BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

COMPLAINANT'S SUGGESTIONS IN SUPPORT OF
ITS MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

Complainant Metropolitan St. Louis Sewer District ("MSD") is entitled to summary determination in this case. Under the plain and unambiguous language of Section 249.645.1, RSMo, which governs Missouri sewer districts, Respondent Missouri-American Water Company ("MAWC") is required to provide certain water usage and customer identification data ("Water Usage Data") to MSD free of charge. The statute provides that "[a]ny private water company…shall…make available to such sewer district its records and books so that such sewer district may obtain therefrom such data as may be necessary to calculate the charges for sewer service." § 249.645.1, RSMo. Nothing in the statute suggests that a private water company, such as MAWC, may impose a fee for the mandatory provision of such data. Yet in violation of the statute, MAWC refuses to provide the Water Usage Data to MSD or to permit MSD to inspect MAWC's water meter reading records without the payment of a substantial fee.

Accordingly, MSD seeks an Order from the Public Service Commission ("PSC") determining that MAWC's conduct in seeking to charge a fee for the provision of Water Usage Data constitutes a violation of Section 249.645.1 and that pursuant to the statute, MAWC is

required to provide the Water Usage Data to MSD free of charge or is otherwise required to make its water meter reading information and other pertinent records available to MSD at no cost.

Because there is no genuine issue as to any material fact and the plain and unambiguous terms of Section 249.645.1 demonstrate that MSD is entitled to judgment as a matter of law, summary determination of this case in favor of MSD is warranted.

II. FACTUAL BACKGROUND

MAWC regularly conducts water meter readings and related estimates and compiles Water Usage Data for its own billing purposes. In February 2002, the parties entered into an agreement for the provision of Water Usage Data to MSD to assist MSD in the calculation of its customers' billing statements ("Water Usage Data Agreement").

The Water Usage Data Agreement provided that, in exchange for the provision of Water Usage Data, MSD would pay MAWC a fee for such data.[1] The term of the Water Usage Data Agreement was "December 1, 2001, to December 1, 2003, and from year to year thereafter subject to termination by either party at any time on 30 days notice." In September 2003, by mutual written correspondence, the parties terminated the Water Usage Data Agreement, effective December 31, 2003.

In April 2004, MAWC submitted to the PSC a new tariff for the provision of Water Usage Data to MSD. The new schedule established a yearly flat-fee tariff of $760,000.00, to be paid by MSD in twelve equal monthly installments. Because MSD had not agreed to any such fee, it requested that the PSC reject the new rate tariff schedule. MAWC subsequently withdrew

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[1] Under the terms of the Water Usage Data Agreement, the fee was to approximate 50% of MAWC's cost of obtaining the Water Usage Data and was set by a rate tariff of $0.54 per account read, which became effective in April 2002. *See* MSD's Complaint, Exh. 1.

the new schedule, and this litigation followed.[2]

During the pendency of this proceeding and MSD's previous litigation in state court, MSD has continued to pay a fee to MAWC for Water Usage Data as per the rate tariff agreed to in the Water Usage Data Agreement, subject to and without waiver of MSD's right to challenge the imposition of a fee for the provision of such data.

III. STANDARD FOR SUMMARY DETERMINATION

The PSC "may grant [a] motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the [PSC] determines that it is in the public interest." 4 CSR 240-2.117. The goal of summary determination is to permit the relevant adjudicative body to enter judgment, without delay, when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. Rule 74.04;[3] *ITT Commercial Finance v. Mid-American Marine Supply*, 854 S.W.2d 371, 376-377 (Mo. banc 1993). Because no genuine dispute as to any material fact exists and MSD is entitled to judgment as a matter of law, MSD's motion for summary determination should be granted.

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[2] Despite MAWC's attempt to interject a tariff for the provision of Water Usage Data into its last rate proceeding, this case does not involve a challenge to a rate. Rather, this dispute involves the interpretation of a statute governing sewer districts. To the extent that the PSC perceives this as a rate dispute, there is no longer an existing tariff to challenge. The tariff terminated upon the expiration of the underlying Water Usage Data Agreement. Previously, MSD maintained that the PSC does not have any regulatory authority over MSD and that the interpretation of Section 249.645.1, RSMo, which governs a sewer district's computation of charges for its sewer service, is outside the purview of the PSC. However, on April 24, 2006, the Circuit Court of St. Louis County entered a Judgment of Dismissal in MSD's civil case against MAWC, determining that primary jurisdiction of this dispute rested with the PSC. As a result, MSD seeks resolution of this matter before the PSC.

