BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	**File No. WC-2014-0018**
Consolidated Public Water Supply District, C-1 of Jefferson County, Missouri,	)	
and	)	
City of Pevely, Missouri,	)	
Respondents.	)	

RESPONDENT CONSOLIDATED PUBLIC WATER SUPPLY DISTRICT, C-1 OF JEFFERSON COUNTY, MISSOURI'S SUGGESTIONS IN SUPPORT OF ITS ANSWERS AND OBJECTIONS TO COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION

COMES NOW Respondent, Consolidated Public Water Supply District, C-1 of Jefferson County, Missouri ("C-1"), and for its *Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination* pursuant to 4 CSR 240-2.117(1)(C), states as follows:

INTRODUCTION

The majority of *Staff's Suggestions in Support of its Motion for Summary Determination* recites Staff's version of "undisputed" facts.[1] As C-1 has demonstrated in its *Answers and Objections to Staff's Motion for Summary Determination*, however, genuine issues of material fact remain in this case. In addition, "[t]he key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question."[2] On its burden of

[1] See *Staff's Suggestions in Support of its Motion for Summary Determination*, pg. 3-5.
[2] **ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.**, 854 S.W.2d 371, 380 (Mo. banc. 1993)

demonstrating its undisputed right to judgment as a matter of law, Staff has also failed.

In sum, material issues of fact exist regarding (1) whether an agreement existed between the Respondents in light of the fact that Respondents were not abiding by the document they previously signed, and (2) whether any alleged agreement was a "territorial agreement" as that term is used in § 247.172. At best, Staff has proven that the Respondents previously signed a piece of paper that they titled "territorial agreement." Finally, discovery is ongoing in this case.

As for the law, in addition to its prior arguments regarding the Commission's lack of jurisdiction in this case, Staff has not proven that Respondents entered into a territorial agreement subject to Mo. Rev. Stat. § 247.172 in light of the fact that Pevely does not provide water service beyond its corporate municipal boundaries and that competition was not displaced by the alleged agreement.

I. DISPUTED FACTS EXIST PRECLUDING SUMMARY DETERMINATION

Staff insists that this case presents only a legal controversy and that no facts are in dispute. While C-1 agrees that this case presents a host of disputed legal issues, it disagrees that Staff has met its burden of establishing no genuine issue of fact. In addition, the facts are not settled in this case because discovery is ongoing.[3]

In 2007, Respondents signed a piece of paper they titled "territorial agreement." As established in *C-1's Answers and Objections to Staff's Motion for Summary Determination,* there is a factual dispute regarding whether an agreement existed between the parties and whether that agreement constitutes a "territorial agreement" as contemplated by § 247.172.[4]

An agreement did not exist in this case because Respondents were not observing their

(emphasis added).

[3] C-1 understands why Staff needed to file its *Motion for Summary Determination* when it did in order to comply with the 60-day rule set forth in 4 CSR 240-2.11(1)(A).

[4] C-1*'s Response to Staff's Data Request No. 4-7, 15-20, 22-26, 29; Pevely's Answer* ¶ 11; *C-1's Answer ¶ 11*.

signed "territorial agreement." Both Respondents have denied that they had "[s]ince 2007, . . .acted upon the terms of their service boundaries agreement in such matters as determining which water service provider customers must use for their water service."[5] This led to the removal and replacement of water meters and a lawsuit between Respondents in 2012.[6] Thus, there is a factual dispute as to whether there was any agreement between the parties.

In addition, there is a factual dispute regarding whether any alleged agreement constituted a "territorial agreement" as that term is used in the § 247.172. The alleged agreement did not specifically designate any and all powers granted to Pevely to operate in areas beyond its corporate municipal boundaries. Thus, a dispute exists as to whether the alleged agreement constitutes a "territorial agreement" under the statute.

There is also a factual dispute regarding whether the alleged agreement displaced competition between Respondents as required by § 247.172. The competition existing between Respondents is demonstrated the fact that the Respondents were not abiding by the alleged agreement; by the affidavit from H & H's receiver; as well as the actions of Respondents in removing and replacing one another's water meters in the months leading up to the 2012 lawsuit between Respondents and even after that lawsuit.[7] Staff actually admits that competition was not displaced per the agreement in its statement providing that the competition between Respondents has been expensive and prolonged, among other things.[8]

Accordingly, Staff has not established the absence of material issues of fact in this case.

II. STAFF HAS FAILED TO PROVE ITS UNDISPUTED RIGHT TO JUDGMENT AS A MATTER OF LAW

[5] *Pevely's Answer* ¶ 11; *C-1's Answer ¶ 11*
[6] *C-1's Response to Staff's Data Request No.19, 22-29.*
[7] *C-1's Response to Staff's Data Request No.19, 22-29.*
[8] *Staff's Suggestions in Support of its Motion for Summary Determination*, pg. 6.

Staff has failed to prove its undisputed right to judgment as a matter of law because it has failed to prove (1) that an agreement existed between the parties, beyond the existence of a piece of paper the parties titled "territorial agreement" and (2) that the alleged agreement constituted a "territorial agreement" subject to the Commission's jurisdiction.

First, Staff has not proven that any agreement existed between Respondents. Rather, the Respondents were not abiding by the piece of paper they titled "territorial agreement."

