

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
3
4 TRANSCRIPT OF PROCEEDINGS
5 Hearing
6 June 11, 2014
7 Jefferson City, Missouri
8 Volume 3
9 The Staff of the Missouri)
Public Service Commission,))
10)
Complainant,)
11)
vs.) File No. WC-2014-0018
12)
Consolidated Public Water)
13 Supply District C-1 of)
Jefferson County, Missouri)
14 and City of Pevely,)
Missouri,)
15)
Respondent.)
16
17 KIM S. BURTON, Presiding,
REGULATORY LAW JUDGE.
18
19 ROBERT S. KENNEY, Chairman
STEPHEN M. STOLL,
20 WILLIAM KENNEY,
DANIEL Y. HALL,
21 SCOTT RUPP,
COMMISSIONERS.
22
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1 P R O C E E D I N G S

2 (WHEREUPON, the hearing began at
3 10:30 a.m.)

4 (STAFF EXHIBIT NOS. 1, 2 AND 4 WERE
5 MARKED FOR IDENTIFICATION BY THE REPORTER.)

6 JUDGE BURTON: This is Case
7 No. WC-2014-0018, in the matter of State of
8 Missouri Public Service Commission, Complainant
9 versus Consolidated Public Water Supply District
10 C-1 of Jefferson County, Missouri and City of
11 Pevely Missouri, Respondents.

12 The Commission has set this time for
13 oral arguments on a motion for summary
14 determination as well as an evidentiary hearing, if
15 needed. At this time I would ask the parties to
16 enter their appearance. On behalf of the Staff of
17 Missouri Public Service Commission?

18 MR. THOMPSON: Thank you, your Honor.
19 Kevin A. Thompson for the Staff of the Missouri
20 Public Service Commission, and with me today is
21 Ms. Jamie Myers, a second-year law student from the
22 University of Missouri School of Law who is
23 certified under Supreme Court Rule 13 and under my
24 supervision will be assisting in the representation
25 of Staff in this proceeding.

1 JUDGE BURTON: Welcome, Ms. Myers.

2 All right.

3 MR. THOMPSON: Staff's address, I
4 think you know that. Thank you.

5 JUDGE BURTON: I believe that that's
6 already been presented to the court reporter.

7 MR. THOMPSON: Yes, it has.

8 JUDGE BURTON: Thank you. And on
9 behalf of the Consolidated Public Water Supply
10 District C-1 of Jefferson County, Missouri?

11 MS. EDEN: Bianca Eden, Respondent,
12 and I have also filed a written entry of
13 appearance. And if you'd like to refer to us as
14 C-1 as opposed to the long name, that is certainly
15 fine. It's much easier.

16 JUDGE BURTON: Thank you. I was just
17 about to ask that. And on behalf of the City of
18 Pevely, Missouri?

19 MR. GOOD: Good morning. My name is
20 Terry Good. I'm with the law firm of Lashly & Baer
21 in St. Louis. I'm here on behalf of City of
22 Pevely, Missouri.

23 JUDGE BURTON: All right. Thank you,
24 Mr. Good. Now, at this time I was going to see if
25 we have any preliminary matters to take up.

1 MR. GOOD: Your Honor, there is one
2 preliminary matter. The Court asked that the
3 parties discuss the issue as to whether there are
4 any disputed facts. If there are disputed facts,
5 then the Commission may or may not be able to make
6 a determination -- summary determination, summary
7 determination being similar to a motion for summary
8 judgment where the facts are undisputed.

9 JUDGE BURTON: Mr. Good, could you
10 please verify that your microphone is on?

11 MR. GOOD: I now have a green button.

12 JUDGE BURTON: Thank you.

13 MR. GOOD: I'm not going to repeat
14 what I said. So, your Honors, there are three
15 disputed facts that the City of Pevely contends.
16 The first one is whether there is an active
17 agreement between the City of Pevely and C-1.

18 The reason that this is material and
19 relevant is because the City contends that this
20 matter is moot. If there is no active agreement
21 between the parties, if figuratively if not
22 literally the parties have not -- have torn up the
23 agreement or at least one party has torn up the
24 agreement, then there is nothing for the Commission
25 to decide.

1 There is a case, your Honors, that we
2 can give you the citation to that talks to the fact
3 that if the -- any order by the Commission has no
4 practical effect, then the matter is moot and the
5 Commission will not make a determination.

6 JUDGE BURTON: Mr. Good, I'm going to
7 go ahead and stop you right here. It seems like
8 your arguments are more going to the substantive
9 issue for oral arguments for the motion for summary
10 determination.

11 MR. GOOD: Your Honor, I was trying
12 to place it within context, but yes, I'll confine
13 my remarks to the facts.

14 The active agreement, the facts are
15 that there was a lawsuit in 2012 between C-1 and
16 Pevely wherein C-1 made a contention that Pevely
17 was not following the territorial agreement that's
18 the subject of this hearing.

19 In addition, there is an affidavit
20 and testimony that's been submitted by the former
21 city manager of the City of Pevely wherein that
22 Mr. Thomas, that person, says that the city is
23 willing to provide water to anyone within its
24 district and anyone that makes an application to it
25 for water supply.

1 The second disputed fact is the
2 question of whether C-1 and the City are competing.
3 That's going to go to whether this agreement is an
4 agreement subject to the statute.

5 And the third such disputed fact --
6 before leaving the competition, there is no
7 evidence that we know of that's going to be
8 submitted by the Staff that there is no competition
9 between the parties.

10 And the third is that there was a
11 citizen complaint. We believe that the complaint
12 that was filed by the trustee or receiver of a
13 development within the city of Pevely was not a
14 complaint in the sense that a complaint was filed
15 about the parties not competing for water service.

16 So those are the disputed facts as
17 the City of Pevely sees them.

18 JUDGE BURTON: Okay. Staff's
19 response?

20 MR. THOMPSON: Thank you, Judge.
21 First of all, this is a complaint case, and so
22 unlike many of the cases the Commission takes up,
23 it's not prospective in nature. It's
24 retrospective. It looks backwards. It looks back
25 at actions and behavior and transactions that

1 occurred in the past and determines whether or not
2 there is a violation of a statute, a regulation or
3 a Commission order.

4 And so whether or not that agreement
5 is active today, whatever that might mean, is
6 irrelevant. The fact remains that they did make an
7 agreement, I believe it was in 2007. They entitled
8 it a territorial agreement.

9 Its purpose was to determine who was
10 going to serve where within a certain strip of
11 territory that is within both the district and the
12 City. Their territories overlap because of a City
13 annexation. And this agreement was made to
14 determine who would serve within that territory
15 where there was an overlap.

16 And that agreement was never
17 presented to the Commission for determination, for
18 approval as the statute requires. So it's Staff's
19 view that, with respect to the material facts,
20 there is no dispute and that summary determination
21 lies.

22 JUDGE BURTON: Let me ask you this:
23 What exactly is the relief that the Staff is
24 requesting?

25 MR. THOMPSON: We thought when we

1 brought this to the attention of these parties,
2 when we became aware of this back in 2012, or 2013
3 I guess it was, that when we pointed out to the
4 parties that they needed to come here and have
5 their agreement approved, that they would forthwith
6 go ahead and jump through that hoop. They did not.
7 It's their position that the Commission has no
8 jurisdiction.

9 So the relief that Staff is looking
10 for is really a declaration that the Commission has
11 jurisdiction over this kind of agreement. We did
12 ask for penalties in the complaint, but the purpose
13 of that really was to prod the parties into coming
14 in here and seeking Commission approval.

15 In reality, we don't really want any
16 money, any penalties against these two public
17 entities. But we do believe that the Commission
18 does have jurisdiction under the law, and I think
19 the Commission needs to make a decision affirming
20 that.

21 MR. GOOD: If I might respond, your
22 Honor?

23 JUDGE BURTON: Yes.

24 MR. GOOD: If the relief that they're
25 seeking is first of all a requirement that we

1 submit the agreement for approval, it makes no
2 sense, because they're asking us to submit for
3 approval an agreement that one party doesn't want
4 to be in. So they're asking us to submit an
5 agreement that we contend is not effective, and
6 then I suppose they're going to ask us to then go
7 back to the Commission and ask the Commission to
8 allow us to end the agreement, which makes no
9 sense.

10 In essence, what the Staff is asking
11 for is an advisory opinion. And, your Honors, in
12 the case that I referred to earlier about mootness,
13 which is State ex rel Public Counsel versus Public
14 Service Commission, which is a 2011 case -- and I
15 have copies I can give Mr. Thomas.

16 JUDGE BURTON: Could you please
17 provide the cite?

18 MR. GOOD: It is, your Honor,
19 328 SW 3rd 347. And excuse me. It's a 2010 case.
20 It's a Western District Court of Appeals case. In
21 that case, the Commission granted an interim rate,
22 and then it was before the Commission for a
23 permanent.

24 In that matter, the Public Counsel
25 came before the Commission and contested the

1 interim rate that had already been ordered, and the
2 Court said there is going to be no practical effect
3 as a result of this order because it was before the
4 court on a permanent rate. The Staff at that point
5 said, well, if it is moot, we would still like to
6 go forward and get an opinion from the Court or
7 opinion from the Commission.

8 Forgive me. This is the first time
9 I'm before the Public Service Commission. I'm
10 going to fall back on habits and say Court and your
11 Honors. So please forgive me.

12 But in that opinion, the Court of
13 Appeals specifically said that it was not going to
14 issue such an advisory opinion.

15 So, in effect, we're here with the
16 Staff asking for an advisory opinion that it had
17 jurisdiction over an agreement that was entered in
18 2007 to which one party is saying it's not -- it's
19 not living up to, and the other respondent even
20 filed a lawsuit to try to force it to comply with
21 the agreement. So that's why we say it's moot.

22 JUDGE BURTON: Is it possible,
23 counsel, that there may be a territorial agreement
24 between the parties in the future?

25 MR. GOOD: Well, if there is, your

1 Honor, then that would be a ripe action for the
2 Commission to decide. But at this point there
3 really isn't anything for the Commission to decide.

4 And if, in fact, they're looking for a test
5 case, there should be a better case than this one
6 where the parties don't even agree that there is an
7 agreement. We don't believe that it's an agreement
8 that falls within the statute. We can argue about
9 that, but it's not clear.

10 So they have an agreement that both
11 parties aren't following. They have an agreement
12 that's not a clear territorial agreement. And
13 so -- and in addition, under 247.172, that section
14 is set up because of a concern for competition
15 between water suppliers, and the territorial
16 agreement being an exception to that, which has to
17 be approved by this Commission. In this instance,
18 there's no evidence that the parties are not
19 competing.

20 JUDGE BURTON: Ms. Eden, I would like
21 to hear your thoughts.

22 MS. EDEN: Well, your Honors, I would
23 point out that I'm in agreement with Mr. Good as to
24 it being essentially moot. And also I would point
25 out that under 247.172, it states that if this were

1 a terr-- if the original territorial agreement as
2 envisioned were to fall under the provisions of
3 this statute, it's ineffective until filed, and
4 certainly an ineffective agreement is void. And if
5 that is void, there's nothing to force us then if
6 later on we decide we don't want to abide by that,
7 which is what Mr. Good is indicating Pevely and,
8 frankly, my client, even though no document was
9 filed to that case, you know.

10 The time frame on the agreement as
11 stated was ten years, so it would be 2017 if we
12 were to follow it.

13 JUDGE BURTON: I'm just curious as to
14 when the District C-1 changed its opinion as far as
15 there being a valid agreement between the parties
16 when it filed suit in 2012 in Jefferson County
17 Circuit Court and now.

18 MS. EDEN: Well, I think if you have
19 the -- C-1 would rather not have the agreement.
20 There's territories potentially that overlap that
21 can be addressed in other ways other than a
22 territorial agreement between the parties, and they
23 just have no real desire to necessarily have that
24 agreement in place.

