BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CITY OF O'FALLON, MISSOURI,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	Case No. WC-2010-0010
MISSOURI-AMERICAN WATER COMPANY and,	)	
PUBLIC WATER SUPPLY DISTRICT NO.2 OF ST. CHARLES COUNTY, MISSOURI,	)	
	)	
Respondents.	)	

PUBLIC WATER SUPPLY DISTRICT NO. 2 OF ST. CHARLES COUNTY, MISSOURI'S RESPONSE TO STAFF'S REPORT OF INVESTIGATION AND ITS RECOMMENDATION

Public Water Supply District No. 2 of St. Charles County, Missouri (hereinafter "the District") submits the following in response to Staff's Investigation and Recommendation filed on or about September 24, 2009.

The Staff will certainly be the first to agree that at this phase of the proceeding there is no evidence before the Commission, and therefore Staff's arguments, investigation, recommendations and suggestions are chiefly based in what has been alleged in the complaint and in the pleaded answers and defenses of the respondents. Staff does not appear to rely on information it independently acquired. Staff's arguments and recommendations are entirely dependent on whether O'Fallon can shoulder its burden of proof at hearing. Even assuming the allegations in O'Fallon's complaint are true, Staff's legal analysis and its investigatory findings are flawed in several respects.

A. District Defenses

The District enumerated four defenses to the complaint. Two will be highlighted here but the act of not featuring them further in this pleading is not to be construed as abandonment of those defenses. The Commission will observe that the District's defenses intertwine.

1. Standing

Staff concludes that O'Fallon has standing to bring the complaint because it claims a threatened economic injury if the agreement is enforced as it is written. Staff adds that since O'Fallon is not a party to the Territorial Agreement ("the Agreement"), then under the provisions of Section 247.172.6[1] its rights and duties as a water supplier were not altered or diminished by approval of the territorial agreement between the District and Missouri American Water Company (MAWC).[2] The Staff has misunderstood the relationship of the parties and the scope of the relief and protections available under the Territorial Agreement.

The Staff cites *Eastern Missouri Laborers Dist. Council v. St. Louis County* 781 S.W.2d 43 (Mo. 1989) in support of its conclusion. The opinion in *Eastern Missouri* ruled on a "taxpayer standing" issue suit and did not address standing to complain about the terms, provisions or protections of a contract. The case is inapposite. The complaint and Staff's recommendations invite the Commission's interpretation--or declaration-- of

[1] Statutory citations herein are to RSMo 2000 or its current cumulative supplement unless otherwise indicated.

[2] At page 10, ¶ 29 of its recommendation, Staff seems to claim that the Agreement restricts O'Fallon's water utility operations. The Agreement affects the right of a customer, or potential customer, who resides in the service territories to obtain service from one or the other party to the Agreement. It does not restrict water utility operations. This point is also addressed on page 5 of this response.

what is intended by the Agreement. Does O'Fallon have the requisite standing to bring an action to discern the meaning of a contract in which it is not a party?

> Standing to bring a declaratory judgment action requires the plaintiff to have a legally protectable interest at stake. *Battlefield Fire Protection Dist. v. City of Springfield*, 941 S.W.2d 491, 492 (Mo. banc 1997). A legally protectable interest means "a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, either immediate or prospective." *American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 274 (Mo.App.1995) (citation omitted). In contract actions, a party has a legally protectable interest at stake if it has a right to enforce the contract as a party thereto or as a third party beneficiary. *Farmers Ins. Co., Inc. v. Miller*, 926 S.W.2d 104, 107 (Mo.App.1996).

General Motors Acceptance Corp. v. Windsor Group, Inc. 2 S.W.3d 836, 839 (Mo.App. E.D.,1999).

It is indisputable that O'Fallon is not a party to the Territorial Agreement. O'Fallon is a competitor of the two parties bound by the Agreement. O'Fallon is not named in the Agreement and has no rights under the Agreement. The Agreement delineates rights and duties between the District and MAWC alone. By force of law, O'Fallon's rights and obligations to provide water service have not been affected by the Agreement. The Agreement poses no barrier to O'Fallon's right and ability to provide water service in its incorporated area, even if it overlaps the service territory defined in the Agreement.[3]

O'Fallon cannot claim third party beneficiary status under the Agreement. Its complaint does not attempt to allege that status and in truth it could not. O'Fallon's status is no different from or greater than any other customer of either the District or MAWC. Essentially, O'Fallon contends that because of a rate (or price) differential

[3] However, O'Fallon's right to serve customers in incorporated area that overlaps the District territory has been modified by a separate agreement between the parties. See Exhibits C and D attached to the complaint.

between MAWC and the District, the Agreement no longer serves the public interest. The differences in the rates charged by the District and MAWC, and the potential "flip-flopping" that customers might engage in to take service at the lower of competing rates, along with the serious impediment to efficient facility planning and installation that such "flip-flopping" causes, were the reasons why the Agreement was found to be in the public interest in the first place. If potential customers or existing competitors of the parties to a territorial agreement may petition this Commission at any time to set aside a territorial agreement because of a long standing rate differential, then such agreements will virtually have no meaning.