Second, as stated in Respondents' *Joint Motion to Dismiss*, *Memorandum of Law in Support of Their Joint Motion to Dismiss*, *Joint Reply to Staff's Response to Motion to Dismiss*, and *Motion for Rehearing*, the Commission lacks jurisdiction over this case because the alleged agreement does not include as a party a water corporation subject to the Commission's jurisdiction and because the Commission lacks jurisdiction to hear complaints involving non-approved agreements. Pursuant to the terms of § 247.172, if a "territorial agreement" subject to the statute is not presented to the Commission for approval, it is simply not effective. Thus, to the extent § 247.172 applies to the Respondents' alleged agreement, it only renders the agreement void. Moreover, the language of the statute only grants the Commission jurisdiction over complaints involving "commission-approved territorial agreements." "A presumption exists that the legislature does not insert idle verbiage or superfluous language in the statute. Cook v. Newman, 142 S.W.3d 880, 892 (Mo. App. W.D. 2004). Rather, we presume that the legislature intends that every word, clause, sentence, and provision of a statute have effect. Id." State ex rel Vincent v. D.C., Inc., 265 S.W.3d 303, 308 (Mo. App. E.D. 2008). If the Commission had jurisdiction to hear the complaint pursuant to § 386.390 RSMo as set forth in its denial of *Respondents' Joint Motion to Dismiss*, the language of §247.172.7 stating "the commission shall have jurisdiction to entertain and hear complaints involving any commission-approved territorial

agreement" would be superfluous and of no effect. Nothing within the plain language of the statute gives the Commission jurisdiction over an agreement that has not been presented or approved, such as the agreement between Respondents. Accordingly, the Commission lacks jurisdiction over this case.

The Commission also lacks jurisdiction over this case because the alleged agreement does not specifically designate any and all powers granted to Pevely to operate in areas beyond its corporate municipal boundaries nor does it displace competition between the Respondents. To constitute a territorial agreement under § 247.172.2,

> such territorial agreement shall specifically designate [1] the boundaries of the water service area of each water supplier subject to the agreement, [2] any and all powers granted to a public water supply district by a municipality, pursuant to the agreement, to operate with the corporate boundaries of that municipality, notwithstanding the provisions of section 247.010 to 247.67 to the contrary, and [3] any and all powers granted to a municipally owned utility, pursuant to the agreement, to operate in areas beyond the corporate municipal boundaries of its municipality.

(alteration and emphasis added).

As set forth in the statute, a territorial agreement must designate any and all powers granted to a municipally owned utility to operate in areas beyond its corporate municipal boundaries. Here, the alleged "territorial agreement" does not specifically designate Pevely's powers to operate beyond its corporate municipal boundaries. In fact, Pevely does not provide water service beyond its corporate municipal boundaries. Thus, the Commission lacks jurisdiction over this alleged agreement.

The statute also requires that a "territorial agreement" displace competition. Specifically, Missouri Revised Statutes § 247.172.1 provides:

> Competition to sell and distribute water…may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section.

Although Staff admits that the parties were in competition and suggests that such actions were "evil",[9] their behavior was actually sanctioned by § 247.172 in that they had not displaced competition between each other by virtue of an agreement.

That competition was not displaced is consistent with Respondents' Answers denying that they had "[s]ince 2007, . . .acted upon the terms of their service boundaries agreement in such matters as determining which water service provider customers must use for their water service." Thus, per the language of the statute, territorial agreements are regulated because they displace competition. That is simply not the case here.

CONCLUSION

Staff has failed to meet the standard for the Commission's grant of summary determination. Specifically, as demonstrated by *Pevely's Answer and Objections to Staff's Motion for Summary Determination*, genuine issues of fact remain in this case. In addition, Staff has failed to prove its undisputed right to judgment as a matter of law concerning this alleged "territorial agreement" or that the public interest favors granting summary determination in a case that is apparently unlike any other case ever before the Commission. Nor has Staff met its burden of negating all of C-1's affirmative defenses, as discussed in *C-1's Response to Complainant's Reply to Respondents' Denominated Affirmative Defenses* filed simultaneously herewith.

WHEREFORE, the Consolidated Public Water Supply District, C-1 of Jefferson County, Missouri prays that the Commission will deny Staff's *Motion for Summary Determination*, and grant such other and further relief as the Commission deems just.

[9] *Staff's Suggestions in Support of Its Motion for Summary Determination*, pg. 6. Staff does not cite authority for the proposition that Respondents' behavior is exactly the type of "evil" that the General Assembly sought to address by enacting § 247.172. Given the language of the statute governing the displacement of competition, Staff's position that § 247.172 was enacted to address competition is peculiar.

Respectfully submitted,

/s/ Bianca L. Eden

Bianca L. Eden #50301
WEGMANN LAW FIRM
P.O. Box 740
455 Maple Street
Hillsboro, MO 63050
(636) 797-2665 or 296-5769
beden@wegmannlaw.com
Attorneys for Respondent Consolidated Public Water Supply District C-1 of Jefferson County, Missouri

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed by U.S. Mail on this 25th day of April, 2014, unless served electronically via EFIS to:

Kevin A. Thompson
Chief Staff Counsel
Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
amy.moore@psc.mo.gov

Office of Public Counsel
P.O. Box 2230
200 Madison Street
Suite 650
Jefferson City, MO 65102
opcservice@ded.mo.gov

Terrence J. Good
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
tjgood@lashlybaer.com
Attorneys for Respondent City of Pevely, Missouri

*/s/ Bianca L. Eden*_____