25 MR. GOOD: If I could give you some

1 background.

2 JUDGE BURTON: Why don't we go ahead
3 and refrain from that right now. We're going to go
4 ahead and take that consideration of the moot
5 argument under advisement for now, and why don't we
6 go ahead and continue with the oral arguments on
7 the motion for summary determination.

8 MR. GOOD: I'd be happy to, your
9 Honor. With regard to the merits of the motion,
10 it is the position of Pevely, and we believe that
11 this is true, that this is not a territorial
12 agreement that's within the meaning of the statute.

13 JUDGE BURTON: I'm going to stop you
14 again, Mr. Good. Why don't we go ahead and begin
15 just for convenience sake and clarity of what the
16 issues are for the motions to have Staff begin, and
17 if you would just proceed at the podium.

18 MR. THOMPSON: Certainly, your Honor.
19 May it please the Commission?

20 We're here to determine what one
21 phrase means. The phrase is between and among.
22 That's the language that the General Assembly used
23 in Section 247.172, which is a chapter having to do
24 with public water supply districts where the
25 General Assembly granted this Commission authority

1 to approve and to adjudicate contests over
2 territorial agreements between public water supply
3 districts, municipal water supplies and regulated
4 public utilities.

5 Between and among. Staff takes the
6 position that between and among means that a
7 territorial agreement involving any combination of
8 those three entities comes within the jurisdiction
9 of the Commission under this chapter, under this
10 section.

11 There is no reported case construing
12 the meaning of that phrase or construing how it's
13 used in this particular chapter, in this section.
14 There are no other -- looking at words and phrases,
15 for example, there are no other cases where a court
16 has taken up between and among and, using the
17 canons of construction, determined exactly what it
18 means.

19 So we're left with the same sort of
20 analysis that the Judge applied in denying the
21 motion to dismiss that the parties filed, which is
22 each of those words must be taken to have a
23 meaning. None of those words are superfluous, and
24 the General Assembly did not intend an absurd or
25 ridiculous result.

1 Staff believes that the best
2 construction of that language is that any
3 combination of a public water supply district, a
4 municipal water supplier or a public utility
5 selling water for profit, any combination of those
6 entities that enter into a territorial agreement
7 must bring that agreement to the PSC and get the
8 PSC's approval after hearings held to determine
9 whether or not the agreement is in the public
10 interest.

11 Now, I agree with Mr. Good
12 100 percent, the Commission is a creature of
13 statute. The Commission has only that authority
14 that the General Assembly has delegated to the
15 Commission. The Commission may act only within the
16 framework of those statutes, and that's all exactly
17 true.

18 So our disagreement, like I said,
19 comes down to that phrase. If the phrase requires
20 that a public utility always be party to an
21 agreement before the Commission may act, as
22 Mr. good has argued, and Ms. Eden, then Staff is
23 wrong and you have no jurisdiction. If Staff's
24 view is correct, then you do have jurisdiction and
25 they committed a violation of this statute.

1 Now, during the discussion of
2 disputed facts prior to the beginning of the
3 argument, there was -- the phrase was used a test
4 case. Staff's not interested in a test case. We
5 don't go out looking for test cases. That's not
6 what we do. What we do is the business that's
7 brought to us.

8 Most of the cases that the Staff
9 handles come to us because a public utility has
10 filed a complaint or an application or tariffs.
11 They have filed something that initiates the case
12 because most of what they do requires permission
13 and authorization from this Commission in order for
14 them to take those actions.

15 We also deal with complaints filed by
16 consumers, complaints filed by utilities against
17 each other, complaints filed by competitors of
18 utilities against utilities. We do not go out
19 looking for cases. Instead, we deal with the
20 things that are brought to us.

21 In this instance, this matter was
22 brought to our attention by a man named John
23 Holborow, who is the receiver for a condominium
24 development that lies in that strip that is both
25 within the City of Pevely and within the C-1

1 district, and Mr. Holborow contacted the PSC Staff
2 because he was concerned about the water supply for
3 that condominium.

4 The water has been provided, as I
5 understand it, by the City, which has a main that
6 is attached to the condominium, and the district
7 does not have a line that reaches to the
8 condominium. There had been an agreement evidently
9 before the receivership with the original developer
10 that he was going to put in a main to connect to
11 the county's water supply. That never happened.

12 So there was some to and fro in which
13 meters were taken out and other meters were put in
14 and agreements were made for temporary service and
15 lawsuits were filed, and Mr. Holborow was
16 concerned. He needed a secure water supply for the
17 condominium without any drama.

18 So Staff took a look at the situation
19 and we looked at the papers that Mr. Holborow
20 provided to us, which included the lawsuit that was
21 then pending, and attached to that complaint was
22 the agreement that these two entities had entered
23 into, the agreement that is the subject of this
24 complaint here.

25 And for purposes of this discussion,

1 let me hand out copies of that.

2 We knew what we were looking at right
3 away because at the top it says territorial
4 agreement. Amy Moore, who was at that time the
5 water and sewer deputy, did a review of the
6 statutes and determined that it appeared that this
7 was a violation of 247.172. She brought it to me.
8 I discussed it. I talked with Mr. Busch.

9 There was discussion within the Staff
10 Counsel's Office, with the management of the Staff,
11 and we decided to take it to the General Counsel
12 because there was at that time a lawsuit already
13 pending, and as you know, Staff Counsel's Office
14 does not practice outside of this building. So we
15 took it to the General Counsel, and the General
16 Counsel sent one of his assistants to intervene in
17 that case.

18 And at that point, I believe, without
19 knowing for sure, they set aside the lawsuit and
20 this action then occurred.

21 As I said earlier, Staff confidently
22 expected the parties to come jump through the hoop
23 that they had missed and get that administrative
24 requirement out of the way, and then they could go
25 back to court and finish their lawsuit. They did

1 not. They assert that there is no jurisdiction.

2 This is on their reading of that phrase, between
3 and among.

4 So that's why we're here. Staff
5 views it as a purely legal dispute. The material
6 facts are, there was a territorial agreement. The
7 members, the parties to that agreement were a
8 public water supply district and a municipal water
9 supply, two of the three entities enumerated in
10 247.172. And the agreement had not been approved
11 by the Commission.

12 From our point of view, those were
13 the material facts, those were the elements of the
14 complaint, and that's why we're here. I filed
15 the -- I filed this motion that we're now arguing
16 so that we wouldn't have to show up here and argue
17 it or have a hearing on this because, as a purely
18 legal dispute, it seemed to me that the real answer
19 lies in the Court of Appeals, and that would allow
20 the parties to get to the Court of Appeals as
21 quickly as possible where a definitive answer would
22 be available.

23 And I should point out that there was
24 an application to the Eastern District for a writ,
25 which declined to grant it, but I think because

1 they thought they were the wrong district.

2 So that's the case. That's why we're
3 here. And as far as saying that it's moot, if I
4 could address that briefly, we may not want
5 penalties, and as I told you we don't, but there
6 has been a violation of the law. Whether or not
7 the Commission will send its General Counsel to get
8 penalties in Circuit Court, that's up to you.
9 That's your power. That's your job.

10 Staff is essentially making a
11 recommendation. We don't think penalties are in
12 the public interest in this case, but we do believe
13 they lie, if the Commission should choose to pursue
14 them.

15 But the more important point is a
16 violation has occurred. A violation has occurred.
17 It's kind of like a victimless crime. People are
18 prosecuted for victimless crimes every day. Maybe
19 it doesn't make a lot of sense to put the
20 perpetrator in prison or to collect a fine from the
21 perpetrator, but the State, the State nonetheless
22 must demonstrate that something happens when you
23 break the law. Something does happen.

24 There is an adjudication that a law
25 has been broken. Then it's up to the judge to

1 decide all the different factors that the judge
2 takes into consideration. Well, what's the
3 appropriate penalty here? What's the appropriate
4 penalty?

5 So you're in the position of a judge
6 determining a victimless crime, and you will decide
7 what the appropriate penalty is, but Staff's
8 position remains, there has been a crime. There
9 has been a violation of the law. Thank you.

10 JUDGE BURTON: Thank you,
11 Mr. Thompson. Any questions, Chairman?

12 CHAIRMAN KENNEY: Yes. Thank you,
13 Mr. Thompson. So let me ask about the phrase
14 between and among. Are there other examples where
15 the Commission has asserted jurisdiction pursuant
16 to Chapter 245 where it's a public supply district
17 and a municipal corporation and not a regulated
18 IOU?

19 MR. THOMPSON: Yes, Commissioner.
20 Staff's response to the Respondents' joint motion
21 to dismiss, Staff's response in opposition, in a
22 footnote listed I believe it was 11 fairly recent
23 examples of territorial agreements of just exactly
24 that sort. And I'm frantically looking for that
25 document.

1 I have it here. It's on page 5 of
2 that document. The footnote is Footnote No. 3. It
3 states, a quick search of the Commission's
4 Electronic Filing Information System, the familiar
5 EFIS, shows that in the past ten years the
6 Commission has decided 11 territorial agreement
7 cases between municipalities and public water
8 supply districts without the involvement of any
9 regulated entity. Those cases are then listed in
10 the footnote by case number and by style.

11 CHAIRMAN KENNEY: Were any of those
12 11 appealed to Court of Appeals on jurisdictional
13 grounds by the public water supply district or the
14 municipal corporation?

15 MR. THOMPSON: No, sir. Those were
16 all brought to the Commission by the parties who
17 then paid a filing fee and sought the Commission's
18 approval. They did not dispute that they needed to
19 do it.

20 CHAIRMAN KENNEY: Have we had a case
21 go to the Court of Appeals where anybody has
22 contested the meaning of that phrase, between and
23 among?

24 MR. THOMPSON: Not to my knowledge
25 and not that I've been able to discover looking

1 over the Commission's cases.

2 CHAIRMAN KENNEY: So as far as we
3 know, this is a --

4 MR. THOMPSON: This is a case of
5 first impression.

6 CHAIRMAN KENNEY: Contesting our
7 jurisdiction under 247 is a case of first
8 impression here?

9 MR. THOMPSON: Yes, Mr. Chairman.

10 CHAIRMAN KENNEY: Let me ask a
11 factual kind of pedestrian question. The
12 subdivision in question, are there people living in
13 that subdivision?

14 MR. THOMPSON: I believe that there
15 are.

16 CHAIRMAN KENNEY: Okay. And have any
17 of those condominium owners or citizens had their
18 water shut off or otherwise been denied service
19 because of the dispute between Pevely and C-1?

20 MR. THOMPSON: No, I don't believe
21 so.

22 CHAIRMAN KENNEY: Then let me ask an
23 additional question. I want to be sure I'm
24 understanding this. The attorney for one of the
25 Respondents indicated that there is currently no

1 active agreement between the parties.

2 Let me ask two questions. Do you
3 agree with that statement that there is currently
4 no active agreement between the parties?

5 MR. THOMPSON: No, I do not.

6 CHAIRMAN KENNEY: Okay. So there is,
7 in Staff counsel's opinion, an active agreement,
8 but it's just one or both of the parties are
9 disputing the validity of the agreement?

10 MR. THOMPSON: This agreement was
11 made in 2007, and the parties complied with it for
12 perhaps five years before they came to a falling
13 out and litigation ensued.

14 According to Chapter 247.172, not
15 only do you need Commission authorization to make
16 the agreement in the first place, you also need
17 Commission authorization to modify or amend the
18 agreement or to cancel it.

19 CHAIRMAN KENNEY: And so to the
20 extent that in the first instance they didn't come
21 to us to get it approved, but the -- there's a
22 document out there denominated territorial
23 agreement under which the parties were at one point
24 operating?