[3] Generally, rules of civil procedure do not govern the conduct of proceedings before administrative agencies. "The rules of civil procedure by their very terms of promulgation apply only to civil actions in judicial courts." *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App. 2004). Although the PSC adjudicates MSD's motion under 4 CSR 240-2.117 rather than Rule 74.04, "the two are sufficiently similar (and in many instances, nearly identical) as to make many cases interpreting the latter helpful." *Id.*

IV. ARGUMENT

A. MAWC's imposition of a fee for the provision of Water Usage Data constitutes a violation of Section 249.645.1 as a mater of law.

Summary determination in favor of MSD is required in this case because the plain and unambiguous language of Section 249.645.1 does not authorize the imposition of a fee for the provision of Water Usage Data to MSD.

The cardinal rule of statutory construction is to ascertain the legislature's intent by considering the plain and ordinary meaning of the words used in the statute. *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005). "Only when the language is ambiguous or if its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute." *Lonergan v. May*, 53 S.W.3d 122, 126 (Mo. App. 2001). "In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988).

The plain language of Section 249.645.1, which expressly authorizes MSD "to establish, make and collect charges for sewage services," does not similarly permit MAWC to charge a fee for the provision of Water Usage Data to MSD. The statute provides:

> Any private water company, public water supply district, or municipality supplying water to the premises located within a sewer district ***shall, upon reasonable request, make available*** to such sewer district its records and books so that such sewer district may obtain therefrom such data as may be necessary to calculate the charges for sewer service.

§ 249.645.1, RSMo (emphasis added). Indeed, there is no language in the statute suggesting that MAWC's provision of Water Usage Data to MSD or its obligation to make such Data available to MSD is optional or in any way permitted to be contingent on payment by MSD. To the contrary, the legislature's use of the term "shall" denotes a mandatory obligation on the part of

MAWC to make its Water Usage Data accessible to MSD regardless of payment. *See id.* ("Any private water company . . . **shall** . . . make available to such sewer district its records and books. . . .").

Missouri courts are clear that the legislative use of the word "shall" connotes a mandatory duty. *Bauer v. Transitional School District of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003); *State ex rel. Dreer v. Public School Retirement System of City of St. Louis*, 519 S.W.2d 290, 296 (Mo. 1975) ("the use of 'shall' is indicative of [a] mandate"); *U.S. Central Underwriters Agency v. Hutchings*, 952 S.W.2d 723, 724-725 (Mo. App. 1997) ("the definition of 'shall' states that it is 'used in laws, regulations or directives to express what is mandatory'") (citing Webster's Third New International Dictionary); *Missouri Society of the American College of General Practitioners v. Roderick*, 797 S.W.2d 521, 524 (Mo. App. 1990) (Missouri law is clear that a legislature's use of "shall" is mandatory and not permissive).

Despite the manifest language of Section 249.645.1, MAWC reads into the statute the right to impose a fee for complying with its statutory obligation. Such a construction requires the addition of language to the statute. Generally, courts do not strain to interpret a statute "where [s]uch an interpretation impermissibly adds language to the statute." *BHA Group Holding, Inc. v. Pendergast*, 173 S.W.3d 373, 379 (Mo. App. 2005). The judiciary is not permitted to "engraft upon [a] statute provisions which do not appear in explicit words or by implication from the words in the statute." *State Dept. of Social Services, Division of Medical Services v. Brundage*, 85 S.W.3d 43, 49 (Mo.App.2002).

The provision of Water Usage Data or accessibility to such Data free of charge is an explicit statutory obligation of MAWC. Inserting the right to impose a fee for the provision of Water Usage Data into Section 249.645.1 would render this mandatory obligation a nullity. In

effect, there would be *no obligation* to aid sewer districts in the provision of Water Usage Data, if private water companies, such as MAWC, could hold such Data hostage by requiring payment as a condition precedent to its accessibility.

