

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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| Staff of the Missouri Public Service Commission, |) | |
| |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | <u>Case No. WC-2014-0018</u> |
| |) | |
| Consolidated Public Water Supply District |) | |
| C-1 of Jefferson County, Missouri, |) | |
| |) | |
| and |) | |
| |) | |
| City of Pevely, Missouri, |) | |
| |) | |
| Respondents. |) | |

MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its *Motion for Summary Determination* pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

1. Staff filed its *Complaint* on July 19, 2013, asserting that the Respondents had in 2007 entered into a territorial agreement without seeking its approval by this Commission, in violation of § 247.172, RSMo.¹ For relief, Staff prays that the Commission will determine that Respondents’ conduct has violated the law and, if Respondents will not then seek approval of their territorial agreement from this

¹ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (“RSMo”), revision of 2000, as amended and cumulatively supplemented.

Commission, authorize its General Counsel to seek penalties in circuit court.as authorized by law.

2. Commission Rule 4 CSR 240-2.117(1) provides as follows:

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period. However, a motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the commission.

(B) Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted and testimony, discovery or affidavits not previously filed that are relied on in the motion. The movant shall serve the motion for summary determination upon all other parties not later than the date upon which the motion is filed with the commission.

* * *

(E) The commission may grant the 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 commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

* * *

3. There are two Respondents in this case, to-wit: Consolidated Public Water Supply District C-1 of Jefferson County, Missouri ("CPWSD C-1"), and the City of Pevely ("Pevely" or "the City"); Respondent Pevely filed its *Answer* on December 5, 2013, and Respondent CPWSD C-1 filed its *Answer* on December 10, 2013; this motion

therefore, is filed after Respondents have filed their responsive pleading as required by Commission Rule 4 CSR 240-2.117(1)(A).

4. On March 6, 2014, the Commission issued its *Notice of Hearing*, setting the evidentiary hearing herein on June 11, 2014. That date is 75 days after today, March 28, 2014, and therefore, this motion is filed more than sixty days prior to the hearing as required by Commission Rule 4 CSR 240-2.117(1)(A).

5. Pursuant to Commission Rule 4 CSR 240-2.117(1)(B), Staff states that there is no genuine issue as to the material facts set out in ¶¶ 6 through 27, below, which are established by the *Answers* filed herein by the Respondents and by the *Affidavit of John F. Holborow* and the *Affidavit of James Busch*, which are attached hereto and incorporated herein by reference as authorized by Rule 4 CSR 240-2.117(1)(B).

6. Both Respondents admit in their *Answers* that Complainant is the Staff of the Missouri Public Service Commission (“Commission”) acting through the Chief Staff Counsel as authorized by Commission Rule 4 CSR 240-2.070(1).²

7. Both Respondents admit in their *Answers* that Respondent CPWSD C-1 is a public water supply district located in Jefferson County, Missouri, and that Its principal place of business is P.O. Box 430, Barnhart, Missouri 63012; and that Respondent Pevely is a municipality located in Jefferson County, Missouri, with Its principal place of business at 401 Main Street, Pevely, Missouri 63070.³

8. Respondent CPWSD C-1 admits in its *Answer* that it provides water utility

² CPWSD C-1 *Answer*, ¶ 2; Pevely *Answer*, ¶ 2.

³ CPWSD C-1 *Answer*, ¶¶ 3 & 4; Pevely *Answer*, ¶¶ 3 & 4.

services to the public, pursuant to Section 247.⁴

9. Both Respondents admit in their *Answers* that the City provides water utility services to the public, pursuant to §§ 79 and 91.⁵

10. By law, this Commission has authority to hear and determine complaints against corporations, persons or public utilities pursuant to § 386.390.1, RSMo, which provides that "[c]omplaint may be made . . . in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the Commission . . ."

11. Commission Rule 4 CSR 240-2.070(1) provides in pertinent part, "A complaint may also be filed by the commission on its own motion, the commission staff through the staff counsel, or the Office of the Public Counsel."

12. Section 247.172 grants exclusive authority to this Commission to approve territorial agreements between and among public water supply districts, water corporations subject to public service commission jurisdiction, and municipally-owned utilities, and provides:

1. Competition to sell and distribute water, as between and among public water supply districts, water corporations subject to public service commission jurisdiction, and municipally owned utilities may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section.

2. Such territorial agreements shall specifically designate the boundaries of the water service area of each water supplier subject to the agreement, any and all powers granted to a public water supply district by

⁴ CPWSD C-1 Answer, ¶ 5. Pevely denied this allegation but, as it runs against CPWSD C-1 and not against Pevely, that denial is without force. *Pevely Answer*, ¶ 5.

⁵ CPWSD C-1 Answer, ¶ 6; *Pevely Answer*, ¶ 6.

a municipality, pursuant to the agreement, to operate within the corporate boundaries of that municipality, notwithstanding the provisions of sections 247.010 to 247.670 to the contrary, and 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.