25 MR. THOMPSON: That is correct.

1 CHAIRMAN KENNEY: And now there's a
2 dispute as to the validity and the operation of it
3 between the parties?

4 MR. THOMPSON: Yes, sir.

5 CHAIRMAN KENNEY: And that was
6 litigated in Jefferson County Circuit Court?

7 MR. THOMPSON: Litigation began, but
8 I think that the litigation was essentially put on
9 hold while this action went forward.

10 CHAIRMAN KENNEY: So there was no
11 determination in circuit court in Jefferson County
12 as to the validity or invalidity of that document?

13 MR. THOMPSON: I believe that to be
14 true.

15 CHAIRMAN KENNEY: And no action taken
16 here obviously with respect to the validity or
17 invalidity of the document?

18 MR. THOMPSON: That's correct.

19 CHAIRMAN KENNEY: Okay. How do you
20 respond to the Respondents' other point that C-1
21 and Pevely aren't competing as the statute
22 contemplates?

23 MR. THOMPSON: I think the fact
24 that --

25 CHAIRMAN KENNEY: Is that even -- is

1 that relevant to your determination.

2 MR. THOMPSON: I don't think it's
3 relevant first of all because I don't think it's a
4 material fact. It's not one of the elements of the
5 complaint.

6 Secondly, I believe it's obvious that
7 they're competing in that there's an area of
8 overlap and a dispute has clearly arisen over who's
9 going to serve the areas within there. We would
10 not be here, Staff would never have learned of this
11 situation had not Mr. Holborow contacted us and
12 told us the story that I have related to the
13 Commission a few moments ago.

14 We didn't go out looking for this.
15 But as you all are very well aware, in the water
16 and sewer area we often discover things after
17 they've happened. That seems to be the nature of
18 the water and sewer industry. Entire companies
19 will exist and, in fact, operate sometimes for
20 years without regulation because nobody knew they
21 were there.

22 They didn't tell us and nobody else
23 told us, and it's not until somebody complains
24 about it that we discover, oh, look, there's
25 another utility company that we didn't know about.

1 So the Commission never gets a chance to determine
2 whether these people should get a certificate and
3 go into operation because they're already
4 operating.

5 The best we can do is kind of corral
6 them into regulation and determine what the facts
7 are and start protecting their ratepayers by
8 setting the rates and making sure the company is
9 following the reasonable conditions of service.

10 So this is a similar situation. We
11 had no idea that this agreement existed until it
12 was brought to our attention by Mr. Holborow.

13 CHAIRMAN KENNEY: And then I have an
14 additional one last question. I think I can
15 anticipate how you're going to respond. So it
16 occurs to me that these are purely legal issues for
17 our determination. Why are we -- what facts is
18 anybody going to put on when we get to the
19 evidentiary hearing? Why are we here for an
20 evidentiary hearing rather than just arguing this
21 motion for summary determination?

22 MR. THOMPSON: Well, I believe we
23 don't need to be here for an evidentiary hearing,
24 and that's why I filed a motion for summary
25 determination. In Staff's view, this is purely a

1 legal question.

2 That, however, is not the perspective
3 shared by the Respondents. If they can convince
4 you that there's a material fact that's at issue,
5 then I guess we'll have a hearing to determine that
6 material fact.

7 CHAIRMAN KENNEY: Thanks,
8 Mr. Thompson. I don't have any other questions.

9 MR. THOMPSON: Thank you, Mr. Chair.

10 JUDGE BURTON: Commissioner Kenney?

11 COMMISSIONER W. KENNEY: Just a brief
12 question. When they -- in this agreement,
13 territorial agreement in November of 2007, as I
14 remember reading it -- I didn't look at it now --
15 is that the agreement was that the developer put in
16 some pipe into his subdivision, and the City of
17 Pevely or the C-1 district contracted with Pevely
18 to supply the water and they are -- and then
19 they -- they billed the customers and paid the City
20 of Pevely; is that correct?

21 MR. THOMPSON: I believe that's true.

22 COMMISSIONER W. KENNEY: How does
23 that create competition?

24 MR. THOMPSON: I believe the
25 competition is innate in that they both have the

1 right to serve the overlapping territory. The fact
2 that they had to make an agreement saying who was
3 going to serve where within the overlap shows that
4 competition is innate. The fact that they are now
5 suing each other over this shows that the agreement
6 that they made hasn't worked.

7 So I think this is exactly the
8 circumstance that the public -- that the General
9 Assembly provided for in 247.172.

10 COMMISSIONER W. KENNEY: Did C-1 have
11 the -- the underground lines?

12 MR. THOMPSON: It's my understanding
13 that C-1's mains do not reach the condominium in
14 question, and there had been an agreement made with
15 the developer of that --

16 COMMISSIONER W. KENNEY: I'll make it
17 simple. Whose line reaches?

18 MR. THOMPSON: City.

19 COMMISSIONER W. KENNEY: And it
20 always reached the subdivision?

21 MR. THOMPSON: As far as I know these
22 facts, yes, sir, that's the case.

23 COMMISSIONER W. KENNEY: Thank you.
24 I'm done.

25 JUDGE BURTON: Commissioner Hall?

1 COMMISSIONER HALL: Thank you. I'm a
2 little confused about the procedural posture of the
3 litigation currently pending in court. At one
4 point you said it was set aside. Another point you
5 said it was put on hold. Is it stayed pending
6 resolution here or what is the current posture?

7 MR. THOMPSON: When I looked at it on
8 Case.net, my memory is it said it was dismissed by
9 the parties, and this was after Shelly Brueggemann
10 intervened on behalf of the Commission. But they
11 will be able to tell you much better than I the
12 status of that litigation.

13 COMMISSIONER HALL: Okay. If I
14 understand your argument on the mootness issue is
15 that because a -- because from your perspective the
16 law has been violated, that that -- that makes this
17 controversy ripe --

18 MR. THOMPSON: Yes, sir.

19 COMMISSIONER HALL: -- for
20 determination? And so how would you distinguish
21 this set of facts with the case cited by opposing
22 counsel, the 2010 Western District case?

23 MR. THOMPSON: As I recall, that was
24 a rate case, and there was someone who wanted to
25 question an interim rate, and they did this at the

1 point where the Commission was putting a permanent
2 rate in place. And the Court of Appeals said
3 basically can't do it. You've missed your window.
4 The interim rate is already a thing of the past.
5 It's finished. It's been replaced by permanent
6 rates, and so you cannot now question the propriety
7 of that interim rate because it's gone. There's no
8 relief that can be granted.

9 Here I think it's a little different.
10 In addition to recognizing and adjudicating that a
11 violation has occurred, the Commission can also
12 direct the parties to come in and have their
13 agreement approved or to bring in a new and better
14 agreement for approval.

15 COMMISSIONER HALL: So if you're
16 right that this was a territorial agreement and it
17 should have been brought to us for our review, what
18 is your opinion as to the legal status of that
19 territorial agreement? Is it void because it was
20 not brought to us?

21 MR. THOMPSON: No, I don't believe
22 so. I think that the parties made the agreement
23 and abided by it for five years, and then they went
24 and one of them sued the other over it. So the
25 agreement certainly existed, but it was an

1 unapproved, it was a rogue agreement, an outlaw
2 agreement.

3 I think that it needed to be brought
4 in here for approval, and if that's done belatedly,
5 nonetheless, I think that's what the law requires.
6 Evidently they now don't want that agreement, but
7 it appears to me they need something, and --

8 COMMISSIONER HALL: So it's not void
9 for failure -- for the failure of us to actually
10 review it and approve it?

11 MR. THOMPSON: No, I don't think that
12 it's void because of that.

13 COMMISSIONER HALL: Okay. I have
14 no --

15 MR. THOMPSON: It may be voidable in
16 the sense that you could ask a court of competent
17 jurisdiction to set it aside because approval was
18 lacking and declare that it didn't exist. I think
19 it's voidable, but I don't think it's void
20 ab initio.

21 COMMISSIONER HALL: I understand.
22 Thank you. I have no further questions.

23 JUDGE BURTON: Thank you.
24 Commissioner Rupp?

25 COMMISSIONER RUPP: No questions.

1 JUDGE BURTON: I have a question for
2 you real quick. There were statements into the
3 argument made by Ms. Eden earlier that since there
4 was never, in their assertion, a territorial
5 agreement, there was no jurisdiction under 247.172
6 because they never brought it to the Commission for
7 approval. How does the Staff respond to that?

8 MR. THOMPSON: Well, I think that
9 goes to what I was telling Commissioner Hall a
10 moment ago. There was obviously an agreement. The
11 agreement did do those things that a territorial
12 agreement does. It takes a disputed service area
13 and declared who was going to serve within that
14 area. As I recall, it reserved the area to the
15 district except for one, two or perhaps three
16 exceptions. That's what a territorial agreement
17 does.

18 And the fact this they could both --
19 they both had the legal right and perhaps the
20 obligation to serve anybody who requested service
21 within that overlap strip, certainly competition
22 was inherent in that circumstance.

23 JUDGE BURTON: Okay. Thank you.

24 MR. THOMPSON: Thank you.

25 MR. GOOD: Thank you. We started off

1 by the Staff saying that this had to do solely with
2 between and among, and I think you now see that it
3 has to do with a lot more issues than that. And
4 there's a great deal of confusion and there's a
5 number of things that we disagree with the Staff on
6 with regard to this.

7 First let me say that it's our
8 position that this is not effective, it was never
9 effective, and the reason I say that is because of
10 the words of the statute itself. The statute --
11 and I'm going to try to put this all in order so it
12 makes sense. And let me say at the outset, too,
13 that the record is devoid of any evidence that the
14 agreement was ever followed, ever followed.

15 Let me clear up with respect to the
16 lawsuit. The lawsuit was filed in Jefferson County
17 by C-1 against the City of Pevely for specific
18 performance, for jurisdiction, seeking to have
19 Pevely follow the agreement, and then that lawsuit
20 after we filed an answer was dismissed without
21 prejudice and it was not -- they never reached the
22 merits of that.

23 All that is evidence of is that C-1
24 believes or did believe and now believes that the
25 City didn't follow the agreement and never followed

1 the agreement as far as the record indicates,
2 and I know of no evidence that the agreement was
3 ever followed. The --

4 CHAIRMAN KENNEY: I have a question
5 about that. Does that -- so you're saying that
6 because one party to a contract never follows it,
7 that the contract doesn't exist?

8 MR. GOOD: Well, what I'm saying is
9 that the Staff in this instance saw a piece of
10 paper that was denominated territorial agreement
11 and it stopped there. We have many arguments about
12 whether it is, in fact, a territorial agreement
13 under the statute.

14 But to answer your specific question,
15 in this instance, if they signed this on June 10th
16 of 2007 and it was never followed, what was the
17 status of it? And if, in fact, the -- one party,
18 let's just take it to an extreme, the next day
19 decided that it didn't want to follow it, what have
20 you got? In addition --

21 CHAIRMAN KENNEY: You have a breach
22 of contract.

23 MR. GOOD: Well, if there was --

24 CHAIRMAN KENNEY: You have a breach
25 of a contract.

1 MR. GOOD: If there was a breach of
2 contract, in addition, let me jump ahead, 247.172
3 says that the competition to distribute water may
4 not be displaced except by territorial agreement,
5 and that's why competition is a relevant issue.

6 And then it says, before becoming
7 effective -- and this is subsection 4. Before that
8 territorial agreement can become effective, you
9 must file an application, and the agreement must
10 set forth three things.

11 It has to denominate the territories
12 of each, and it has to denominate the boundaries of
13 service for both of them, and it has to -- and it
14 says, it shall designate any and all powers of the
15 public water supply district within the city's
16 boundaries, and then it has to designate and it
17 shall designate any and all powers that the city
18 has within the public water supply district's
19 boundaries. And those boundaries extend outside of
20 the boundaries of the City of Pevely.

