

**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 REPLY TO RESPONDENTS’ DENOMINATED
AFFIRMATIVE DEFENSES 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 *Reply to Respondents’ Denominated Affirmative Defenses 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. The Respondents filed nearly identical *Answers* on December 5,

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

2013 (Pevely), and on December 10, 2013 (CPWSD C-1). Staff filed its *Motion for Summary Determination* with supporting *Suggestions* and affidavits on March 28, 2014; in further support thereof, Staff now denies the Respondents' denominated Affirmative Defenses as set out below.² With respect to affirmative defenses, the Missouri Supreme Court has held:

where the defendant has raised an affirmative defense, a claimant's right to judgment depends just as much on the non-viability of that affirmative defense as it does on the viability of the claimant's claim. It does not matter that the non-movant will bear the burden on this issue at trial. Summary judgment permits the "claimant" to avoid trial; in order to do so, the claimant must meet the burden imposed by Rule 74.04(c) by showing a right to judgment as a matter of law. **Therefore, a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law.** Unlike the burden of establishing all of the facts necessary to his claim, however, **the claimant may defeat an affirmative defense by establishing that any one of the facts necessary to support the defense is absent.** At this stage of the proceeding, the analysis centers on Rule 74.04(c); it is irrelevant what the non-movant has or has not said or done.³

24. The Commission has not previously exercised any authority under § 247.172 RSMo. 2000, to govern agreements the type of which the Respondents are alleged have entered.⁴

This assertion is wrong as a matter of fact. Attached hereto as Exhibit A and incorporated herein by reference is a list of 23 water territorial agreement cases taken up by the Commission over the past twenty years.⁵

25. The Commission has not previously exercised any authority with

² Paragraphs are numbered just as they are in Respondents' *Answers*. For each asserted defense, Respondents' text is set out verbatim in **bold** and Staff's reply in normal text.

³ *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993) (emphasis added).

⁴ CPWSD C-1's *Answer*, ¶ 24; Pevely's *Answer*, ¶ 24.

⁵ This list was prepared in response to a DR served on Staff by Respondent Pevely.

respect to the alleged agreement since November 12, 2007.⁶

This assertion is true. Staff did not know about Respondents' Territorial Agreement until shortly before the *Complaint* herein was filed in 2013. However, this fact does not constitute a factual or legal avoidance of any element of Staff's *Complaint* and it is therefore not an impediment to summary determination in favor of Staff.

26. The Commission and Complainant have not given any prior notice to the Respondents that it intended to enforce § 247.172 RSMo. 2000, so as to have any application to the alleged agreement.⁷

The General Assembly has given Respondents all necessary notice by enacting § 247.172. All persons are presumed to know the law.⁸

27. The Commission and the Complainant have failed to give § 247.172 RSMo. 2000 its most liberal interpretation despite the fact that it contains penal provisions.⁹

Staff and the Commission have given § 247.172 the interpretation required by its plain language. Even if Respondents' assertion were true, it would not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in Staff's favor.

28. Respondent had the right to rely on the procedures and methods of the Commission as administered as to agreements which are the subject of Complainant's allegations.¹⁰

⁶ CPWSD C-1's *Answer*, ¶ 25; Pevely's *Answer*, ¶ 25.

⁷ CPWSD C-1's *Answer*, ¶ 26; Pevely's *Answer*, ¶ 26.

⁸ ***State v. Collins***, 413 S.W.3d 689, 700 (Mo. App., S.D. 2013).

⁹ CPWSD C-1's *Answer*, ¶ 27; Pevely's *Answer*, ¶ 27.

¹⁰ CPWSD C-1's *Answer*, ¶ 28; Pevely's *Answer*, ¶ 28.

Staff does not understand Respondents' assertion and therefore denies it. This case is unique and thus unlike any other Commission proceeding concerning Territorial Agreements. However, even if Respondents' assertion were true, it would not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in favor of Staff.

29. Any fine imposed as a result of this Complaint would be borne by Respondent and its citizens.¹¹

This assertion is true. However, this fact does not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in favor of Staff.

30. No citizen of the State of Missouri has made any complaint regarding the agreement between the Respondents.¹²

This assertion is factually inaccurate. Staff learned about this matter through the complaint of John F. Holborow, receiver of H and H Development Group, Inc., and thus proprietor of Valle Creek Condominiums. Mr. Holborow's address is in Chesterfield, Missouri, and presumably he is a Missouri citizen. However, even if he were not, that fact would not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in Staff's favor.

31. The Commission lacks jurisdiction over the subject matter of the Complaint.¹³

The Commission has already determined this issue against the Respondents.

¹¹ CPWSD C-1's *Answer*, ¶ 29; Pevely's *Answer*, ¶ 29.

¹² CPWSD C-1's *Answer*, ¶ 30; Pevely's *Answer*, ¶ 30.

¹³ CPWSD C-1's *Answer*, ¶ 31; Pevely's *Answer*, ¶ 31.

See *Order Denying Motion to Dismiss*, issued November 4, 2013, and *Order Denying Reconsideration*, issued November 26, 2013.