3. Where the parties cannot agree upon the boundaries of the water service areas that are to be set forth in the agreement, they may, by mutual consent of all parties involved, petition the public service commission to designate the boundaries of the water service areas to be served by each party and such designations by the commission shall be binding on all such parties. Petitions shall be made pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity and the commission shall hold evidentiary hearings on all petitions so received as required in subsection 5 of this section. The commission shall base its final determination regarding such petitions upon a finding that the commission's designation of water service areas is in the public interest.

4. Before becoming effective, all territorial agreements entered into under the provisions of this section, including any subsequent amendments to such agreements, or the transfer or assignment of the agreement or any rights or obligations of any party to an agreement, shall receive the approval of the public service commission by report and order. Applications for commission approval shall be made and notice of such filing shall be given to other water suppliers pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity. Unless otherwise ordered by the commission for good cause shown, the commission shall rule on such applications not later than one hundred twenty days after the application is properly filed with the secretary of the commission.

5. The commission shall hold evidentiary hearings to determine whether such territorial agreements should be approved or disapproved, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties, such hearings may be waived by agreement of the parties. The commission may approve the application if it determines that approval of the territorial agreement in total is not detrimental to the public interest. Review of commission decisions under this section shall be governed by the provisions of sections 386.500 to 386.550.

6. Commission approval of any territorial agreement entered into under the provisions of this section shall in no way affect or diminish the rights and duties of any water supplier not a party to the agreement to provide service within the boundaries designated in such territorial

agreement. In the event any water corporation which is not a party to the territorial agreement and which is subject to the jurisdiction, control and regulation of the commission under chapters 386 and 393 has sought or hereafter seeks authorization from the commission to sell and distribute water or construct, operate and maintain water supply facilities within the boundaries designated in any such territorial agreement, the commission, in making its determination regarding such requested authority, shall give no consideration or weight to the existence of any such territorial agreement and any actual rendition of retail water supply services by any of the parties to such territorial agreement will not preclude the commission from granting the requested authority.

7. The commission shall have jurisdiction to entertain and hear complaints involving any commission-approved territorial agreement. Such complaints shall be brought and prosecuted in the same manner as other complaints before the commission. The commission shall hold an evidentiary hearing regarding such complaints, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties, such hearings may be waived by agreement of the parties. If the commission determines that a territorial agreement that is the subject of a complaint is no longer in the public interest, it shall have the authority to suspend or revoke the territorial agreement. If the commission determines that the territorial agreement is still in the public interest, such territorial agreement shall remain in full force and effect. Except as provided in this section, nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting, or management of any public water supply district or municipally owned utility, or to amend, modify, or otherwise limit the rights of public water supply districts to provide service as otherwise provided by law.

8. Notwithstanding the provisions of section 386.410, the commission shall by rule set a schedule of fees based upon its costs in reviewing proposed territorial agreements for approval or disapproval. Responsibility for payment of the fees shall be that of the parties to the proceeding as ordered by the commission in each case. The fees shall be paid to the director of revenue who shall remit such payments to the state treasurer. The state treasurer shall credit such payments to the public service commission fund, or its successor fund, as established in section 33.571. Nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any public water supply district or municipally owned utility and except as provided in this section, nothing shall affect the rights, privileges or duties of public water supply districts, water corporations subject to public service commission jurisdiction or municipally owned utilities.

9. Notwithstanding any other provisions of this section, the commission may hold a hearing regarding any application, complaint or petition filed under this section upon its own motion.

13. Both Respondents admit in their *Answers* that in 2007, they entered into a written agreement designating the boundaries of the water service area of each entity and the powers granted to each entity to operate within the boundaries of the other.⁶

14. The written agreement that Respondents entered into in 2007 was a purported Territorial Agreement, executed on or about November 12, 2007, governing Respondent Pevely's provision of water service to various locations within Respondent CPWSD C-1's boundaries, including the Valle Creek Condominiums ("the Development") managed by John F. Holborow in his capacity as court-appointed Receiver for its developer, H&H Development Group, Inc. ("H&H").⁷

15. Respondents CPWSD C-1 and Pevely never sought or obtained the approval by this Commission of the Territorial Agreement referred to in ¶¶ 13 and 14, above.⁸

16. The Development is located within the territorial boundaries of Respondent CPWSD C-1, however, Respondent CPWSD C-1's water mains do not extend to the Development, whereas the water mains of Respondent Pevely do extend to the Development.⁹

17. On June 30, 2008, H&H entered into an agreement ("the Main Extension Agreement") with Respondent CPWSD C-1, pursuant to which H&H undertook to install,

⁶ CPWSD C-1 Answer, ¶ 7; Pevely Answer, ¶ 7.

⁷ Holborow Affidavit, ¶¶ 1-3, 5, and Ex. A.

⁸ Busch Affidavit, ¶3.

