

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

**In the Matter of the Application of)
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.)**

Case No. WO-2006-0135

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission and, for its Staff Recommendation, states to the Missouri Public Service Commission as follows.

1. *Summary and overview.* On January 28, 2008, Consolidated Public Water Supply District No. 1 of Clark County, Missouri (“Water District”) and The City of Canton, Missouri (“City”) filed in this case their “Addendum to Joint Application.” On the same day, the Commission ordered the Staff to file its recommendation regarding the proposed “addendum to the territorial agreement” between the Water District and the City by no later than February 19, 2008. The Staff recommends that the Commission find the addendum does not satisfy the condition the Commission imposed upon the Water District and the City.

Procedural History

2. *The need for a detailed procedural history.* The ultimate issue for the Commission is whether “the parties” have submitted a proper addendum to “the agreement.” There may be confusion as to which “agreement” this refers to, and there may be confusion as to which “parties” must submit the addendum. A detailed procedural history will be helpful in understanding the Commission’s Report and Order. After analyzing this issue, the Staff will address the question of whether a proper addendum has been submitted.

3. *The Territorial Agreement.* On April 6, 2005, the Water District and the City executed a document entitled “Water and Sewer Service and Detachment and Territorial Agreement” (“Territorial Agreement”). The Territorial Agreement dealt, generally, with water and sewer service to certain parcels of land, which lie within the boundaries of both the Water District and the City.

4. *The Joint Application.* On September 27, 2005, the Water District and the City initiated this case by filing a document entitled “Joint Application,” in which they requested that the Commission approve the Territorial Agreement.

5. *The Stipulation.* On December 9, 2005, the Water District, the City, the Staff, and the Office of the Public Counsel (“OPC”) filed their Unanimous Stipulation and Agreement (“Stipulation”). In Paragraph 17 of the Stipulation, the parties recognized that the Water District and the City had acknowledged, in the Territorial Agreement, that the Territorial Agreement needed Commission approval, and that the Territorial Agreement describes the procedure for amending the Territorial Agreement. The four parties to the Territorial Agreement also agreed, however, that the Territorial Agreement “does not include provisions requiring that amendments to the agreement be approved by the Commission.”

6. *The agreement to cure the defect in the Stipulation.* The four parties to the Stipulation further agreed, in Paragraph 20, that the Commission should issue an order approving the Territorial Agreement, the Joint Application, and the Stipulation, conditioned upon “the Joint Applicants’ submission of an addendum to the agreement acknowledging that amendments to the Territorial Agreement must be approved by the Commission.”

7. *The Report and Order.* On December 22, 2005, the Commission issued its Report and Order Approving Territorial Agreement (“Report and Order”). By this order, the

Commission approved the Territorial Agreement, “conditioned on the submission by the parties of an addendum to the agreement acknowledging that amendments to the territorial agreement must be approved by the Commission.” The Commission also ordered that the case be closed on January 2, 2006.

8. *The Addendum to Joint Application.* On January 28, 2008, the Water District and the City filed the Addendum to Joint Application (“Addendum”), in which they asked the Commission to approve “the aforesaid Addendum to the Territorial Agreement previously submitted between the [Water] District and the City.”

9. *The Addendum does not achieve its apparent objective.* It appears that the Water District and the City were attempting, by this Addendum, to satisfy the condition in the Report and Order that “the parties” submit an addendum to “the agreement” acknowledging that amendments to the territorial agreement must be approved by the Commission. The Addendum fails to achieve this objective. In order to understand why the Addendum fails to achieve its objective, one must first determine what the Commission meant when it referred, in the Report and Order, to “the agreement” and “the parties.”

The Condition Imposed by the Report and Order

10. *The “Decision” paragraph.* The “Decision” portion of the Report and Order reads in full as follows:

Having considered the Joint Application and Unanimous Stipulation and Agreement, the Commission concludes that the designation of water service areas is in the public interest. Furthermore, the Commission determines that the territorial agreement between the City of Canton and Consolidated Public Water Supply District No. 1 of Clark County, Missouri, is in the public interest and should be approved. *As agreed by the parties*, the Commission will condition its approval on the submission *by the parties* of an addendum *to the agreement* acknowledging that amendments to the territorial agreement must be approved by the Commission. (Emphases supplied.)

