

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

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.)	

**STAFF’S SUGGESTIONS IN SUPPORT OF ITS
MOTION FOR SUMMARY DETERMINATION**

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

Introduction

Staff filed its *Complaint* on July 19, 2013, asserting that Respondents Consolidated Public Water Supply District C-1 of Jefferson County, Missouri (“CPWSD C-1”), and the City of Pevely (“Pevely” or “the City”), had violated § 247.172, RSMo.,¹ in several respects by (1) making a Territorial Agreement between them designating the boundaries of the water service area of each and the powers granted by each to the

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

other to provide service within one another's boundaries with seeking or obtaining the approval of this Commission; (2) by filing a complaint regarding their Territorial Agreement in Circuit Court rather than before this Commission; (3) by seeking a modification or amendment of their Territorial Agreement in the Circuit Court rather than before this Commission; and (4) by seeking revocation or suspension of their Territorial Agreement in the Circuit Court rather than before this Commission on its determination that the Territorial Agreement is no longer in the public interest. For relief, Staff prays that the Commission will make the findings requested by Staff and authorize its General Counsel to seek penalties in Circuit Court pursuant to §§ 386.590 and 386.600.

Argument

Summary Determination:

Commission Rule 4 CSR 240-2.117(1)(E) authorizes 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." Filed simultaneously herewith are Staff's motion and affidavits; these *Suggestions* constitute the "separate legal memorandum" that must be "attached" to a motion for summary determination pursuant to Rule 4 CSR 240-2.117(1)(B).² Staff suggests that its motion, affidavits and suggestions demonstrate that there is no dispute of material fact, that Staff is entitled to relief as a matter of law and that the public interest demands that Staff's complaint be sustained.

² Rule 4 CSR 240-2.117(1) states certain other requirements for summary determination, all of which are met here as detailed in Staff's accompanying motion.

Staff urges the Commission to understand that summary determination should be favored, not disfavored.³ In a proper case, summary determination conserves scarce resources, both fiscal and human, for the Commission and for all the parties.⁴ Why hold an evidentiary hearing in a case like the present, which presents issues of law and public policy, but not issues of fact? Evidentiary hearings are lengthy and expensive and the Commission would gain nothing thereby that it cannot get from holding an oral argument on Staff's motion and Respondents' anticipated opposition to that motion.

What is this Case about?

This case presents a legal controversy; there are no material facts in dispute.⁵ Respondent CPWSD C-1 is a consolidated public water supply district and Respondent Pevely is a Fourth Class City and municipality that owns and operates a water supply utility. Pevely and CPWSD C-1 are adjacent and parts of Pevely are within the corporate boundaries of CPWSD C-1. Disputes arose between the two Respondents as to which of them would provide water service to certain areas and these disputes resulted in litigation.

To resolve these disputes and the consequent litigation, on or about November 12, 2007, the Respondents entered into an agreement that they captioned "Territorial Agreement between the Consolidated Public Water Supply District No. C-1 of Jefferson County, Missouri, and the City of Pevely, Missouri" ("the Territorial Agreement"). The Respondents did not then, nor at any time thereafter, seek or obtain approval by this

³ J.R. Devine, *Missouri Civil Pleading & Practice*, §24-1 (The Harrison Co., Norcross, GA, 1986): "The purpose of summary judgment is to expedite litigation. The process is designed to promote a speedy determination of cases in which there are no genuine factual disputes."

⁴ See *Smith v. Aquila, Inc.*, 229 S.W.3d 106, 124 (Mo. App., W.D. 2007).

⁵ Citations to the evidence or pleadings establishing each assertion of fact herein are set out in Staff's *Motion for Summary Determination*.

Commission of their Territorial Agreement.

The Respondents' Territorial Agreement did not end the disputes between them. Among the parcels that are located within both Pevely and CPWSD C-1 is one known as the Valle Creek Condominiums ("the Development"). The Development was built by H and H Development Group, Inc. ("H&H"), which eventually fell upon hard times, leading to the appointment of a receiver ("the Receiver"). Although the Development is located within CPWSD C-1, none of CPWSD C-1's water mains extend to it. However, Pevely's mains do extend to the Development and Pevely provided water service to the Development via its mains, evidently in violation of the Territorial Agreement.⁶

On June 30, 2008, H&H entered into an agreement ("the Main Extension Agreement") with Respondent CPWSD C-1, which required H&H to install, at its expense, a water main extension connecting the Development to CPWSD C-1's water mains. 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 "[CPWSD] 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."