21 The agreement that you have before
22 it -- before you doesn't do that. It's completely
23 silent with respect to what the powers of the City
24 are outside of its own boundaries.

25 And that's important for another

1 legal issue, because this Commission under 386.250
2 says that this Commission has no jurisdiction with
3 regard to a city water supply, a municipal-owned
4 water supply within its own boundaries.

5 Now, that's another interesting
6 question comes up because you have no jurisdiction
7 within the city's boundaries, and then how do you
8 view 247.172? Is it an exception or, looking
9 strictly at the Commission's jurisdiction, which we
10 believe the case law says, does that mean that the
11 territorial agreement is not effective because it
12 doesn't go beyond the City's borders?

13 I would suggest to you that that's
14 the case. That's the only way to read 386.250
15 along with 247.172 to make any sense out of them,
16 unless you want to say it's an exception, and we
17 don't believe it's an exception because this
18 Commission's jurisdiction only extends to the
19 extent it was given by the statute. So we don't
20 believe there's any jurisdiction for that reason.

21 Now, what happened in this instance
22 was a territorial agreement denominated, somebody
23 chose that title and that's the reason we're here,
24 that doesn't conform with the statute, doesn't have
25 all of the necessary elements for an agreement

1 under 247.172 was signed as a result of litigation
2 between the parties back in 2007.

3 Since that time, there was never any
4 instance in which the territorial agreement came
5 into effect that I'm aware of, and certainly the
6 record is devoid of anything of that nature.

7 And then we have the dispute about
8 the Valle Creek Condominiums, and Valle Creek is
9 within the City's boundaries, and the developer of
10 that condominium or now apartment complex entered
11 into an agreement with C-1 to provide the water.

12 At no time did C-1 ever have a main
13 that reached that. The City did. But the
14 developer reached an agreement with C-1, the
15 competition, under which the developer was going to
16 pay for the water lines to the condominium.

17 Well, what happened was the developer
18 ran out of money and wasn't going to pay for the
19 main, and so the City continued to provide the
20 water. And then the -- C-1 attempted to force the
21 developer to put in the main. The dispute arose
22 between the parties in C-1 and the City as to who
23 was going to supply the water. Pevely continued to
24 supply the water. Wasn't going to leave anybody
25 without water. That gave rise to the lawsuit down

1 in Jefferson County.

2 So at no time has C-1 ever had the
3 ability to even provide water in this instance,
4 even though it contracted to do that, which was a
5 hallmark of competition.

6 Now, as I said, 247.172, the very
7 first section says that competition to sell and
8 distribute water as between and among water supply
9 districts, water corporations subject to this PSC
10 jurisdiction and municipally-owned utilities may be
11 displaced by written territorial agreement only.

12 And then, as I said before,
13 subsection 4 says, before any such territorial
14 agreement shall be effective, you have to do the
15 things that I enumerated.

16 So our position is that even if there
17 was an agreement that was being followed that ever
18 existed and may have existed in the abstract, and
19 again for how long we don't know, because I don't
20 know. If you decide to issue penalties, how long
21 are you going to issue penalties for because how
22 long was it effective? 15 minutes? Five years?
23 One year? There's no evidence of that.

24 And I think that that evidence
25 indicates that there was never an agreement that

1 was ever even followed. Even if there was an
2 agreement, it wasn't effective. And so is this --
3 is the Commission's approval necessary in this
4 instance or do you just have an agreement that's
5 not effective?

6 Now, and again with regard to
7 mootness, it's very clear that the Staff wants a
8 legal decision here so that it can assert its
9 jurisdiction in the future. And as Mr. Thompson
10 said, this is the very first time that they've
11 affirmatively ever sought to enforce this. They
12 specifically admitted that in the pleadings. So
13 this is a test case.

14 And in those instances, those 11
15 instances, they were all voluntarily brought before
16 the Commission, which only means that somebody was
17 being safe or somebody disagreed with our
18 interpretation, which gets to some of my other
19 arguments as to whether it's really unclear as to
20 whether it applies in this instance, and then it
21 has due process implications.

22 Now, with regard to due process, it's
23 a penal statute. You know, even though they say
24 that they are not going to recommend penalties for
25 what the parties have done, the Commission could do

1 it. And to say, as they have in their responsive
2 pleadings, that this is not penal because they
3 don't intend to -- they said that they didn't
4 intend to impose penalties, but now they say
5 they're going to leave it up to you, is -- it makes
6 no sense because that's like saying a criminal
7 statute isn't a penal statute if I arrest you
8 without the intention of putting you in jail or
9 issuing you a fine. If that's a potential, then
10 that makes even a criminal statute not penal in
11 nature.

12 Now, if it's penal in nature, the
13 underlying statute has to be given liberal
14 interpretation in fairness to the party to which
15 you're claiming there was a violation, and it has
16 to be strictly construed.

17 So in this instance you're going to
18 have to look at 247.172 and strictly construe it as
19 a penal statute and make that determination as to
20 whether it applies in this instance when it doesn't
21 even comply with the requirements of a territorial
22 agreement under the statute because it doesn't set
23 out everything necessary for a territorial
24 agreement and, again, because it simply wasn't
25 effective by reason of the wording in the statute.

1 We were never given any notice that
2 they were going to affirmatively enforce this under
3 their interpretation until we received the lawsuit.
4 We had no instance where -- and as they say, this
5 is a test case. They've never done it before.
6 There was never any instance that indicated to the
7 City that it should have been brought before the
8 Commission.

9 And you have before you the
10 testimony, the written testimony of the then city
11 manager who said if we had known that this applied,
12 we would have sought application. We don't believe
13 it did, but if it had been determined that it had
14 been -- that there is jurisdiction and this is such
15 an agreement for jurisdiction, we would have
16 followed the law, brought it before the Commission.

17 The statute is also vague, and
18 because it's vague we don't get our due process
19 notice because we don't know whether we're in
20 violation or not. The fact that some people view
21 it one way and some people view it the other way is
22 nothing more than a clear indication that it's
23 vague.

24 We previously filed motions to
25 dismiss on the issue about the between and among,

1 and we lost that on the motion to dismiss, and I'm
2 not going to relitigate it. I mean, the
3 Commission's made its decision on that. We
4 disagree with it, but I think for purposes of due
5 process it shows that parties can disagree as to
6 whether the statute applies in this particular
7 instance.

8 There are instances where it's clear
9 and it would clearly have jurisdiction and clearly
10 have effect. This is not one of them.

11 So it is vague. We were given no
12 notice of its intent to do it, as I said, until the
13 suit was filed, you know. Now we have an admission
14 that they filed with an in terrorem effect that we
15 were going to run to the Commission and jump
16 through the hoops that they wanted us to jump
17 through.

18 We have also filed as affirmative
19 defense estoppel because the City's never -- or
20 excuse me -- the Staff and the Commission has never
21 exercised its jurisdiction affirmatively. So the
22 City had no indication that there was going to be
23 an affirmative exercise in this instance. And so
24 it follows under all of the hallmarks of estoppel
25 that we had a right to rely on the actions of the

1 Commission in not enforcing this.

2 There's also an issue of --

3 COMMISSIONER HALL: Let me talk about
4 that for a second or ask you, you're claiming
5 estoppel here. Doesn't that require that Staff had
6 been aware of the territorial agreement at some
7 point in time before they took action on it?

8 MR. GOOD: Well, not with regard to
9 this instance. Now --

10 COMMISSIONER HALL: Aren't we here on
11 this instance?

12 MR. GOOD: We are, but the Staff has
13 never affirmatively asserted jurisdiction on any
14 agreement under this statute, to my knowledge.

15 COMMISSIONER HALL: Explain that.
16 That didn't make any sense to me.

17 MR. GOOD: Well, here's the City of
18 Pevely out in Jefferson County, and it enters into
19 a document that it styles as a territorial
20 agreement. Let's assume that it even is a
21 territorial agreement for purposes of just this
22 discussion. It doesn't know of any instance in
23 which the Public Service Commission Staff has gone
24 out and tried for one of these instances to enforce
25 it. So it's sitting there. It doesn't know any

1 other city that's been sued for this. There has
2 been no test case. There's no written reports, no
3 decisions, no published opinions that this is such
4 an instance in which it's going to do it.

5 And I think that the City has a right
6 to rely on the fact that the Staff has been silent
7 all of these years. It's unfair for the City to be
8 the first on this and to face penalties for this
9 when the Staff has never done this before.

10 COMMISSIONER HALL: There was an
11 attachment that was alluded to earlier, list of
12 territorial agreements where there -- where there
13 were 11, 12, 13 or 14 cases where there was
14 jurisdiction asserted where there was no entity
15 under this -- under the Commission's regulation.

16 So I don't understand how you can say
17 that the Public Service Commission never exerted
18 jurisdiction in a situation such as this one.

19 MR. GOOD: Well, you and I may
20 disagree on it, but my point is that those
21 instances were all instances where the parties
22 voluntarily came before the Commission and sought
23 approval. That's an indication that those parties
24 believed that the statute was effective with regard
25 to their agreements.

1 There's no evidence -- and it's very
2 difficult to get a copy of these
3 things -- that those territorial agreements were
4 like the territorial agreements between C-1 and
5 Pevely. I don't know whether they went through and
6 denominated all of the things necessary under
7 247.172 to be a territorial agreement.

8 So the fact that some parties in some
9 particular instance, which may actually fall within
10 the statute, voluntarily came before the Commission
11 and submitted to the jurisdiction is different from
12 the Staff going out and affirmatively prosecuting,
13 particularly when the statute says that this
14 agreement is not effective if it is a territorial
15 agreement without the approval.

16 And if the statute says it's not
17 effective and you don't care if it's effective, do
18 you have to come before the Commission in order to
19 get approval? So because of this --

20 CHAIRMAN KENNEY: Mr. Good, let me
21 interrupt you. I'm sorry. You had just alluded to
22 this. You didn't undertake an examination of the
23 territorial agreements in those other 11 cases that
24 are cited in Staff's footnote, and that was the
25 question that I was going to ask, because part of

1 your assertion is that the territorial agreement in
2 question here doesn't comport with 247.172.2, it
3 doesn't list those things that must be in a
4 territorial agreement, and so therefore it's not a
5 territorial agreement. So I've got a couple of
6 questions.

7 Were you able to look at any of those
8 11 territorial agreements and discern whether they
9 were the same as this territorial agreement?

10 MR. GOOD: Yes. We were able to get
11 some of them or we looked at some of them, and the
12 ones that we saw very clearly designated all of the
13 powers of the parties in all locations. And so for
14 that reason I don't think that they're dispositive
15 of this situation. I'm not going to say that in
16 every instance because we didn't look at them and
17 because of the way that they were written that they
18 are not totally like our situation.

19 But the ones that we looked at, there
20 are instances where there are situations where a
21 water district and a city submitted to the
22 jurisdiction of the Commission for what they
23 considered to be a territorial agreement that does
24 fall within the three requirements of a territorial
25 agreement.

1 CHAIRMAN KENNEY: And then let me ask
2 another kind of more pedestrian question. Why
3 would they call this a territorial agreement, the
4 C-1 and the City of Pevely? It's not -- to my
5 mind, it's not a commonly used phrase, right? So
6 does it have meaning outside of 247? Why would
7 they call it and denominate it a territorial
8 agreement if they didn't consider it to be a
9 territorial agreement as defined by the statute?