⁹ Holborow Affidavit, ¶ 4.

at its expense, a water main extension connecting the Development to Respondent CPWSD C-1's system.¹⁰

18. The Main Extension Agreement provided that this work was to be completed by February 1, 2009, and, if still incomplete by March 1, 2009, "then the water service line from Pevely's water main will be terminated on that date" and "C-1 water meters will be removed, and the Developer [i.e., H&H] will make other provisions to legally serve Valle Creek Condominiums customers at that time."¹¹

19. The water main extension contemplated by the Main Extension Agreement was never completed and remains incomplete today.¹²

20. The Main Extension Agreement expressly contemplated interim water service to the Development by Respondents Pevely and CPWSD C-1, and Respondent Pevely made a verbal side agreement ("the Temporary Service Agreement") providing for such service.¹³

21. Respondent Pevely provided water to the Development from June 30, 2008, until October 1, 2012, under the Temporary Service Agreement. During that period, the meters on the lines by which Respondent Pevely served the Development belonged to Respondent CPWSD C-1, which billed H&H monthly for the water provided to the Development and reimbursed Respondent Pevely semi-annually for the cost of the water.¹⁴

¹⁰ *Id.*, ¶ 6 and Ex. B.

¹¹ *Id.*, ¶ 7.

¹² *Id.*, ¶ 8.

¹³ *Id.*, ¶ 9.

¹⁴ *Id.*, ¶ 10.

22. In September of 2012, a territorial dispute arose between Respondents, pursuant to which, on October 1, 2012, Respondent Pevely removed Respondent CPWSD C-1's meters from the Development and replaced them with its own; thereafter, Respondent Pevely billed H&H directly for the water service provided to the Development.¹⁵

23. On November 1, 2012, Respondent CPWSD C-1 filed suit against Respondent Pevely, Case No. 12JE-CC01024, in the Circuit Court of Jefferson County, Missouri, praying that the Court, among other things, order Pevely to perform according to the Respondents' Territorial Agreement, modify the Respondent's Territorial Agreement, or declare the Respondent's Territorial Agreement null and void.¹⁶

24. Respondents never filed any complaint with this Commission regarding their Territorial Agreement and never sought or obtained approval by this Commission of any modification or amendment of their Territorial Agreement, or sought and obtained suspension or revocation of their Territorial Agreement by this Commission on its determination that the Territorial Agreement was no longer in the public interest.¹⁷

25. In April 2013, Respondent CPWSD C-1 removed Respondent Pevely's meters from the Development and replaced them with its own; thereafter, Respondent CPWSD C-1 billed H&H directly for the water service provided to the Development.¹⁸

26. Also in April 2013, Respondent CPWSD C-1 by letter to John F. Holborow, Receiver, demanded that H&H complete within 180 days the main extension

¹⁵ *Id.*, ¶ 11.

¹⁶ *Id.*, ¶ 12 and Ex. C.

¹⁷ *Busch Affidavit*, ¶¶ 3-5.

¹⁸ *Holborow Affidavit*, ¶ 13.

contemplated by the Main Extension Agreement, or face service termination.¹⁹

27. H&H lacks funds to complete the contemplated main extension and the Receiver, John F. Holborow, fears that Respondent CPWSD C-1 will terminate water service to the Development.²⁰

28. Respondents CPWSD C-1 and Pevely assert several purported affirmative defenses in Paragraphs 24 through 35 of their *Answers*, none of which constitute a sufficient defense or avoidance of Staff's *Complaint* as fully explained in Staff's *Reply* filed herein simultaneously with Staff's *Motion for Summary Determination*.

WHEREFORE, Staff prays that the Commission will grant summary determination of its *Complaint* filed herein and enter its order finding (1) that Respondents CPWSD C-1 and Pevely are a public water supply district and a municipally-owned water utility, respectively; (2) that Respondents CPWSD C-1 and Pevely violated § 247.172, .4 and .5, by entering into a territorial agreement without seeking and obtaining the approval of this Commission; (3) that Respondents CPWSD C-1 and Pevely have further violated § 247.172.7 by seeking adjudication of complaints concerning their territorial agreement in the circuit court rather than before this Commission; (4) that Respondents CPWSD C-1 and Pevely have further violated § 247.172.7 by requesting that the circuit court rather than this Commission revoke their territorial agreement; (5) that the Commission authorize its General Counsel to seek penalties against Respondents in circuit court pursuant to §§ 386.590 and 386.600; and granting such other and further relief as the Commission deems just.

¹⁹ *Id.*, ¶ 14.

²⁰ *Id.*, ¶ 15.

Respectfully submitted,

/s/ Kevin A. Thompson

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **28th day of March, 2014**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case, which date is not later than the date on which this pleading is filed with the Commission as required by Rule 4 CSR 240-2.117(1)(B), relating to Summary Determination.

s/ Kevin A. Thompson