A verbal side agreement ("the Temporary Service Agreement") permitted Pevely to provide water service to the Development on an interim basis, pending completion of the main extension. 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 the Pevely served the Development belonged to CPWSD

⁶ The Territorial Agreement allows service by Pevely to several named developments, not including the Valle Creek Condominiums. The Valle Creek Condominiums are not mentioned in the Territorial Agreement.

C-1. CPWSD C-1 billed H&H monthly for the water provided to the Development and reimbursed Pevely semi-annually for the cost of the water. The Respondents did not then, nor at any time thereafter, seek or obtain approval by this Commission of the Temporary Service Agreement which was, after all, a modification or amendment of their Territorial Agreement.

However, the main extension was never built, H&H ran out of money, and the Receiver was appointed in 2012. In September of 2012, yet another territorial dispute arose between CPWSD C-1 and Pevely, pursuant to which, on October 1, 2012, Pevely removed CPWSD C-1's meters from the Development and replaced them with its own. Thereafter, Pevely billed H&H directly for the water service provided to the Development. CPWSD C-1 responded by filing a new lawsuit against Pevely on November 1, 2012, Case No. 12JE-CC01024, in the Circuit Court of Jefferson County, Missouri, seeking several varieties of relief, some of which, pursuant to § 247.172, are within the exclusive authority of this Commission.

While the lawsuit was pending, in April 2013, CPWSD C-1 removed Pevely's meters from the Development and replaced them with its own and started billing H&H directly for the water service provided to the Development. The water, by the way, was still coming from Pevely over Pevely's mains as CPWSD C-1's mains still do not extend to the Development. At about the same time, CPWSD C-1, by letter to the Receiver, demanded that H&H complete within 180 days the main extension contemplated by the Main Extension Agreement, or face service termination. H&H lacks the necessary funds to complete the main extension and the possibility exists that the Development will lose its water service.

Discussion:

The undisputed facts establish that CPWSD C-1, a public water supply district, and Pevely, a municipality owning and operating a public water utility, violated § 247.172 in multiple ways:

- By making a territorial agreement without seeking and obtaining Commission approval;
- By modifying or amending that territorial agreement without seeking and obtaining Commission approval;
- By taking their disputes to the Circuit Court rather than to this Commission; and
- By seeking relief from the Circuit Court that only this Commission can grant.

The undisputed facts also establish that granting summary determination in this case is very much in the public interest. The behavior of CPWSD C-1 and Pevely is exactly the evil that the General Assembly sought to address by enacting § 247.172. Their competition has been destructive, expensive, prolonged, pointless, and has actually placed citizens in jeopardy of losing water service, a necessity of life. Indeed, it is the egregious nature of the facts in this case that has led Staff to seek penalties, although Staff is willing to forego them if the Respondents will submit to the authority of the Commission and resolve their differences in a way that best promotes the legitimate interests of all concerned.

Respondents' Denominated Affirmative Defenses:

Part of Staff's burden on its Motion for Summary Judgment is to show "the non-

viability” of Respondents’ affirmative defenses.⁷ Staff has done so in its *Reply to Respondents’ Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, filed simultaneously with these suggestions. Therein, taking each purported affirmative defense one-by-one, Staff has showed that it is either factually incorrect, factually unsupported, legally inadequate, or simply not an avoidance to Staff’s *Motion for Summary Determination*. Staff has carried its burden and the Commission should grant Staff’s *Motion for Summary Determination*.

Conclusion

The undisputed facts established by the pleadings and affidavits relied on by Staff show that Staff is entitled to relief herein as a matter of law and that the public interest favors granting the requested relief. No good is served by the ongoing competition and disputes of these parties and they are manifestly unable to resolve them by themselves. The Commission should grant summary determination as requested herein by Staff and thereby give these parties the help they so desperately need. No one should lose their water service over this.

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

⁷ *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993) (emphasis added).

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.

Respectfully submitted,

s/ Kevin A. Thompson
KEVIN A. THOMPSON
Chief Staff Counsel
Missouri Bar Number 36288

Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102

Attorney for the Staff of the Missouri
Public Service Commission.

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