10 MR. GOOD: I can't answer that. I
11 mean, we weren't there in 2007. We weren't the
12 counsel for City of Pevely in 2007. I'm not aware
13 of any magic words territorial agreement or whether
14 territorial agreement can mean something else in a
15 different situation if that's what you're asking.
16 You know, I don't know what --

17 CHAIRMAN KENNEY: That's really my
18 question. I mean, do we find this phrase anywhere
19 else, and what did the parties intend when they
20 called it a territorial agreement? How did they
21 come up with that title --

22 MR. GOOD: Well, I can't answer --

23 CHAIRMAN KENNEY: -- as opposed to
24 just an contract or just an agreement?

25 MR. GOOD: Well, I can't answer that

1 question. Could they have called it an agreement?
2 Yes. Could they have called it a designation of
3 powers within certain territories? They could have
4 called it that. From our perspective, it's
5 unfortunate the terms that they used, but I don't
6 think that what you title a document is an
7 indication of it.

8 Under the Civil Rules of -- the Rules
9 of Civil Procedure, what you call a pleading
10 doesn't make it that particular kind of pleading.
11 The courts would then look at the substance of the
12 pleading, whether it's a motion or whatever, to
13 determine what the document is. So the title of
14 the document is not dispositive as to what it is.
15 If we had --

16 CHAIRMAN KENNEY: But it's indicative
17 of the parties' intent?

18 MR. GOOD: I don't think that you can
19 say that in this instance because, again, the
20 record's devoid of it, and you can speculate as to
21 why they did it, but there's no evidence that they
22 intended it for it to be within this. In fact, the
23 record's the opposite, where our city -- former
24 city manager said that if we knew that it was
25 within the jurisdiction, we would have gone before

1 the PSC and we would have sought approval.

2 So I think that the record is that
3 they didn't believe that it was a territorial
4 agreement within the meaning of this statute. If
5 we had chosen to call it an agreement and it fit
6 all of the hallmarks of the statute, we wouldn't be
7 here before it and nobody would be arguing that
8 it's not a territorial agreement just because they
9 chose to call it something else.

10 It is called a territorial agreement.
11 I don't believe that it can be said that that
12 indicated intent. The record shows that there was
13 no intent to fall within the jurisdiction of the
14 PSC. I wish they'd called it something different,
15 and that's my best answer to that.

16 CHAIRMAN KENNEY: Let me ask an
17 additional question. I think you said earlier that
18 the territorial agreement came about as the result
19 of some other litigation, it was a negotiated
20 settlement at the end of some other litigation.
21 Did I hear you correctly?

22 MR. GOOD: Yes. And I don't know
23 what the subject of that litigation was. Maybe we
24 should have looked at it, but we didn't. We didn't
25 purposefully say don't tell us what it was. All I

1 can tell you is that at this point in time, I can't
2 explain to you what it is.

3 CHAIRMAN KENNEY: But at some point
4 there was some litigation between C-1 and Pevely,
5 and the result of it was this document called a
6 territorial agreement?

7 MR. GOOD: Correct. Now, whether
8 that had to do with a dispute as to who should have
9 provided water in one particular instance or where
10 it was, I can't tell you. So it may have been a
11 dispute as to territory in one particular instance.
12 I don't know. I mean, it's complete speculation.

13 CHAIRMAN KENNEY: Does the gentleman
14 that filed the affidavit, the former city manager,
15 might he know?

16 MR. GOOD: I don't believe that he
17 was the city manager at the time. In fact, I know
18 he was not the city manager at the time. And I --
19 I don't know who he talked to, but we had him
20 investigate what he was saying in his affidavit
21 before he said it.

22 Now, that city manager was let go by
23 the City about two weeks ago, so you can imagine
24 his cooperative level at this point.

25 CHAIRMAN KENNEY: All right. That's

1 it for me. Thank you.

2 JUDGE BURTON: Let me ask, are you
3 done right now?

4 MR. GOOD: I am, your Honor.

5 JUDGE BURTON: Commissioner?

6 COMMISSIONER W. KENNEY: No
7 questions.

8 COMMISSIONER HALL: Yes. Thank you.
9 I want to get back to the mootness issue for a
10 moment. Staff counsel takes the position that if
11 there is a violation of the law, that makes this
12 adjudication -- that makes this issue ripe for
13 adjudication. I was wondering if you agree with
14 that?

15 MR. GOOD: No.

16 COMMISSIONER HALL: So even if there
17 is a violation of the law, you don't think we have
18 jurisdiction to determine that?

19 MR. GOOD: No, because it's moot.

20 Now, whether -- I don't want to get into semantics
21 about whether you have jurisdiction, but the Court
22 of Appeals in a very similar situation said,
23 because the violation had occurred in the past, the
24 issue was moot. That was the State ex rel Public
25 Counsel versus PSC. It was the rate case. And the

1 principle is --

2 COMMISSIONER HALL: What violation of
3 law was there in that case?

4 MR. GOOD: There was an interim rate
5 setting, and the -- then the parties came before
6 the Commission for a permanent rate setting, and I
7 think it was actually an increase. So it was a
8 change.

9 COMMISSIONER HALL: What violation of
10 law was there?

11 MR. GOOD: Because they didn't -- the
12 Public Counsel contended that the interim rate did
13 not follow the rules in the statute.

14 COMMISSIONER HALL: And your position
15 is that that was a violation of the law?

16 MR. GOOD: Well, the Public Counsel
17 believed it was a violation of the law, but the
18 Court never reached the conclusion that it was a
19 violation or not because the threshold question as
20 to whether the issue was moot was reached.

21 It said -- I've got copies of it,
22 and you can take a look and you can read it, but
23 the Court said that we're not even going to reach
24 the decision as to whether there was a violation
25 because it's moot. It has no practical effect.

1 Whether we make a decision here or not, it's in the
2 past.

3 And at that point the Staff said,
4 well, this may come up again. It's an issue that
5 we'd like to have the Commission decide. And the
6 Court said no, it's not going to make a decision
7 based upon an abstract motion.

8 And so mootness is an issue in this
9 instance. It doesn't even get you to the issue
10 about whether there was a violation.

11 So to answer your question, is
12 adjudication ripe? No, it's not ripe because the
13 controversy is moot.

14 COMMISSIONER HALL: And you would say
15 the controversy is moot because one party doesn't
16 want to follow the contract?

17 MR. GOOD: Well, correct.

18 COMMISSIONER HALL: And so wouldn't
19 that be the case every time there was a territorial
20 agreement if one party decided to stop following
21 it, poof, jurisdiction gone?

22 MR. GOOD: Well, if the parties never
23 followed it, and the one time that it came into
24 question that one of the parties said no, we're not
25 going to do that, then, yeah, there was never an

1 agreement that was effective.

2 COMMISSIONER HALL: I'm done. Thank
3 you.

4 JUDGE BURTON: Commissioner Rupp?

5 COMMISSIONER RUPP: Thank you, sir.

6 In the territorial agreement that we're all
7 referring to, is any of the service area outside or
8 beyond the corporate limits of the municipality?

9 MR. GOOD: Well, no, in the sense
10 that C-1 has its jurisdiction. There are areas of
11 C-1 that lie outside the city boundaries. So you
12 can say in the sense that C-1 has territory outside
13 the city limits that, you know, maybe it's -- it's
14 referred to, but the agreement itself doesn't have
15 anything to do with those areas outside the city
16 limits.

17 So can you say -- can I stand here
18 and say that it doesn't refer to it at all because
19 the water district's territories are outside the
20 city limit? I can't say that the agreement doesn't
21 speak to it at all in a very, very indirect way,
22 but the agreement's provisions themselves do not
23 mention anything out of its -- outside the City's
24 boundaries.

25 It doesn't say what's going to happen

1 if somebody outside of the City's boundaries and
2 within the jurisdiction or within the boundaries of
3 C-1 asks the City to provide water. Silent. And
4 the City's testimony is that it will supply water
5 to anybody that asks it.

6 So, you know, in one sense I can't
7 say that it doesn't indirectly refer to areas
8 outside of it because it does, you know, recognize
9 the boundaries of C-1, but the effect of the
10 agreement does not go outside the boundaries of the
11 city.

12 COMMISSIONER RUPP: That's it.

13 JUDGE BURTON: Commissioner Kenney?

14 COMMISSIONER W. KENNEY: Under
15 247.172.4, I was trying to -- I couldn't remember
16 if I heard you say that. Was it your contention
17 that the territorial agreement was never in force
18 because it never received PSC approval by Report
19 and Order?

20 MR. GOOD: That's correct. 4 says,
21 before becoming effective, all territorial
22 agreements entered into under the provisions of
23 this section, including any subsequent amendments,
24 any transfer or assignment of the agreement, and
25 I'm leaving some words out, or any rights or

1 obligations of the party to the agreement shall
2 receive the approval of the Public Service
3 Commission by Report and Order. Applications for
4 the Commission's approval shall be made, notice
5 shall be given, and other water suppliers pursuant
6 to the rules and regulations shall give notice.
7 Otherwise, you know, the rest of it doesn't apply.

8 COMMISSIONER W. KENNEY: But the
9 start of that was before becoming effective?
10 That's your --

11 MR. GOOD: Correct.

12 COMMISSIONER W. KENNEY: Because they
13 never received it?

14 MR. GOOD: Correct.

15 COMMISSIONER W. KENNEY: Thank you.
16 I'm done.

17 CHAIRMAN KENNEY: Can I follow up on,
18 that, though?

19 MR. GOOD: Sure.

20 CHAIRMAN KENNEY: Commissioner
21 Kenney, were you finished? I'm sorry.

22 COMMISSIONER W. KENNEY: Yes, sir.
23 Yes, Mr. Chairman.

24 CHAIRMAN KENNEY: So, because this --
25 and I meant to ask you about this, because it seems

1 that the way that you're reading that would mean
2 that any municipal corporation and public water
3 supply district could defeat Commission
4 jurisdiction by entering into a territorial
5 agreement that comports with 247.127.2 and has all
6 of the things delineated there so it's a valid
7 territorial agreement, and then just not present it
8 to us.

9 I mean, it sounds like what you're
10 saying is it's not a territorial agreement subject
11 to Commission jurisdiction because we didn't seek
12 Commission jurisdiction.

13 MR. GOOD: Well, it certainly is not
14 an effective agreement. Now, what happens as a
15 consequence of that, I can't say. It would be
16 determined by the specific situations. But yes, I
17 mean, the statute says that if you want it to be
18 effective, you have to come before the Public
19 Service Commission. And so --

20 CHAIRMAN KENNEY: So that would go to
21 the rights and obligations between the parties to
22 the agreement, not to our jurisdiction in the first
23 instance.

24 MR. GOOD: Well, that's correct.

25 CHAIRMAN KENNEY: All right. I just

1 wanted to make sure you agree with me on that. All
2 right. Thanks.

3 JUDGE BURTON: I have a few questions
4 for you, Mr. Good.

5 MR. GOOD: Sure.

6 JUDGE BURTON: Hypothetically
7 speaking, let's say that we have an agreement
8 that's made between a public water supply district,
9 a water corporation that's subject to Public
10 Service Commission authority and a municipally-
11 owned utility. They enter into this agreement on a
12 territorial agreement that identifies in everything
13 in subsection 2, but they don't bring it to the
14 Commission for approval.

15 Does the Staff of the Commission have
16 the authority to say then under subsection 9 that
17 they violated this section, this statute?

18 MR. GOOD: Again, I think it would
19 depend on the circumstances, but in general, I say
20 no, because what they've entered into is an
21 agreement that's not effective. Now, you'd have to
22 look at -- when I say you have to look at the
23 specific situations, if people complain about the
24 fact that they go to the City and the City says
25 we're not going to provide water to you, that's one

1 situation. You know, somebody could bring a
2 complaint before the Public Service Commission.

3 But I don't believe that the Staff
4 should go out and scour the state for agreements
5 that may or may not exist that aren't effective and
6 that nobody's complaining about. I mean, that's
7 one of our points is that the -- nobody's ever
8 complained about this because there's never been a
9 displacement of competition.

