before all of it or when? Particularly Staff
20 because I'm assuming although Staff has taken a position,
21 they don't have an interest in the matter.

22 MR. KRUEGER: It really doesn't matter to
23 me.

24 MS. BAKER: It does not matter to OPC.

25 JUDGE JONES: Just file whenever you want

1 then, put it that way. How long will you need to file
2 your initial brief?

3 MS. LEVEY: We would ask for a week to ten
4 days, your Honor.

5 JUDGE JONES: Says ten days, and then ten
6 days thereafter we'll hear a response, and then an
7 additional ten days we'll get the reply.

8 MR. JONES: I think that's an appropriate
9 schedule, especially given the fact that we have a current
10 rate case with a true-up date of May 31st. I think given
11 that schedule we'll be able to resolve that before this
12 time.

13 JUDGE JONES: That puts us a month out from
14 now, which would be the end of April. So you-all want the
15 Commission to rule before the end of May?

16 MR. JONES: That's our true-up date.

17 JUDGE JONES: Okay. Is there anything else
18 anyone would like to discuss while we're on the record?
19 Seeing nothing, then we are adjourned.

20 WHEREUPON, the oral argument in this case
21 was concluded.

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1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3 COUNTY OF COLE) ss.

4 I, Kellene K. Feddersen, Certified
5 Shorthand Reporter with the firm of Midwest Litigation
6 Services, and Notary Public within and for the State of
7 Missouri, do hereby certify that I was personally present
8 at the proceedings had in the above-entitled cause at the
9 time and place set forth in the caption sheet thereof;
10 that I then and there took down in Stenotype the
11 proceedings had; and that the foregoing is a full, true
12 and correct transcript of such Stenotype notes so made at
13 such time and place.

14 Given at my office in the City of
15 Jefferson, County of Cole, State of Missouri.

16

17 Kellene K. Feddersen, RPR, CSR, CCR
18 Notary Public (County of Cole)
My commission expires March 28, 2009.

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