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 RESPONSE TO COMPLAINANT'S REPLY TO RESPONDENTS' DENOMINATED AFFIRMATIVE DEFENSES

COMES NOW Respondent, Consolidated Public Water Supply District, C-1 of Jefferson County Missouri ("C-1"), and for its *Response to Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, states as follows:

INTRODUCTION

As Staff of the Missouri Public Service Commission ("Staff") acknowledges, it is Staff's burden as the claimant for summary determination to establish not only the viability of its claim, but also to prove that Pevely's affirmative defenses fail as a matter of law.[1] As discussed in *C-1's Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination* and further below, Staff has failed to meet either, much less both, of these burdens.[2]

[1] *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 2 (quoting **ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.**, 854 S.W.2d 371, 381 (Mo. banc 1993)).

[2] C-1 has employed the same approach as Staff in numbering and bolding the affirmative defense at issue and addressing Staff's reply in normal text.

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 to have entered.

In an effort to demonstrate the non-viability of this affirmative defense, Staff alleges that this assertion is wrong as a matter of fact and cites Exhibit A, which is "a list of 23 water territorial agreement cases taken up by the Commission over the past twenty years" prepared in response to one of Pevely's Data Requests.[3]

First, as Exhibit A demonstrates and as the statements of Staff make clear, the agreements listed in Exhibit A over which the Commission has supposedly exercised authority under § 247.172 involved voluntary applications for the Commission's approval of agreements – Staff's twenty-year review of cases revealed no instance where the Commission took affirmative action to assert jurisdiction over an alleged territorial agreement like it has done in the present case. In fact, Staff admits that "[t]his case is unique and thus unlike any other Commission proceeding concerning Territorial Agreements."[4]

Second, from a review of Exhibit A, not all of the 23 agreements involved only public water supply districts and municipal water utilities, such as the case here, but rather a water corporation was included as a party. Nor did all of the agreements involve the Commission's exercise of authority pursuant to § 247.172. For example, the very first case listed involved an Application of Missouri-American Water Company for the Approval of an Agreement with the

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[3] *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 2. Staff states that it prepared this list in response to Pevely's Data Request. See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 2, n. 5. Staff is apparently referring to the following Data Request made by Pevely: "Please provide a list of all territorial agreements between public water supply districts and municipal water utilities which the Public Service Commission has approved, denied approval, or sought to enjoin pursuant to § 247.172 RSMo., since 1994." See *Staff's Responses to Pevely's First Set of DRs, at ¶ 2 (emphasis added).*

[4] *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 4

Chariton County Public Water Supply District #2 to Sell and Deliver Water for Resale and Related Tariff Sheets.[5] In its Order dated May 29, 2013, granting the application in that case, the Commission stated that it had jurisdiction to decide the application pursuant to § 393.150, RSMo. 2000; its Order made no mention of § 247.172.[6] The agreement in that case was not even a "territorial agreement," as it merely provided for the water corporation's sale and delivery of water to the public water supply district for resale.[7]

25. The Commission has not previously exercised any authority with respect to the alleged agreement since November 12, 2007.

Staff admits this assertion to be true, but argues that it provides no basis for avoiding any element of Staff's Complaint.[8] Later, in response to C-1 and Pevely's defense of laches, Staff argues that C-1 and Pevely have not pleaded any facts showing that "Staff unaccountably neglected to act over a prolonged period of time."[9] The admitted absence of any attempt to exercise authority over this alleged agreement for almost six years goes to support Respondents' defense of laches.

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.

Staff argues that the legislation itself has given Respondents all the notice they need,[10]

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[5] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, Exhibit A (emphasis added).
[6] See *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-2013-0443, Order Granting Application, pg. 2, n.2.
[7] See *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-2013-0443, Order Granting Application, pg. 1.
[8] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 3.
[9] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 7.
[10] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 3.

admitting that neither it nor the Commission has ever provided Pevely or C-1 with any sort of notice prior to these proceedings. The statute has not provided notice that it would apply to the Respondents' alleged agreement because it is open to interpretation. Staff admits that this is unlike any other proceeding concerning territorial agreements ever before the Commission – that it has never before interpreted the statute to apply in this situation. How could Respondents have notice of Staff's interpretation of the statute when Staff itself only recently formulated that interpretation? As discussed in response to affirmative defense no. 32, the statute at issue has not provided Respondents with constitutional notice that its conduct would violate the law.

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.