11. *Which “agreement”?* To what “agreement” does the italicized term in this excerpt refer? The Report and Order does not define the word “agreement.” The first line of the above paragraph refers to the “Unanimous Stipulation and Agreement,” which is a four-party document executed by the Water District, the City, the Staff, and the OPC. But the third line of the above paragraph refers to the “territorial agreement,” which is a two-party document executed only by the Water District and the City. This excerpt does not make it clear whether the words “the agreement” refers to the Stipulation or to the Territorial Agreement.

12. *Ordered Paragraph 3.* Ordered Paragraph 3 of the Report and Order sheds a little light on this question, but does not provide a definitive answer. It provides as follows:

3. That the territorial agreement ... is approved, conditioned on the submission by the parties of an addendum to *the agreement* acknowledging that amendments to the territorial agreement must be approved by the Commission. (Emphasis supplied.)

Even though the only agreement specifically identified in Paragraph 3 is the Territorial Agreement, it is not entirely clear that this does not refer to the Stipulation, which is mentioned in Ordered Paragraph 2.

13. *Procedural History Paragraph 8.* The Staff submits, however, that the Decision Paragraph quoted above, when read in the light of Procedural History Paragraph 8 of the Report and Order, does provide a definitive answer. The Decision Paragraph says: “As agreed by the parties” the Commission conditions its approval of the submission of an addendum to “the agreement.” The agreement by the parties that is here referred to is the agreement that is described in the last sentence of Procedural History Paragraph 8, which reads as follows:

However, the Unanimous Stipulation and Agreement provides that the Commission’s order approving the joint application should be conditioned upon the parties’ submission of an addendum to the territorial agreement acknowledging that amendments to the territorial agreement must be approved by the Commission.

14. *What the Commission ordered.* It therefore appears that the Commission wanted to order what the parties had agreed upon. That agreement of the parties is found in Paragraph 20 of the Stipulation, reading in part as follows:

... with that order being conditioned on the *Joint Applicants'* submission of an addendum to the agreement acknowledging that amendments to the Territorial Agreement must be approved by the Commission. (Emphasis supplied.)

15. *Which parties must comply?* The Staff therefore concludes it is only the *Joint Applicants* (and not the Staff and the OPC) who must submit an addendum. That addendum must say that “amendments to the Territorial Agreement must be approved by the Commission.”

Does the Addendum to Joint Application Satisfy this Condition?

16. *Title of the Joint Application is a misnomer.* It should first be noted that the Report and Order requires the Water District and the City to submit an addendum to the *Territorial Agreement*. The document they have submitted, however, is entitled “Addendum to *Joint Application*.” The Staff regards this as a misnomer. There is no need for the parties to amend the Joint Application (which has already been conditionally granted), and the pleading does not purport to change any of the terms of the Joint Application that was previously filed.

17. *Recitations in the Addendum.* Paragraphs 1-3 of the Addendum are pure recitals. Paragraphs 4 and 5 of the Addendum are primarily recitals, but also contain statements of what the Water District and the City intended when they executed the Territorial Agreement; however they contain no new promises.

18. *Promises in the Addendum.* Only Paragraph 6 contains new promises. But the promises in Paragraph 6 do not quite comply with the Report and Order, either. In Paragraph 6, the Water District and the City agree they will not make further territorial agreements or transfers of service area without approval of the Commission. The Commission’s Report and

Order, though, requires these two parties to agree that *any amendment* to the Territorial Agreement must be approved by the Commission. This the Addendum does not do.

19. *Addendum must be formally executed.* The Addendum is deficient in one other respect. Paragraph 3 of the Territorial Agreement reads in full as follows:

The terms of this Agreement may not be modified, repealed or changed except by a written document executed by the parties and approved by the parties' respective governing bodies.

The Addendum does not comply with this requirement. It was signed only by counsel for the Water District and was not executed "by the parties." Also, there is no indication that the Addendum was approved by the governing bodies of either the Water District or the City.

Cure

20. *How to remedy the defects.* The Staff submits that the defects in the Addendum can be cured with a new document, entitled "Addendum to Territorial Agreement," that says the Territorial Agreement is amended by inserting one new sentence at the end of Paragraph 3, as follows: "Any such modification, repeal or change will not become effective unless and until it is approved by the Public Service Commission." The Addendum must also be executed by the parties (not only by their attorneys), and must be approved the parties' governing bodies.

WHEREFORE, the Staff recommends that the Commission find that the Addendum to Joint Application does not satisfy the condition that the Commission imposed upon the Water District and the City in the Report and Order that was issued on December 22, 2005.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or transmitted via e-mail to all counsel and/or parties of record this 19th day of February, 2008.

/s/ **Keith R. Krueger**