32. Enforcement of § 247.172 RSMo. 2000 as the Complainant seeks would violate the due process rights of the Respondent pursuant to the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution.¹⁴

This assertion is untrue. Due process requires that the government must give notice and provide an opportunity for a hearing appropriate to the nature of the case.¹⁵ The Commission's adjudicatory rules, procedures and processes have provided Respondents with notice as required by statute and a meaningful opportunity to be heard. The requisites of due process have been afforded Respondents.

33. Complainant and the Commission are estopped to enforce § 247.172 RSMo. 2000, as sought in the Complaint.¹⁶

Estoppel is a doctrine under which a party may not change position to the detriment of another party which acted in reliance upon the first asserted position. It is an equitable affirmative defense based upon the notion of good-faith detrimental reliance upon a misleading representation.¹⁷ It is founded on the concept of fairness. Equitable estoppel has three elements: "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon; (2) action by another party on the faith of such admission, statement, or act; and (3) injury to such other party, resulting

¹⁴ CPWSD C-1's *Answer*, ¶ 32; Pevely's *Answer*, ¶ 32.

¹⁵ *Dabin v. Director of Revenue*, 9 S.W.3d 610, 615 (Mo. banc 2000); *Session v. Director of Revenue*, 417 S.W.3d 898, 905 (Mo. App., W.D. 2014).

¹⁶ CPWSD C-1's *Answer*, ¶ 33 ("stopped" rather than "estopped"); Pevely's *Answer*, ¶ 33.

¹⁷ *Black's Law Dictionary*, 570 (7th ed., 1999).

from allowing contradiction of the admission, statement, or act.”¹⁸ When an estoppel claim is made against the government, in addition to these three elements, the party must also show that the governmental conduct on which the claim is based constitutes affirmative misconduct.¹⁹

With these points in mind, it is clear that the asserted affirmative defense must fail as a matter of law because it is unsupported by any factual allegations. What was Respondents’ detrimental reliance? What was Staff’s affirmative misconduct? Respondents have the burden of proof as to their affirmative defenses.²⁰ However, no facts making out these elements appear in the record and they have manifestly failed to carry their burden.

34. Complainant may not seek to enforce § 247.172 RSMo. 2000, as set out in this Complaint by reason of laches.²¹

Laches is an equitable doctrine. It is the neglect to act, for an unreasonable and unexplained length of time, under circumstances permitting diligence, where the law requires action.²² “There is no fixed period within which a person must assert his claim or be barred by laches.”²³ Most importantly, “[l]aches is a question of fact to be determined from all the evidence and circumstances adduced at trial.”²⁴ The doctrine is

¹⁸ *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 650 -652 (Mo. App., E.D. 2010), *citing Fraternal Order of Police Lodge # 2 v. City of St. Joseph*, 8 S.W.3d 257, 263 (Mo. App., W.D.1999).

¹⁹ *Id.*

²⁰ *Moore v. Weeks*, 85 S.W.3d 709, 721 (Mo. App., W.D 2002).

²¹ CPWSD C-1’s *Answer*, ¶ 30; Pevely’s *Answer*, ¶ 30.

²² *Metro. St. Louis Sewer Dist. v. Zykan*, 495 S.W.2d 643, 656 (Mo. 1973).

²³ *Id.*

²⁴ *Id.*, at 657 (emphasis added).

not favored by equity and is used primarily to prevent injustice.²⁵ “Mere delay in asserting a right does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the defendant.”²⁶

Respondents’ attempted affirmative defense of laches must fail as a matter of law. Respondents have the burden of proof as to their affirmative defenses²⁷ and have again failed to carry that burden. They have pleaded no facts showing that Staff unaccountably neglected to act over a prolonged period of time; indeed, Staff brought this *Complaint* as soon as it was made aware of the circumstances. Neither have they pleaded any facts showing that they have been unfairly disadvantaged or prejudiced. They are presumed to know the law,²⁸ yet failed to seek Commission approval of their Territorial Agreement. Even after Staff filed its *Complaint*, they have obdurately insisted that the Commission has no jurisdiction. This attempted affirmative defense must fail as a matter of law because it is unsupported by any factual allegations.

35. The Commission lacks jurisdiction pursuant to the plain language of § 247.172 RSMo. and the enabling statute of the Commission.²⁹

The Commission has already determined this issue against the Respondents. See *Order Denying Motion to Dismiss*, issued November 4, 2013, and *Order Denying Reconsideration*, issued November 26, 2013.

Conclusion

Part of Staff’s burden on its *Motion for Summary Judgment* is to show “the non-

²⁵ *Moore, supra*, 85 S.W.3d at 721.

²⁶ *Zykan, supra*, 495 S.W.2d at 656–57 (internal quotation omitted).

²⁷ *Moore, supra*.

²⁸ *State v. Collins*, 413 S.W.3d 689, 700 (Mo. App., S.D. 2013).

²⁹ This affirmative defense is asserted by Respondent CPWSD C-1, but not by Respondent Pevely.

viability” of Respondents’ affirmative defenses.³⁰ Staff has done so in this pleading, taking each purported affirmative defense one-by-one and showing that it is either factually incorrect, factually unsupported, legally inadequate, or simply not an avoidance to Staff’s *Motion for Summary Determination*. For that reason, the Commission should grant Staff’s *Motion for Summary Determination*.