Staff argues that it has given § 247.172 the interpretation required by its plain language.[11] For the reasons set forth in its *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*, which are incorporated by reference herein, § 247.172 does not apply to this case by its plain language because no water corporation is involved and because the dispute does not involve an approved agreement. In addition, as discussed in *C-1's Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination*, Staff has not proven that an agreement existed between Respondents, much less one that constitutes a "territorial agreement" as that term is used in § 247.172. Further, even if a territorial agreement as contemplated by the statute existed, the plain language of the statute indicates that the legislature only grants the Commission jurisdiction to hear complaints over agreements they have approved. "A presumption exists that the legislature does not insert idle verbiage or superfluous language in

[11] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 3.

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. As discussed in response to affirmative defense no. 32, the statute did not provide Respondents with constitutional notice that its conduct would violate the law. Staff has admitted that these proceedings are unique and unlike any other proceeding before the Commission. It has never interpreted § 247.172 to apply to this situation and has given Respondents no notice of its intent to do so.

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.

Staff states that it does not understand C-1's assertion and therefore denies it, yet it admits that "[t]his case is unique and thus unlike any other Commission proceeding concerning Territorial Agreements."[12] This admission is precisely the point that C-1 has made in its affirmative defense – the Commission has never (or at least not within the last 20 years) attempted to affirmatively exercise jurisdiction over an alleged territorial agreement between a municipal water district and a public water supply district.[13] This is admittedly a new interpretation for Staff in enforcing § 247.172. Respondents had a right to rely on the Commission's procedures and methods. By

[12] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 4.
[13] See *Staff's Responses to Pevely's First Set of DRs*, at ¶ 3.

attempting to exercise jurisdiction in this case, the Commission's exercise of authority is inconsistent with its prior procedures and methods. These facts support C-1's claim for estoppel, as discussed more fully below.

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

Staff admits that this assertion is true, but insists that it is not an impediment to summary determination.[14] In doing so, however, Staff ignores the language set forth in 4 CSR 240-2.117(E) requiring that before it may grant summary determination, the Commission must conclude that it is in the public interest. If Respondents and its citizens are going to be subjected to fines, then it is only in the public interest to conduct full discovery and to hold an evidentiary hearing on these far-reaching issues of law.

In addition, the public should not bear the costs of Staff's newly crafted interpretation of § 247.172. Respondents received no notice of Staff's intention to enforce § 247.172 against the alleged agreement because Staff only recently interpreted the statute to allow for such enforcement.

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

Staff asserts that this claim is factually inaccurate and claims that it learned about this matter from the complaint of John F. Holborow, receiver of H & H Development Group, Inc.[15] As part of its data requests, Pevely received from Staff the alleged complaint made by Mr.

[14] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 4.
[15] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 4.

Holborow.[16] A review of Mr. Holborow's affidavit, however, reveals that he did not complain about the agreement between Respondents but rather, that he fears due to the breach of agreement by H&H, the Consolidated Public Water Supply District C-1 of Jefferson County Missouri (the "District") will seek to cut service to Valle Creek Condominiums ("Valle Creek"). His affidavit demonstrates that the Respondents were not living up to the document they titled "territorial agreement" nor had the agreement displaced competition between them, as required by § 247.172.

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

Staff states that the Commission has already determined this issue against Respondents.[17] 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*, hereby incorporated by reference, the Commission does not have jurisdiction over the subject matter of the Complaint because a water corporation is not a party to the alleged agreement and because the complaint involves an unapproved agreement. The plain language of the statute indicates that the legislature only grants the Commission jurisdiction to hear complaints over agreements they have approved. "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

[16] See Holborow affidavit attached to *Staff's Motion for Summary Determination*.
[17] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 4-5.

involving any commission-approved territorial agreement" would be superfluous and of no effect. Further, as discussed in *C-1's Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination*, Staff has not proven that an agreement existed between Respondents, much less one that constitutes a "territorial agreement" as that term is used in § 247.172 because the alleged "territorial agreement" has not designated Pevely's powers to operate beyond its corporate municipal boundaries and because it has not displaced competition. Thus, the Commission has no jurisdiction over the agreement at issue.

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.

This affirmative defense is related to C-1's affirmative defense no. 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.") and no. 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.").

Staff argues that Respondents have been afforded due process because the Commission's rules, procedures and processes have provided Respondents with notice and an opportunity to be heard.[18] Staff, however, ignores the essence of C-1's due process defense, which is that enforcement of § 247.172 violates due process because the statute is unconstitutionally vague and did not provide C-1 or Pevely with adequate notice that its entering into an alleged territorial agreement would violate the law.[19] The offer of Staff to forgo fines if C-1 agrees to submit to the

[18] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 5.