10 JUDGE BURTON: Is that a requirement
11 of the statute, that someone complains?

12 MR. GOOD: No, but it's a requirement
13 of the statute in the sense that, before
14 competition can be displaced, there has to be a
15 valid agreement. If there has been no displacement
16 of competition, the statute doesn't apply to the
17 agreement. If there is a displacement of
18 competition, then, yes, the statute is true.

19 JUDGE BURTON: Okay. Now, I want to
20 go back just a little bit. You were talking about
21 there was no actual agreement or, if there was an
22 agreement, it was never actually in force because
23 it lasted for two weeks or what have you. You were
24 speculating, I believe, on how long the parties
25 complied with it.

1 I just want to clarify. Was what the
2 Staff is asserted true, that the City was providing
3 water service to Valle Creek and then allowing the
4 district to bill them and then the district was
5 reimbursing the City, I believe it was twice a
6 year?

7 MR. GOOD: I believe that's correct.

8 JUDGE BURTON: And how long did that
9 occur?

10 MR. GOOD: I can't tell you.

11 JUDGE BURTON: Why, if there was no
12 agreement, didn't the City just go ahead and on
13 their own provide service?

14 MR. GOOD: I can't answer that
15 either. I just can't. It may be -- it may have
16 been because of the territorial agreement, but I
17 simply can't say, and there's nothing in the record
18 that indicates why they did it.

19 JUDGE BURTON: Okay. Now, I want to
20 go back to what's been captioned the territorial
21 agreement. Under the therefore clauses it says --
22 I'm looking at paragraph 3 -- Pevely also agrees to
23 cease all plans to extend water service within the
24 current geographic boundaries of the district.

25 Now jumping to paragraph 6, the

1 parties further agree that all other territory
2 within the district boundary shall remain the
3 exclusive territory of the district.

4 Doesn't that sort of provide the
5 boundaries that you were saying are required for a
6 territorial agreement?

7 MR. GOOD: I think it may. I think
8 it may. But it doesn't -- it doesn't say what the
9 powers of the City are. It does say --

10 JUDGE BURTON: Doesn't it say there
11 that the City agrees to cease all plans to extend
12 within the boundary's district territory (sic)?

13 MR. GOOD: I stand corrected. You're
14 right.

15 JUDGE BURTON: Now, I want to jump to
16 something you were stating about penal statutes
17 being -- penal statutes being strictly construed.
18 Do you have any case law that says for civil
19 penalties that a State agency is obligated to
20 strictly construe that statute?

21 MR. GOOD: I don't have any case law,
22 but I can provide the Commission case law if you
23 want to give me some time to brief that, because
24 that hasn't been an issue. The Staff hasn't
25 contested that issue, but --

1 JUDGE BURTON: That was an issue that
2 you brought up in response, correct?

3 MR. GOOD: Correct. And we did -- we
4 did put that in our response to the motion. So it
5 was in our pleadings. There just hasn't been any
6 response to the Staff on that particular issue that
7 I can remember. So if you would like case law or
8 to have it briefed, I'd be happy to do that.

9 JUDGE BURTON: That would be great.
10 Thank you. Moving on to the issue of the estoppel,
11 do you have any case law that says that an issue of
12 laches or estoppel applies to a state agency?

13 MR. GOOD: Yes. Actually, the Staff
14 supplied that. The -- and I don't have it in front
15 of me, but they cite a case in their papers.

16 JUDGE BURTON: Okay. Could you give
17 me the facts of that case, please?

18 MR. GOOD: I don't -- I don't
19 remember the facts, and I don't even know if I read
20 the case. I mean, I've had somebody else helping
21 me with the case. So I'm not going to stand here
22 and say that I can recite the facts to you, but --

23 JUDGE BURTON: Maybe later.

24 MR. GOOD: But all I can tell you is
25 that in their responsive pleadings they refer to a

1 government agency when it's talking about the
2 elements. And, in fact, one of the elements is
3 that the government's action has to be the
4 equivalent of affirmative misconduct.

5 JUDGE BURTON: Okay. So where was
6 the affirmative misconduct?

7 MR. GOOD: Affirmative misconduct is
8 asserting a statute that doesn't apply.

9 JUDGE BURTON: Okay. Is that the
10 only affirmative misconduct?

11 MR. GOOD: Well, seeking penalties in
12 the situation where it previously had never
13 exercised its jurisdiction affirmatively, we
14 believe that that's misconduct. I mean, it -- the
15 Staff is attempting to expand the jurisdiction in
16 this instance. It's a test case. It's never done
17 it before. And it's placing the City of Pevely at
18 risk for penalties.

19 JUDGE BURTON: All right. Now, I
20 want to go back to your issue about the public
21 water supply district and the jurisdiction issue
22 because you believe, correct, that if the
23 Commission was to have jurisdiction, it would be
24 under Chapter 386?

25 MR. GOOD: Correct.

1 JUDGE BURTON: Is that what the
2 argument is?

3 MR. GOOD: Yes.

4 JUDGE BURTON: But isn't the caption
5 of this Chapter 247 specific to water supply
6 districts? Is it possible the Legislature intended
7 by making this statute under this section to ensure
8 that it was known that they were giving
9 jurisdiction to the Commission over public water
10 supply districts?

11 MR. GOOD: Actually, the caption that
12 I see is written territorial agreements for sale
13 and distribution of water.

14 JUDGE BURTON: I'm looking at
15 Chapter 247.

16 MR. GOOD: The chapter that I see
17 says water supply -- water -- public water supply
18 districts and county districts, and county
19 districts I'm not even sure is in the title.
20 Actually, title -- title 15 is lands, levies,
21 drainage sewers and public water supply.

22 So I mean, if you can point me to
23 something, I'd be happy to look at it.

24 JUDGE BURTON: I'm looking under
25 Title 15 of the Missouri Revised Statutes,

1 Chapter 247, public water supply districts.

2 MR. GOOD: I'm sorry. The caption I
3 see doesn't have that.

4 JUDGE BURTON: Okay. Now, you also
5 referenced the fact that there's -- the testimony
6 or the affidavit let's say of Thomas, who says that
7 if the City was aware of this issue or of the
8 Commission asserting that it has jurisdiction, it
9 would have brought this territorial agreement to
10 the Commission.

11 MR. GOOD: Well, he does say that,
12 but I think what he means by it is he'd comply with
13 the law. I mean, if an agreement such as this was
14 brought before the Commission and if the Commission
15 has determined that it is -- it applies, and if the
16 Court of Appeals, Circuit Court and the Court of
17 Appeals has reviewed it and agreed, yes. Now, you
18 know, it's going to follow the law.

19 We at this point where it's not been
20 litigated and is a test case don't believe that it
21 is -- and now that we've looked at it and the
22 questions there, we don't believe that it is under
23 the statute.

24 JUDGE BURTON: Was the Staff of the
25 Commission under any duty to inform the parties at

1 any point prior to this case how they were
2 interpreting this statute?

3 MR. GOOD: I believe that they were.

4 I believe that because this is a test case and
5 because this is the first instance in which they
6 did it, I think that the -- that what the
7 Commission -- or the Staff should have done was
8 contact the City outside of litigation to initiate
9 this discussion. I mean, to put it -- it's a due
10 process requirement. If --

11 JUDGE BURTON: Aren't citizens of the
12 state implied to know what the laws are of the
13 State? Isn't that a burden that every citizen,
14 municipality, person, corporation has that operates
15 within the state?

16 MR. GOOD: Yes and no. Yes, they are
17 deemed to know the law, but when the law is vague,
18 you can't enforce it against them when there are --
19 it's open to more interpretation. You can't deem
20 them to know what the Commission's interpretation
21 of the law is until the Commission makes that
22 determination.

23 JUDGE BURTON: So in other words, the
24 Commission does need to make that determination?

25 MR. GOOD: Well, in an instance where

1 the action's not moot and in an advisory way, if
2 you want to make an advisory opinion, which I don't
3 believe that you should and which the Court said
4 that you shouldn't, it's an interesting question.

5 But the law is that when the
6 controversy is here and the matter is moot, it's
7 not even going to reach that interesting question.

8 JUDGE BURTON: All right. And what
9 section does the City believe applies to any type
10 of territorial agreement then that they may enter
11 with C-1?

12 MR. GOOD: It depends on what the
13 agreement says, and our position is that --

14 JUDGE BURTON: Let's say it's this
15 type of agreement.

16 MR. GOOD: No, that agreement, it
17 does not fall within the statute.

18 JUDGE BURTON: Which statute does it
19 fall under?

20 MR. GOOD: It doesn't fall under any
21 statute.

22 JUDGE BURTON: So in other words, the
23 City is saying that it and a district, a water
24 district can enter into an agreement without having
25 a circuit court review it or the Commission review

1 it?

2 MR. GOOD: The statutes are silent as
3 to what happens in that instance. Let's say that
4 this agreement is not within the jurisdiction of
5 the Public Service Commission because it doesn't
6 fulfill all the requirements of 247.172. And then
7 your question is, let's assume that it's not within
8 that. What do you do in this situation where
9 they've entered into an agreement that may or may
10 not displace competition? And then if somebody
11 complains about it, what is the remedy on that?

12 And the remedy would be that that
13 agreement's not effective because it wasn't
14 approved.

15 JUDGE BURTON: So in other word, that
16 would evade review?

17 MR. GOOD: Well, you have an
18 ineffective agreement. You have an ineffective
19 agreement. So you're asking the district and the
20 City to come before the Commission to seek approval
21 of an agreement that the parties aren't following
22 and an agreement that the statute says is not
23 effective. What are you going to approve?

24 JUDGE BURTON: All right. This kind
25 of ties into that mootness issue and the case that

1 you were referring to, and I looked at that, and it
2 cites to Missouri Gas Energy versus Public Service
3 Commission case. That cite is 224 SW 3rd 20.

4 And in that case the appellate court
5 identifies exceptions to the mootness doctrine
6 where they will exercise their jurisdiction, and
7 among those standards they look at whether or not
8 it's in the public interest and importance whether
9 it would or not it would evade appellate review.

10 Isn't that what is happening here if
11 we decide it's moot, we don't -- if what you're
12 saying is true?

13 MR. GOOD: I don't believe so. And
14 I'm aware of that provision in the case law, and I
15 don't think that this is a case of great public
16 importance in the sense of what this -- what the
17 original case said. And I can't tell you what the
18 Joplin case says, but in that instance they sought,
19 they clearly examined whether it was important, and
20 they said there can be exceptions in important
21 situations.

22 I don't think that this is an
23 important situation, and particularly when you have
24 before you an agreement that the parties aren't
25 following. Like I said, if there's going to be a

1 test case, if there's going to be a case where the
2 Commission decides its jurisdiction on an
3 agreement, it ought to be in a situation where the
4 parties are following it, and it ought to be one in
5 which the agreement's clearly under the statute.

6 I mean, the Staff wants these people
7 to, you know, the City to come before the
8 Commission to seek approval of an agreement it
9 doesn't follow, doesn't want to follow, and then
10 it's going to ask the City to come before the
11 Commission to revoke an agreement it never wanted
12 to enter into, or it did enter into, it doesn't
13 want to be in. It's moot.

14 The case says, if there's no
15 practical effect, and what's the practical effect
16 here if the Commission's going to make a decision
17 as to whether the parties enter into the agreement
18 when the parties aren't following the agreement?
19 It's moot.

20 JUDGE BURTON: Okay. Thank you.
21 Commissioner Rupp had a question.

22 COMMISSIONER RUPP: All right. Thank
23 you. I just wanted to clarify. You've been giving
24 us arguments on that this is not a territorial
25 agreement because you didn't qualify under all of

1 the steps under Chapter 247. You also made the
2 comment that we should not have jurisdiction under
3 Chapter 386 because there's no territory outside
4 the city, and so we don't have jurisdiction. Which
5 argument are you really making?