In fact, the Supreme Court of Missouri has previously held that in circumstances where the language of a statute does not expressly authorize payment of a fee, no fee may be imposed. *See Carpenter v. King*, 679 S.W.2d 866 (Mo. banc 1984). In arriving at its holding, the Missouri Supreme Court in *Carpenter* rejected the argument that because the legislature made express its intention not to allow the collection of a fee in a similar statute, the silence of the statute under dispute on the imposition of a fee implied "its tacit intention to authorize a fee." *Id.* at 868.

Similar to the statute at issue in *Carpenter*, the fact that Section 249.645.1 is silent with respect to the collection of a fee by MAWC does not imply that the legislature has tacitly authorized the imposition of a fee. Had there been any ambiguity in the mind of the legislature as to whether the statute authorizes private water companies to collect fees for the provision of Water Usage Data to sewer districts, it could have inserted language expressly providing for such fees. Obviously, the legislature elected to do otherwise.

Accordingly, based on the unambiguous language and plain meaning of Section 249.645.1, it is clear that MAWC's imposition of a fee for the provision of Water Usage Data violates the statute as written, thus entitling MSD to summary determination in its favor as a matter of law.

B. MAWC's purported affirmative defenses are insufficient as a matter of law.

In an attempt to circumvent its mandatory obligation to make its Water Usage Data available to MSD free of charge, MAWC enumerates various affirmative defenses, which are inadequate as a matter of law. Specifically, MAWC alleges, in conclusory fashion, that the doctrines of waiver, estoppel, and laches preclude MSD from claiming that Section 249.645.1

requires MAWC to provide Water Usage Data free of charge and that MSD's interpretation of Section 249.645.1 renders the statute a violation of MAWC's due process rights and/or an unconstitutional taking of MAWC's property interests. Because MAWC's affirmative defenses fail to allege ***any*** supporting facts, they are legally insufficient and it is unnecessary for MSD to disprove them in order to prevail on its motion for summary determination.

Under Missouri law, "[a] pleading that sets forth an affirmative defense...shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense." Rule 55.08. Thus, Missouri courts require that the factual basis for defenses be set out in the same manner that is required for pleading claims — i.e. so-called "notice pleading" is insufficient. *See ITT Commercial Fin. Corp.*, 854 S.W.2d at 383-84 (Mo. banc 1993) (noting that affirmative defenses which plead nothing more than "bare legal conclusions" are insufficient as a matter of law because they "fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08"); *Leiser v. City of Wildwood*, 59 S.W.3d 597, 605-06 (Mo. App. 2001) (noting that the defendant's affirmative defenses were insufficient to overcome summary judgment in favor of the plaintiff because they failed to plead any supporting facts, and thus, were insufficient as a matter of law).

It is well settled that where a defendant's affirmative defenses are pled inadequately, a party seeking summary judgment is not required to negate the defenses in order to prevail on its motion. *ITT Commercial Finance Corp.*, 854 S.W.2d at 384. In *ITT Commercial Finance*, the Supreme Court of Missouri noted that "[r]equiring a 'claimant' to negate such conclusory allegations as a prerequisite to summary judgment would require that party to first make the non-movant's case then defeat it." *Id. See also Leiser*, 59 S.W.3d at 605-06 (relying on the same rationale and holding that a plaintiff is not obligated to establish the non-viability of a

defendant's affirmative defenses in the plaintiff's motion for summary judgment when the affirmative defenses are pled inadequately).

Similar to the non-movant in *Leiser*, the affirmative defenses pled by MAWC are bald legal conclusions. Indeed, MAWC fails to allege ***a single*** fact supporting any of its affirmative defenses. The mere pleading of legal conclusions, without more, is insufficient to allege an affirmative defense. *Id.* Because MAWC has failed to plead any facts supporting its affirmative defenses, all of its purported defenses fail as a matter of law. Accordingly, the PSC must grant summary determination in MSD's favor based on the plain language of Section 249.645.1.

C. Even if MAWC had pled facts supporting its waiver, estoppel and laches defenses, the defenses still fail as a matter of law.

MAWC contends that the doctrines of waiver, estoppel, and laches preclude MSD from claiming that Section 249.645.1 requires MAWC to provide Water Usage Data free of charge. Because MAWC has suffered no detriment as a result of MSD's alleged conduct, each of these affirmative defenses are insufficient as a matter of law.