WHEREFORE, having fully replied to Respondent’s *Answer* and Denominated Affirmative Defenses, Staff prays the Commission will grant the relief sought in Staff’s *Complaint*; and grant such other and further relief as the Commission deems just in the premises.

Respectfully submitted,

s/ Kevin A. Thompson
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³⁰ *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993) (emphasis added).

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

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List of Territorial Agreements

WO-2013-0443, In the Matter of the Application of Missouri-American Water Company, for the Approval of an Agreement with the Chariton County Public Water Supply District #2 to Sell and Deliver Water for Resale and Related Tariff Sheets.

WO-2013-0193, In the Matter of the City of Chillicothe, Missouri, and Public Water Supply District No. 2 of Livingston County, Missouri's Application for Approval of Joint Service Agreement (not granted).

WO-2012-0088, In the Matter of the Application of Missouri-American Water Company and the Public Water Supply District No. 2 of St. Charles County, Missouri, for Approval of a Territorial Agreement Concerning Territory in St. Charles County, Missouri.

WO-2009-0351, In the Matter of the Joint Application of the City of Centralia, Missouri and Public Water Supply District No. 10 of Boone County, Missouri for Approval of a Third Amendment to a Written Territorial Agreement Concerning Territory Within Boone County, Missouri.

WO-2007-0188, In the Matter of the Application of the Consolidated Public Water Supply District No. 1 of Clark County, Missouri and the City of LaGrange, Missouri for Approval of a Territorial Agreement Concerning Territory Encompassing Part of Lewis County, Missouri.

WO-2007-0091, In the Matter of the Joint Application of the City of Centralia, Missouri and Public Water Supply District No. 10 of Boone County, Missouri for Approval of a Second Amendment to a Written Territorial Agreement Concerning Territory within Boone County, Missouri.

WO-2006-0488, In the Matter of the Joint Application of Public Water Supply District No. 3 of Franklin County, Missouri and the City of St. Clair, Missouri for Approval of a Water Service Area Territorial Agreement in Franklin County, Missouri.

WO-2006-0230, In the Matter of the Joint Application of the Public Water Supply District No. 2 of St. Charles County, Missouri, and the City of Wentzville, Missouri, for Approval of an Amendment to Their Water Service Area Territorial Agreement.

WO-2006-0135, In the Matter of the Application of Consolidated Public Water Supply District No. 1 of Clark County, Missouri and the City of Canton, Missouri for Approval of a Territorial Agreement Concerning Territory Encompassing Part of Lewis County, Missouri.

WO-2005-0286, In the Matter of the Application of Missouri-American Water Company, for the approval of an Agreement with the City of Kirkwood, Missouri to Construct

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Transmission Mains and Points of Delivery and to Sell and Deliver Water for Resale and Related Tariff Sheets.

WO-2005-0242, In the matter of the application of Consolidated Public Water Supply District NO. 1 of Boone County, Missouri for approval of a territorial agreement concerning territory encompassing part of Boone County, Missouri.

WO-2005-0127, In the matter of the joint application of the City of Hannibal, Missouri and Public Water Supply District No. 1 of Ralls County, Missouri for approval of a water service area territorial agreement.

WO-2005-0084, In the Matter of the Joint Application of the City of Centralia, Missouri and Public Water Supply District No. 10 of Boone County, Missouri for approval of a first amendment to a written territorial agreement concerning territory within Boone County, Missouri and Audrain County, Missouri.

WO-2004-0163, In the Matter of the Joint Application of the City of Hannibal, Missouri and Public Water Supply District No. 1 of Ralls County, Missouri for Approval of Three Territorial Agreements Concerning Water Service Areas in Marion County, Missouri.

WO-2003-0186, In the matter of the joint application of the City of Union, Missouri and Public Water Supply District No.1 of Franklin County, Missouri for approval of a Territorial Agreement concerning territory in Franklin County, Missouri.

WO-2002-208, Centralia, City of (Water territorial agreement with Public Water Supply District No. 10 of Boone County which designates boundaries in Boone County, approved).

WO-2002-226, Pacific, City of (Water territorial agreement with Public Water Supply District No. 3 of Franklin County which encompasses part of Franklin County, approved).

WO-2001-326, Public Water Supply District No. 3 of Franklin County (Water territorial agreement with the City of Washington, encompassing part of Franklin County, approved).

WO-2000-472, City of Columbia (Territorial agreement with Public Water Supply District No. 4 of Boone County which encompasses part of Boone County, approved).

WO-2000-849, Public Water Supply District No. 2 of St. Charles County (Water territorial agreement with City of Wentzville, granted).

WO-99-129, Columbia, City of and Consolidated Public Water Supply District No. 1 of Boone County (Water territorial agreement, Boone County, approved).

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WO-99-561, Public Water Supply District #1 of Nodaway County & City of Maryville
(Territorial agreement, approved).

WO-95-282, City of Ste. Genevieve, Public Water Supply District No. 1 of Ste.
Genevieve, (Water territorial agreement, approved).