

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

The Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant)	
)	
vs.)	<u>Case No. WC-2014-0018</u>
)	
Consolidated Public Water Supply District C-1 of Jefferson County, Missouri,)	
)	
and)	
)	
City of Pevely, Missouri)	
)	
Respondents)	
)	

STAFF’S RESPONSE TO MOTION TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through counsel, and in response to *Respondents’ Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted* states as follows:

1. Respondents’ motion to dismiss Staff’s Complaint should be denied for the following reasons:

Circuit courts do not have the authority to approve monopolistic territorial service agreements between municipalities and public water supply districts.

2. Despite Respondents’ assertions, Section 247.160 and 247.170¹ do not give the circuit court authority to approve territorial agreements between municipalities and public water supply districts. Section 247.160 dictates how waterworks systems shall be conveyed and/or operated following annexation or detachment of territory from

¹ All statutory references refer to RSMo 2000, as currently revised.

a district to a municipality. The entire statute is organized around solving the problem of how to resolve ownership of water infrastructure when territory is annexed by a city. For instance, 247.160.1(1-4) addresses how bonds constituting liens should be settled between a district and a city when water infrastructure is conveyed to a city upon annexation. The only mention of circuit court authority in this section is in 247.160.2, which requires the district or city to apply for approval of a contract to sell or convey property related to water systems. There is no mention of circuit court determination that the district may serve certain parts of the city's annexed territory. On the contrary, the statute is clearly designed to make effective a complete transfer of ownership or control over the water infrastructure associated with annexed territory so that water service for that territory is entirely the responsibility of the city.

3. Section 247.170, which Respondents also reference as giving some authority over territorial agreements to circuit courts, is even less applicable to the issue of territorial service agreements. The provisions of 247.170 deal with detachment of city territory to a district. There are provisions for the disposition of water system infrastructure, as in 247.160, and directions on how to deal with liens on physical components of water infrastructure. There is no mention of circuit court authority over agreements between a city and district to provide water service within the other's territory.

Municipalities and Public Water Supply Districts may not enter into monopolistic territorial service agreements without the approval of the Missouri Public Service Commission.

4. Section 247.172 gives the Commission exclusive jurisdiction over territorial agreements between municipalities and public water supply districts.

5. Respondents correctly state that the Commission only has what power is granted it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable implication. Respondents also are correct that the Commission should not interpret a statute in a way that is contrary to the plain terms of the statute. What Respondents fail to understand is that necessity and reasonable implication dictate that the Commission act in exactly the manner Staff has proposed. Sections 247.160 regarding city annexation, 247.170 regarding detachment to a district, and 247.172 regarding territorial agreements have a common underlying principle, which is that the public must have a say in who they will pay for water service. Section 247.160 and Section 247.170 both provide for the public's input on service provision through the public's ability to vote on annexation and detachment. There is no such balance of power available to the public when a city and municipality agree between themselves that it is in their collective self-interest to allow one to provide water service within the other's territory. This is why Section 247.172 exists, and, in large part, why the Public Service Commission itself exists. As the Supreme Court of Missouri said in 1937, "prior to [Missouri Public Service Commission Law] enactment, the only protection to consumers as to rates and service was their right to make the best contract they could with utilities in competition with each other for their business. This law was the result of growing feeling that such competition, as existed in this field, was inadequate to protect the public. It provided, in lieu of competition and the right of

private bargaining, impartial treatment of every one under regulations approved and enforced by the state.”²

6. The case at hand provides a very practical example of why the Commission is tasked with approval of monopolistic agreements between two entities it does not normally regulate. The dispute between Respondents came to the attention of Staff through a public inquiry. The water customer who contacted Staff described a scenario in which, during Respondents’ dispute regarding their unapproved territorial agreement, each entity has come to the customer’s property at different times to cut out the meters of the other entity, leaving the customer unsure of who is his water service provider. Furthermore, while the City assured the customer it would continue water service no matter what the District did, the District communicated to the customer that it would require the customer to construct a pipeline to connect to the District’s system, which related to an agreement made between the customer’s predecessor and the District before the City annexed the land on which the customer’s property rests. Such actions on the part of both the City and the District create great uncertainty for a customer, which the customer would not have been subjected to if Respondents had an approved territorial agreement. Or, if such behavior did occur under an approved territorial agreement, the customer could have filed a Complaint before the Commission. Finally, since the root of the difficulty between the City, District, and this particular customer seems to be the construction of a pipeline to connect the customer to the District, if this issue were raised before the Commission within an application for approval of a territorial agreement, the Commission would have fulfilled its duty to determine whether service by the District, requiring the construction of a pipeline, was in

² *May Department Stores Co. v. Union Electric Light & Power Co. et al.*, 341 Mo. 299, 316, 107 S.W.2d 41, 48 (1937).

the public interest. On the other hand, perhaps the Commission would determine that service by the City, which already had infrastructure in place to the customer, would be in the public interest. Either way, the public would not be caught in the middle of the struggle between the City and District.

7. To address Respondents' argument that the plain language of Section 247.172 indicates the Commission only has authority over territorial agreements that involve regulated utilities, Staff argues exactly the opposite. The terms "as between and among" indicate the territorial agreements under the jurisdiction of the Commission may involve municipalities, public water supply districts, and regulated water corporations, or any combination of the three. "Between" implies two choices. "Among" implies more than two choices. Using both terms allows for combinations of two and also more than two.