1. Waiver

MAWC contends that MSD has waived its right to claim that Section 249.645.1 requires MAWC to provide Water Usage Data free of charge. Even if the PSC is willing to accept the manner in which MAWC mischaracterizes its own statutory obligation as an allegedly waivable right of MSD, the affirmative defense of waiver fails as a matter of law.

"In order to establish a waiver based upon estoppel it is essential that the party asserting it show that he has done or omitted to do some act or changed his position to his detriment in reliance upon some representation or conduct of the person against whom the waiver is sought." *Conservative Federal Sav. and Loan Ass'n v. Warnecke*, 324 S.W.2d 471, 481 (Mo. App. 1959); *see also Doss v. EPIC Healthcare Management Co.*, 901 S.W.2d 216, 221 (Mo. App. 1995)

(doctrine of waiver requires a showing of detrimental reliance). Thus, unless MAWC can establish some indicia of detrimental reliance such as a change in its position as a result of MSD's purported conduct, the defense of waiver is inapplicable.

No such detrimental reliance exists here. MAWC regularly compiles its Water Usage Data through water meter readings and related estimates for its own billing purposes and it would have continued to compile such Data and to conduct water meter readings during the relevant time period for its own purposes regardless of any agreements between the parties. The Water Usage Data Agreement between the parties simply provided MAWC with the added benefit of additional funds to defray the costs associated with its own necessary data collection – costs that would exist with or without a statutory obligation to provide Water Usage Data to MSD.

Thus, MAWC seeks to invoke the affirmative defense of waiver not to protect itself from injustice, but to retain an undeserved windfall. Under such circumstances, application of the doctrine of waiver is entirely inappropriate. Foregoing the added benefit of another party defraying one's own collection costs and expenses, does not constitute the detrimental reliance necessary to invoke the waiver doctrine.

2. Estoppel

For similar reasons, the doctrine of estoppel must fail as a matter of law. Estoppel is not a favorite of the law and will not be lightly invoked; it should be applied with care and caution and only when all elements constituting estoppel clearly appear. *State ex rel. Sprouse v. Carroll County*, 889 S.W.2d 907 (Mo. App. 1994). The elements necessary to establish the affirmative defense of estoppel are (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the

admission, statement, or act. *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 386 (Mo. 1989). The existence of detrimental reliance is also a necessary element of estoppel. *Sharp v. Interstate Motor Freight System*, 442 S.W.2d 939, 946 (Mo. banc 1969) (holding a plea of estoppel must be disallowed for lack of showing of the essential element of detriment).

MAWC has never relied upon MSD's statements or actions to its detriment. As noted above, MAWC conducts meter readings and compiles Water Usage Data for its own purposes in any event. The past agreements between the parties have provided MAWC with an additional windfall of defraying costs that would exist with or without a statutory obligation to provide Water Usage Data to MSD. The only injury MAWC could legitimately claim it has suffered is that *in the future* it will no longer receive this past windfall associated with the costs of its own data collection. Given these facts, estoppel is likewise insufficient as a matter of law.

3. Laches

Finally, MAWC contends that MSD's cause of action is barred by the doctrine of laches. As was the case with waiver and estoppel, this affirmative defense must fail as a matter of law. Laches applies where "a party with knowledge of the facts giving rise to his rights delays assertion of them for an excessive time and the other party suffers legal detriment therefrom." *Rich v. Class*, 643 S.W.2d 872, 876-877 (Mo. App. 1982). "[T]he delay must be unreasonable and unexplained and the other party must be materially prejudiced." *Moore v. Director of Revenue*, 51 S.W.3d 923, 927 (Mo. App. 2001).

MAWC simply cannot establish that it has suffered a detriment as a result of MSD's alleged delay in the assertion of its claim. Because MSD could have been receiving Data from MAWC free of charge pursuant to MAWC's statutory obligation under Section 249.645.1, MSD's delay in the assertion of its claim was a benefit to MAWC rather than a detriment. As a result, the affirmative defense of laches must also fail.

V. CONCLUSION

In light of the foregoing, a summary determination of this case in favor of MSD is clearly warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via electronic submission and/or by U.S. Mail, postage prepaid, this 15th day of December, 2006, upon the following parties/counsel of record:

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