6 MR. GOOD: Well, I was originally
7 making both, but Judge Burton pointed out to me
8 that the agreement does refer to areas outside the
9 city where the City's recognizing the exclusive
10 jurisdiction of the district. So I was incorrect
11 about that. My argument's not sound.

12 But we are saying that the agreement
13 doesn't fall within the provisions of this section
14 here, so we don't believe it's in effect. We don't
15 believe it's an agreement that's subject to it, and
16 particularly in an instance where it's never
17 happened before.

18 COMMISSIONER RUPP: So we should
19 focus on Chapter 247 and the requirements that
20 you're arguing?

21 MR. GOOD: That's correct.

22 COMMISSIONER RUPP: Thank you.

23 JUDGE BURTON: Any other questions
24 from the Commissioners? Okay. Thank you.

25 MR. GOOD: Thank you.

1 MS. EDEN: I'm not going to repeat
2 any of the argument that -- well, at least not much
3 of the argument that Mr. Good presented. I just
4 have a couple of additional points I wanted to
5 make.

6 In regards to the argument that
7 247.172 is the exclusive avenue for a territorial
8 agreement in regards to a public water supply
9 district and a city, the state statutes actually
10 disagree with that.

11 If you look at Section 247.165, it
12 talks about the water service to annexed territory,
13 agreement may be developed. This also goes to the
14 argument that in order for 247.172 to apply, that
15 the agreement has to apply to areas outside of the
16 boundaries of the City and the water district, the
17 water supply district, because 247.165 provides
18 that whenever any -- whether -- see if I can talk.
19 Sorry about that. Whenever all or any part of a
20 territory located within public water supply
21 district organized pursuant to Sections 247.010 to
22 247.220, which is C-1, is included by annexation
23 within the corporate limits of a municipality,
24 which is what we're talking about here, in, oh --
25 Valle Creek used to be a KOA campground. I can

1 give you a little bit of background. So when it
2 was the KOA campground, it was outside of the city
3 limits of Pevely. When they decided to develop it,
4 H&H Development, who was the developer prior to the
5 receiver, they had it annexed into the City of
6 Pevely.

7 And also there was a question about
8 whether the City had a main at that location.
9 Actually, it was just the main was closer than
10 C-1's main. There was still an extension that was
11 done by H&H to hook on to Pevely's main. It was
12 not -- that property at the time that all this
13 began was not serviced by either.

14 COMMISSIONER W. KENNEY: What was the
15 date of that annexation?

16 MS. EDEN: I can't tell you the exact
17 date of the annexation. I've driven the road where
18 that property is located.

19 COMMISSIONER W. KENNEY: Was it after
20 this agreement?

21 MS. EDEN: No. It was prior to that
22 agreement. It was prior to that agreement. It was
23 probably within the time frame, not very much
24 before that agreement.

25 Anyway, under 247.165, when you have

1 that overlap but the property, the territory is not
2 receiving water service from such district or such
3 municipality at the time of such annexation, the
4 municipality and the board of directors of the
5 district may, and this is within six months after
6 such annexation becomes effective, develop an
7 agreement to provide water service to the annexed
8 territory.

9 There is no mention whatsoever in
10 this statute that brings it within 247.172, and, in
11 fact, if there is a deannexation to occur and they
12 can't agree as to exact location, then
13 commissioners can be appointed by the court, by the
14 circuit court. There's no reference to take it
15 into 247-- to the Public Service Commission
16 jurisdiction, which is why the provisions of
17 paragraph 2 of 247.172 where it says to operate in
18 areas beyond the corporate municipality, municipal
19 boundaries of its municipality seems to be in line
20 with Mr. Good's argument that in order for you to
21 have jurisdiction over the City, it has to be
22 outside of its boundaries, because we've got 165
23 which states that if there's overlap, there's an
24 agreement that can be developed.

25 And I think there's a little bit of a

1 misunderstanding with the idea of service and the
2 public interest. The public certainly has say in
3 both the City of Pevely and in the public water
4 supply district. Both are elected boards. Both
5 have duties under their -- they're both not for
6 profit, so we have the duty to keep the rates
7 reasonable and low, which is why the rates of the
8 districts are not -- or the City are not within the
9 purview of the Public Service Commission. We are a
10 political subdivision of the State of Missouri,
11 just as the City of Pevely is.

12 Going into a little bit more of the
13 idea of what's the public to do if they want a
14 choice as to who to serve. The statutes provide
15 that when overlap has occurred between a
16 municipality and a city, that the city or its
17 citizens can petition for deannexation from the
18 water district into the city's district for service
19 purposes.

20 There's been case law on the ability
21 of the city to serve property that has not been
22 properly detached. So what these -- what 165 is
23 meant to do also is to take care of those issues of
24 who has the jurisdiction over water service in that
25 area.

1 But to the purposes of whether the
2 Commission has jurisdiction, we've all talked
3 about, I think everybody's mentioned giving effect
4 to all of the language of the statute. So you have
5 the issue of before it becomes effective. So you
6 have a void agreement, and that seems to apply --
7 indicate later in the language of the statute under
8 paragraph 7 where it states that the Commission
9 shall have jurisdiction to entertain and hear
10 complaints involving any Commission-approved
11 territorial agreement.

12 If you have an ineffective agreement,
13 you asked what was the process then to deal with
14 that ineffective agreement? If you have an
15 ineffective agreement where we've determined where
16 service is supposed to be between overlapping
17 boundaries and that agreement isn't effective, then
18 you fall back on the statutory provisions for
19 requesting detachment and reattachment. That is
20 the process which the State has put together for
21 those disputes.

22 Let's see if I had anything else I
23 wanted to add. And then there was the question of
24 356.390 about when the Commission can hear a
25 complaint. I would just point out that 386.390

1 does not specify within its language a
2 municipality. So it does not negate the provisions
3 of 386.250.3, which specifies no jurisdiction.
4 What 386.390 states is any corporation. It doesn't
5 mention anything about a municipality.

6 I didn't know if anybody had any
7 questions.

8 JUDGE BURTON: Chairman?

9 CHAIRMAN KENNEY: I'm sorry. I was
10 on mute. No questions. Thank you.

11 JUDGE BURTON: Commissioner Kenney?

12 COMMISSIONER W. KENNEY: I have no
13 questions either.

14 JUDGE BURTON: Commissioner Hall?

15 COMMISSIONER HALL: Yeah, I have a
16 question. You were talking about the relationship
17 between ineffective agreements and the Commission's
18 jurisdiction, and I'm confused because doesn't it
19 take Commission -- in that -- why are the
20 agreements that you're talking about ineffective?

21 MS. EDEN: If this were an agreement
22 that falls within the purview of 172, that's
23 talking into account if 172 doesn't apply just in
24 the event that you're moving outside of the
25 corporate boundaries of the municipality or the

1 water district, then you have the language that the
2 Commission has the jurisdiction to entertain
3 involving any Commission-approved territorial
4 agreement.

5 If you had jurisdiction to hear those
6 that weren't approved, then that makes this
7 superfluous. And we're supposed to give meaning to
8 everything that the Legislature puts in there.

9 COMMISSIONER HALL: But isn't it also
10 true that if the Commission were to take the
11 position that this agreement should have been
12 brought before us for approval and it was first --
13 well, first of all, we have jurisdiction; second,
14 the agreement should have been brought before us;
15 and then third, because it wasn't, then we have to
16 determine whether -- then there has to be a
17 determination either by us or by a court as to
18 whether or not that agreement is effective. But as
19 a prerequisite for that whole chain of events, this
20 Commission has to assert jurisdiction. And it
21 seems to be your-all's position that we don't have
22 jurisdiction.

23 MS. EDEN: Well, whether you have
24 jurisdiction to institute something for a
25 declaratory judgment before the circuit court to

1 see whether it applies or not, I'm not indicating
2 that that's -- anybody can file for a declaration.

3 COMMISSIONER HALL: So we would have
4 to go to circuit court to determine whether or not
5 we have jurisdiction?

6 MS. EDEN: Well, you -- coming before
7 you for an ineffective agreement to say whether you
8 have jurisdiction, I don't think that No. 9
9 prohibits you from making a declaration that you
10 don't have jurisdiction, but I don't think No. 9
11 negates 7 where it says that you only have -- you
12 have jurisdiction to hear complaints involving any
13 Commission-approved territorial agreement.

14 But there's nothing within the
15 statute that can force -- if it's decided between
16 the parties that they entered into it not knowing
17 that there was any other application, they decide
18 they don't want that any longer, from saying we're
19 not acting under this. You haven't approved it.

20 You have to have, pursuant to the
21 statute, a hearing as to whether -- and the only
22 thing that the statute sets forth is you can
23 approve it or disapprove it. There's nothing in
24 the statute that says you can add terms to it, that
25 you can change the boundaries, that you can tell us

1 what the rates have to be or anything along those
2 lines.

3 Now, within the City and the
4 municipality and C-1, our rates are all set for
5 whoever's within our district, and these -- there's
6 nothing that questions that this is not within the
7 district boundaries.

8 COMMISSIONER HALL: Thank you.

9 JUDGE BURTON: Commissioner Rupp?

10 COMMISSIONER RUPP: Yes. Did the
11 board of directors approve this territorial
12 agreement by execution by its duly elected
13 officials?

14 MS. EDEN: Yes. That document, yes.

15 COMMISSIONER RUPP: Did the City of
16 Pevely enact a resolution or an ordinance approving
17 the execution of this agreement?

18 MS. EDEN: Yes.

19 COMMISSIONER RUPP: Thank you.

20 JUDGE BURTON: Following up on that,
21 did the Circuit Court of Jefferson County approve
22 this document?

23 MS. EDEN: No. The original document
24 was entered in settlement of a suit from 2006, I
25 believe.

1 JUDGE BURTON: But it was never taken
2 to the Circuit Court for approval?

3 MS. EDEN: I don't believe so.

4 JUDGE BURTON: Isn't that a
5 requirement of 247.165?

6 MS. EDEN: The only thing under
7 247.165 that has to go to the court is if there's
8 an agreement that there's any detachment.

9 JUDGE BURTON: So your interpretation
10 of 165 is that as long as the parties reach an
11 agreement, they never need to go to circuit
12 court --

13 MS. EDEN: Right.

14 JUDGE BURTON: -- or the Commission
15 for approval of that agreement?

16 MS. EDEN: Under Chapter 67,
17 political subdivisions have the right to contract
18 with each other.

19 JUDGE BURTON: Now, I wanted to
20 follow up. You mentioned to Commissioner Kenney's
21 question that the annexation occurred prior to the
22 agreement?

23 MS. EDEN: Correct.

24 JUDGE BURTON: But you don't recall
25 when?

1 MS. EDEN: I haven't looked up that
2 exact date. I can -- I can tell you it was
3 sometime around that time period. Like I said, I
4 know when the development started and kind of when
5 KOA was sold. I don't know when the exact date the
6 annexation was. That would have been in Pevely's
7 documents, not ours.

8 JUDGE BURTON: Okay. Not just for
9 Valle Creek but for the other areas and
10 subdivisions that are referenced in this
11 territorial agreement --

12 MS. EDEN: That I cannot -- I cannot
13 tell you when Bushburg and the vineyards were -- or
14 the abbey were annexed.

15 JUDGE BURTON: Do you know if they
16 were annexed?

17 MS. EDEN: Yes. They are within the
18 city limits of Pevely.

19 JUDGE BURTON: And do you know if
20 they were receiving water service -- for those
21 areas that were annexed by the City were receiving
22 water service from either the City or C-1 prior to
23 the agreement or prior to -- excuse me -- prior to
24 the annexation?