Under the analysis supplied by *General Motors* above, O'Fallon lacks standing to bring this complaint, and hence the complaint fails to state a justiciable claim upon which the Commission may provide any relief.

2. Substantial Change in Circumstances

Commission final decisions are immune from collateral attack pursuant to Section 386.550. O'Fallon must allege a change in circumstance to invoke the jurisdiction of the Commission under Section 247.172. Otherwise, its complaint would amount to a collateral attack on the final order of the Commission, which is prohibited. *State ex rel. Ozark Border Elec. Co-op. v. Public Service Commission,* 924 S.W.2d 597, 601 (Mo.App. W.D. 1996); see also *State ex rel. Licata, Inc. v. Public Service Commission*, 829 S.W.2d 515 (Mo.App. W.D.1992). Attempting to overcome the bar of Section 386.550, O'Fallon alleges in paragraph 15 of its complaint that "there has been a substantial change in the character of the areas that were the subject of the Territorial Agreement." Staff is content that this allegation invokes Commission jurisdiction.

The District submits that a change of circumstance which would justify Commission review in this case must be a change in the circumstances that gave rise to the approval of the Agreement in the first instance. The Commission will find that whatever the allegations of changed circumstances in paragraph 15, O'Fallon's complaint focuses on the changes O'Fallon is experiencing in providing service to its own customers, and not on changes in circumstances between the District and MAWC. Furthermore, it is clear that circumstances existing in 2001, when the Agreement was approved, still persist. The rate differences between the District and MAWC continue, and, as O'Fallon's allegations confirm, customers or potential customers want to benefit from the lower of the two, irrespective of the prohibitions of the Agreement.

On page 10, ¶ 29 of its report of investigation and recommendation the Staff states that the Agreement "should not restrict O'Fallon's water utility operations" and it does not. The Agreement reduces the options for customers or potential customers who reside in the respective service territories that are defined for the parties in the Agreement. The Agreement does not restrict O'Fallon's water utility operations or its ability to further expand its own supply; it merely limits O'Fallon's options on where it may purchase water and at what prices, something which the agreement does and has done for those similarly situated since it was approved.

In order for the complaint to not constitute a collateral attack on a Commission order, O'Fallon's complaint must allege a change in the circumstances that justified approval of the Agreement between the District and MAWC. A fair reading of the complaint confirms that those circumstances have not changed. The complaint is a collateral attack on a Commission order which is prohibited. Furthermore, since no

change in those facts and circumstances has occurred, the public interest is still served by the Agreement.[4]

B. Wholesale/Retail

On pages 7 and 9 of Staff's report, and on page 2 of Mr. Merciel's attached memorandum, the claim is made that the District's wholesale rate is 1) "substantially greater" than MAWC's, and 2) in dollars worth is a commodity rate of $3.00 per 1,000 gallons. This misstates the amount of the District's wholesale rate. The District supplies water to a municipality in its service area at a competitive wholesale rate. The filing of the complaint notwithstanding, O'Fallon and the District have held discussions about a wholesale rate for District service set at a similarly competitive level. During its investigation the Staff did not ask the District what its charge was or might be for wholesale service. The Commission should disregard so much of the Staff's report which compares MAWC's wholesale rate and the District's wholesale rate.

On page 2 of Mr. Merciel's memorandum he underscores this statement: "If a MAWC wholesale arrangement is put in place, no customers or assets would be transferred from or to any other utility." This is inaccurate. The City of O'Fallon has been a District customer in the past. If the Agreement is interpreted as argued for by Staff and the complainant, O'Fallon will "flip" to MAWC, a result the Agreement was designed to prevent.

[4] Staff believes that the agreement is no longer in the public interest because O'Fallon is unable to obtain water at the purportedly lower rate offered by MAWC. There are many customers like O'Fallon who are not able to obtain water from MAWC. They reside in the territory reserved for the District under the Agreement. The Agreement was intended to limit their water service provider to the District and was approved with that understanding. That the Agreement is having its intended effects, all of which were expected at the time it was approved, supports a finding that the Agreement continues to serve the public interest, not the contrary.

Finally, the Staff has dwelled upon the differences between retail and wholesale service and at page 9, ¶ 24 of its report has opined that wholesale service is excluded from its provisions. The Commission will be the final arbiter on the question. Even so, the District contends that irrespective of the label pasted on the class of the service sought by O'Fallon, the effect is the same. If O'Fallon is permitted to purchase water from MAWC as it has requested, that water will be delivered to customers located within service territory reserved in the Agreement for the District. MAWC will thus have achieved an *indirect* extension of service to structures or customers within the District's territory in violation of the Agreement.

O'Fallon's complaint should be dismissed.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was served by electronic mail or U.S. Mail, postage prepaid, this 2nd day of October, 2009, upon the following:

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