[19] See **Conseco Finance Servicing Corp. v. Missouri Dep't of Revenue, 195 S.W.3d 410, 415 (Mo. banc. 2006)** ("Vagueness, as a due process violation, takes two forms. One is the lack of notice given a potential offender because

authority of the Commission alter the due process analysis.[20] The simple fact remains that Staff is seeking to enforce a statute against C-1 that did not provide adequate notice that C-1's conduct would violate that statute.

That the statute is open for interpretation is supported by the fact that Staff only recently interpreted § 247.172 to apply to the present situation. It has admitted that it has never before interpreted the statute in this way. Respondents had no notice of this interpretation, either by the language of the statue or by Staff's prior actions.

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

Staff erroneously claims that C-1 has not supported its defense of estoppel with any factual allegations.[21] As discussed above, the Commission has never attempted to affirmatively exercise jurisdiction over an alleged territorial agreement between a municipal water district and a public water supply district. C-1 had a right to rely on the Commission's procedures and methods. By attempting to exercise jurisdiction in this case, the Commission's exercise of authority is inconsistent with its prior procedures and methods. C-1 has thereby been injured in the form of the Commission's Complaint and the potential to face penalties. Staff's affirmative misconduct is demonstrated by the fact that it admittedly never gave C-1 any notice that it intended to apply § 247.172 to the agreement at issue, nor has it ever affirmatively sought to exercise authority over such agreements, and now is seeking to enforce that statute against C-1, along with seeking penalties against C-1 for supposedly violating that statute.

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the statute is so unclear that '[persons] of common intelligence must necessarily guess at its meaning.'" (citations omitted) (alteration in original)).

[20] See *Staff's Suggestions in Support of its Motion for Summary Determination*, pg. 6.

[21] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 7.

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

By Staff's own statements, summary determination on the issue of laches is inappropriate; rather, "laches is a question of fact to be determined from all the evidence and circumstances adduced at trial."[22]

Moreover, Staff erroneously contends that C-1 has pleaded no facts showing that Staff unaccountably neglected to act over a prolonged period of time.[23] As established in response to C-1's affirmative defense no. 25, the Commission has not previously exercised any authority with respect to the alleged agreement since November 12, 2007. In other words, Staff waited almost six years to bring this Complaint. This is despite the fact that, according to Staff, the Commission has "exclusive authority" to approve territorial agreements under § 247.172,[24] and that Respondents' actions have been "prolonged" and "egregious."[25] Given the "exclusive authority" vested in the Commission to regulate such agreements and the length of time and supposed severity of actions involved, C-1 has shown that Staff "neglect[ed] to act, for an unreasonable and explained length of time, under circumstances permitting diligence, where the law requires action."[26]

Staff is also incorrect in asserting that C-1 has not pleaded any facts showing that it has been unfairly disadvantaged or prejudiced by the delay.[27] Rather, the prejudice to C-1 is evident by the relief requested by Staff in in its Complaint – specifically, to "deem each day that such

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[22] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 6 (alteration and emphasis deleted) (emphasis added).
[23] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 7.
[24] See Staff's *Motion for Summary Determination*, ¶ 12.
[25] See *Staff's Suggestions in Support of its Motion for Summary Determination*, pg. 6.
[26] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 6 (citing **Metro St. Louis Sewer Dist. v. Zykan,** 495 S.W.2d 643, 656 (Mo. 1973)).
[27] See *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 7.

violation existed to be a separate offense and authorize its General Counsel to proceed in Circuit Court to seek such penalties as are authorized by law."[28] Thus, C-1 is prejudiced by the delay in the amount of fees it may bear.

CONCLUSION

Staff has failed to meet its burden on summary determination because it has failed to prove the viability of its claim as well as prove that C-1's affirmative defenses fail as a matter of law. To the contrary, each of C-1's affirmative defenses discussed above remains as a barrier to summary determination because Staff has not negated either the factual or legal basis behind the assertions.[29]

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.

[28] See Staff's *Complaint*, pg. 3, 4, 5.
[29] Cf. *Staff's Suggestions in Support of its Motion for Summary Determination*, pg. 7 (arguing that Staff's Motion for Summary Determination should be granted because it has shown that each affirmative defense is either factually incorrect, factually unsupported, legally inadequate, or simply not an avoidance to Staff's Motion for Summary Determination).

Respectfully submitted,

/s/ Bianca L. Eden

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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:

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