25 MS. EDEN: Prior to the annexation, I

1 can't tell you. Those -- some of those
2 subdivisions are quite old. There's -- you're
3 probably going back 25 years on those subdivisions,
4 at least a couple of them.

5 JUDGE BURTON: All right. Any
6 follow-up questions?

7 COMMISSIONER HALL: Yeah. If this
8 Commission were to assert jurisdiction and
9 determine that this was a territorial agreement
10 which should have been brought to us for approval,
11 what is your position as to the legal effect of the
12 territorial agreement at that point?

13 MS. EDEN: Then it's ineffective. If
14 it's an agreement that should have been brought
15 before the Commission, then it's a void agree--
16 it's an ineffective agreement.

17 COMMISSIONER HALL: And so it would
18 be void or voidable?

19 MS. EDEN: Void.

20 COMMISSIONER HALL: Void ab initio?

21 MS. EDEN: By the terms of the
22 statute, it's not effective.

23 COMMISSIONER HALL: And so it would
24 only become effective after the Commission
25 determines that it's in the public interest and

1 approves it?

2 MS. EDEN: I think it would have to
3 be after application, after the hearings that are
4 specified. That's the way the statute provides for
5 approval.

6 COMMISSIONER HALL: So are both the
7 district and the City taking the position that the
8 territorial agreement is not effective?

9 MS. EDEN: I would say it's not
10 effective if this section applies to it.

11 COMMISSIONER HALL: But I'm -- are
12 both the City and the district taking the position
13 right now that the territorial agreement is not
14 effective, that it's not effective and you guys are
15 not complying with it?

16 Let me phrase it this way: In
17 Jefferson County Circuit Court, what party is --
18 what party was seeking --

19 MS. EDEN: To enforce?

20 COMMISSIONER HALL: Yeah.

21 MS. EDEN: C-1. Or a declaration as
22 to if it were not effective.

23 COMMISSIONER HALL: So in Circuit
24 Court you took the position that this was a
25 contract that could be enforced?

1 MS. EDEN: We took several positions.
2 We took the position that it could be enforced, but
3 if it were not enforceable, we also had the
4 position that we asked for injunctive relief that
5 they were not to be allowed to serve the areas
6 covered under the territorial agreement because
7 there had been no detachment proceedings pursuant
8 to 160 or 170.

9 COMMISSIONER HALL: But one of the
10 positions you took in Circuit Court was that this
11 was an enforceable agreement?

12 MS. EDEN: Yeah.

13 COMMISSIONER HALL: Okay. Thank you.

14 JUDGE BURTON: Nothing further?
15 Thank you. Okay. Did the Commission have any
16 other questions for the attorneys?

17 Okay. Why don't we go ahead and just
18 take a -- it's 12:14. Did we want to go ahead and
19 just take a lunch break? I know you'd submitted --
20 we're actually behind that schedule, proposed
21 schedule for 11:30. So why don't we say 1:30 to
22 return. Okay. We'll go ahead and go off the
23 record.

24 (A BREAK WAS TAKEN.)

25 JUDGE BURTON: Let's go ahead and go

1 back on the record in Case No. WC-2014-0018.

2 The Commission has determined to go
3 ahead and take the motion for summary determination
4 under advisement and will be making a decision on
5 that at a later time. And I believe that the
6 parties have reached an agreement as far as the
7 evidentiary hearing goes.

8 MR. THOMPSON: That's correct. We're
9 going to stipulate to the admission of Mr. Busch's
10 testimony, and I understand that the Respondents
11 have no cross-examination for Mr. Busch.

12 We're going to stipulate to the
13 admission of Mr. Thomas' testimony. He was the
14 witness for one of the Respondents who became
15 unemployed unexpectedly and who is no longer
16 cooperating.

17 And we will stipulate to the
18 admission of Mr. Holborow's affidavit with the
19 attached exhibits, and that was part of Staff's
20 motion for summary determination.

21 JUDGE BURTON: Okay. Then why don't
22 we go ahead and --

23 MR. THOMPSON: If I could, too,
24 Judge, there were data requests exchanged, and they
25 were basically in the nature of requests for

1 admissions. I would like to put those into the
2 record, including the ones that you asked us that
3 we responded to. Is that acceptable to you?

4 MR. GOOD: That is. That wasn't part
5 of our original stipulation, but that's not a
6 problem. We will stipulate to that as well as what
7 Mr. Thompson said earlier.

8 MS. EDEN: That's fine.

9 MR. THOMPSON: That way you'll know
10 as much about this case as I do.

11 JUDGE BURTON: And just to state for
12 the record, the Office of the Public Counsel has
13 previously submitted a notice that they would be
14 not participating in this evidentiary hearing. So
15 we don't need to see if they're going to be
16 consenting to this stipulation since they stated
17 they are not a party.

18 Let me go ahead, then, and for the
19 record and for clarification for the parties for
20 briefing purposes identify those documents. Let's
21 go ahead and mark the direct testimony of James
22 Busch as Exhibit 1, and that will be admitted.

23 (EXHIBIT NO. 1 WAS RECEIVED INTO
24 EVIDENCE.)

25 JUDGE BURTON: We will then have the

1 direct testimony of Terry Thomas as Exhibit 2. We
2 will have the affidavit of Mr. Holborow, John
3 Holborow as Exhibit 3. And then we are admitting
4 the -- was there reply testimony from Mr. Busch?

5 MR. THOMPSON: There was. There was
6 rebuttal by Mr. Busch.

7 JUDGE BURTON: Okay. And that will
8 be admitted as well under the stipulation?

9 MR. THOMPSON: Yes.

10 MR. GOOD: That's correct, your
11 Honor.

12 JUDGE BURTON: That will be marked
13 and admitted as Exhibit 4.

14 (EXHIBIT NOS. 2 THROUGH 4 WERE
15 RECEIVED INTO EVIDENCE.)

16 MR. GOOD: The direct testimony and
17 the rebuttal together is one exhibit?

18 JUDGE BURTON: No. I had the
19 rebuttal testimony as Exhibit 4.

20 MR. GOOD: Then what are we marking
21 the direct testimony?

22 JUDGE BURTON: Exhibit 1.

23 MR. GOOD: Okay. I've got you. I'm
24 sorry.

25 MR. THOMPSON: I apologize for any

1 confusion we've created, Judge.

2 JUDGE BURTON: That's okay. And then
3 I don't have the data request material.

4 MR. THOMPSON: They're in EFIS. I'll
5 get them printed out.

6 JUDGE BURTON: We'll go ahead for
7 purposes of convenience --

8 MR. THOMPSON: It will take some
9 time. There's 69 of them.

10 JUDGE BURTON: Will that all be one
11 exhibit?

12 MR. THOMPSON: It's all right with me
13 if it's all one exhibit.

14 MR. GOOD: I would make it a group
15 exhibit. There were numerous individual responses
16 filed in separate pleadings, and I think for
17 purposes of convenience for the Commission and
18 everybody involved, you can make it one group
19 exhibit. It will be very easy to find response to
20 number so and so, request number so and so.

21 JUDGE BURTON: Are they paginated so
22 that it's clear to identify what page we're
23 referencing, or if not, Mr. Thompson, could you do
24 that?

25 MR. GOOD: They are not paginated

1 because they're individual documents, so there'll
2 be one, two, three many times.

3 JUDGE BURTON: To make sure that we
4 have a consistent version, I don't know if you have
5 a Bates stamp, Mr. Thompson. Would the parties
6 prefer that I go ahead and keep the record open for
7 that submission or any objections, or is everyone
8 in agreement as to the data requests?

9 MR. THOMPSON: I think we're just
10 discussing how it would be denominated or how it
11 would be marked. The responses, the questions and
12 responses are in the EFIS system in the data
13 request module, and they would be printed out from
14 that and supplied to the Law Judge because, of
15 course, you don't have access to the data request
16 module.

17 JUDGE BURTON: Then I would ask,
18 Mr. Thompson, if you could, why don't you number
19 those and then make a copy and provide it to the
20 other parties so that we're all on the same page as
21 far as what is admitted.

22 MR. THOMPSON: Absolutely.

23 MS. EDEN: If I recall correctly,
24 each of the requests it was No. 1, No. 2.

25 MR. THOMPSON: Exactly. They are

1 numbered 1 through 68. Each request is numbered.
2 Then the requests that were submitted to Staff by
3 the Respondents or one of the Respondents were put
4 in by Staff after the fact, and that forms DR
5 No. 69, all of those questions and answers.

6 MR. GOOD: Just to be clear, they
7 are -- the responses are designated 1, 2, 3, 4, but
8 they are filed separately. So the page numbers at
9 the bottom of the page are going to be 1, 2, 3 for
10 the first, 1, 2, 3 for the second. So that's why I
11 say, if you make it a group exhibit, you'll be able
12 to tell the response to which request, but you're
13 not going to be able to flip to page 52.

14 JUDGE BURTON: That's why I would
15 again ask Mr. Thompson if he would number all of
16 them.

17 MR. THOMPSON: Print them out, put
18 them together, number it consecutively and submit
19 it?

20 JUDGE BURTON: Yes.

21 MR. THOMPSON: With copies to
22 counsel. Absolutely.

23 MR. GOOD: And No. 5 is going to be a
24 group exhibit of your -- of the Staff's data
25 requests and our responses?

1 MR. THOMPSON: Yes. So then No. 6
2 would be your data requests and Staff's responses.

3 JUDGE BURTON: Do you agree with
4 that, Mr. Good?

5 MR. GOOD: That is fine with me, your
6 Honor.

7 JUDGE BURTON: Merely to clarify,
8 Exhibit 5 will be the data requests, questions and
9 responses that were presented to the Respondents,
10 and those again will be numbered and identified by
11 Mr. Thompson who will present a copy to all
12 parties. Exhibit 6 will be Staff's response to
13 Respondents' discovery requests or data requests,
14 and those again will be paginated by Mr. Thompson.

15 MR. THOMPSON: Yes, that is correct.

16 JUDGE BURTON: And those are
17 admitted.

18 (LATE-FILED EXHIBIT NOS. 5 AND 6 WERE
19 RECEIVED INTO EVIDENCE.)

20 MR. GOOD: Did you have any?

21 MS. EDEN: No.

22 JUDGE BURTON: Now, let's go ahead
23 and discuss briefly the briefing schedule. We
24 currently have July 23rd for the post-hearing
25 briefs and August 6th for the reply briefs. Do the

1 parties see any problems with staying on that
2 schedule?

3 MR. GOOD: Can you give me those
4 dates again? I'm sorry, your Honor.

5 JUDGE BURTON: July 23rd for initial
6 briefs and August 6th for replies.

7 MR. THOMPSON: I believe that's fine
8 as far as Staff's concerned.

9 MR. GOOD: I see no problem, your
10 Honor. And the parties have cooperated in the past
11 if more time is needed. We've been liberal about
12 agreeing and then submitting it to the Court for
13 approval.

14 JUDGE BURTON: And I'm sure,
15 Mr. Good, you'll include reference to the case
16 citations that I've asked of you before.

17 MR. GOOD: Yes. I have a case now I
18 can give you now if you would like to look at it
19 now.

20 JUDGE BURTON: Why don't you include
21 it in the briefs. That way the parties can address
22 it. And, Ms. Eden, is the district okay with that?

23 MS. EDEN: That schedule is fine.

24 JUDGE BURTON: Okay. Well, then if
25 there is nothing else, I'll go ahead and conclude

1 today's hearing.

2 (WHEREUPON, the hearing concluded at

3 1:39 p.m.)

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C E R T I F I C A T E

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STATE OF MISSOURI)

) ss.

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COUNTY OF COLE)

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I, Kellene K. Feddersen, Certified

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