8. Finally, Staff's interpretation of Section 247.172 is the same as the Commission's interpretation. A quick search of the Commission's Electronic Filing Information System shows that, in the past ten years, the Commission has decided eleven territorial agreement cases between municipalities and public water supply districts without the involvement of a regulated entity.³ Staff found no cases in which the

³ **Case No. WO-2009-0351.** *In the Matter of the Joint Application of the City of Centralia, Missouri and Public Water Supply District No. 10 of Boone County, Missouri for Approval of a Third Amendment to a Written Territorial Agreement Concerning Territory within Boone County, Missouri;* **Case No. WO-2007-0188.** *In the Matter of the Application of the Consolidated Public Water Supply District No. 1 of Clark County, Missouri, and the City of Canton, Missouri, and the City of LaGrange Missouri for Approval of a Territorial Agreement Concerning Territory Encompassing Part of Lewis County, Missouri;* **Case No. WO-2007-0091.** *In the Matter of the Application of the City of Centralia, Missouri and Public Water Supply District No. 10 of Boone County, Missouri, for Approval of a Second Amendment to a Written Territorial Agreement Concerning Territory within Boone County, Missouri;* **Case No. WO-2006-0488.** *In the Matter of the Joint Application of Public Water Supply District No. 3 of Franklin County, Missouri, and the City of St. Clair, Missouri, for Approval of a Water Service Area Territorial Agreement in Franklin County, Missouri;* **Case No. WO-2006-0230.** *In the Matter of the Joint Application of the Public Water Supply District No. 2 of St. Charles County, Missouri, and the City of Wentzville, Missouri, for Approval of an Amendment to Their Water Service Area Territorial Agreement;* **Case No. WO-2006-0135.** *In the Matter of the Application of Consolidated*

Commission rejected such an application for lack of jurisdiction. In all cases, the Commission summarizes its jurisdiction in similar terms. For example, in Case No. WO-2004-0163, the Commission's Report and Order says, "The Missouri Public Service Commission has jurisdiction over the territorial agreement between the District and the City as specified in Section 247.172. When a public water supply district and a municipality enter into a territorial agreement, the agreement must be approved by the Commission after hearing."⁴

9. Respondents cite *City of Harrisonville v. Public Water Supply District 9 of Cass County*⁵ to support their contention that a regulated water corporation must be a party to a territorial agreement to trigger Commission jurisdiction over that agreement. *Harrisonville's* support of Respondents' argument is weak, at best. First, the contract in *Harrisonville* was established in 1974, and the appellate court ruled it was in "full force and effect" from 1974 until 1999. Therefore, if the contract at issue was a territorial agreement under the meaning of 247.172, it was established well before section 247.172 was created. Second, Respondents are mistaken in their assertion that the

Public Water Supply District No. 1 of Clark County, Missouri and the City of Canton, Missouri for Approval of a Territorial Agreement Concerning Territory Encompassing Part of Lewis County, Missouri; Case No. WO-2005-0242. In the matter of the application of Consolidated Public Water Supply District NO. 1 of Boone County, Missouri for approval of a territorial agreement concerning territory encompassing part of Boone County, Missouri; Case No. WO-2005-0127. In the matter of the joint application of the City of Hannibal, Missouri and Public Water Supply District No. 1 of Ralls County, Missouri for approval of a water service area territorial agreement; Case No. WO-2005-0084. In the Matter of the Joint Application of the City of Centralia, Missouri and Public Water Supply District No. 10 of Boone County, Missouri for approval of a first amendment to a written territorial agreement concerning territory within Boone County, Missouri and Audrain County, Missouri; Case No. WO-2004-0163. In the Matter of the Joint Application of the City of Hannibal, Missouri and Public Water Supply District No. 1 of Ralls County, Missouri for Approval of Three Territorial Agreements Concerning Water Service Areas in Marion County, Missouri; Case No. WO-2003-0186. In the matter of the joint application of the City of Union, Missouri and Public Water Supply District No.1 of Franklin County, Missouri for approval of a Territorial Agreement concerning territory in Franklin County, Missouri.

⁴ *In the Matter of the Joint Application of the City of Hannibal, Missouri, and Public Water Supply District No. 1 of Ralls County, Missouri, for Approval of Three Territorial Agreements Concerning Water Service Areas in Marion County, Missouri.*

⁵ 49 S.W.3d 225 (Mo. App. W.D. 2001).

appellate court analyzed “those sections of chapter 247 applicable to county water supply districts.”⁶ The appellate court was quoting an earlier court, which was answering a completely different question than that at issue in this Complaint. The *Harrisonville* appellate court did analyze several sections of chapter 247, including 247.160 and 247.170. However, it never mentioned 247.172 and never stated that it had reviewed any other sections than the ones it specifically cited. In fact, the question before the *Harrisonville* appellate court was primarily one of contract interpretation, and even its mention of 247.160 and 247.170 was made to show how those sections did not apply to the case. So, although it may have been helpful if *Harrisonville* had interpreted 247.172, it did not.

The Commission has exclusive jurisdiction over disputes regarding territorial agreements.

10. Section 247.172 delineates the procedures for Complaints on territorial agreements. No territorial agreement may be entered into without Commission approval. Therefore, disputes regarding unapproved territorial agreements may not be heard by any court other than the Commission.

11. If the Commission determines Respondents’ treatment of their agreement as if it were valid has created a *de facto* territorial agreement, as Respondents term it, any dispute on that agreement must be addressed before the Commission. Staff asserts that it is reasonable to treat Respondents’ agreement as a *de facto* Commission-

⁶ Respondents cite *Harrisonville* at 232, saying “The appellate court stated that it analyzed ‘those sections of Chapter 247 applicable to county water supply districts.’” The appellate court did not state this. The court was quoting *Mathison v. Public Water Supply District No. 2 of Jackson County*, 401 S.W.2d 424 (Mo. 1966), which made the cited statement in discussing whether the legislature would have intended that both a city and a district be able to distribute water in the same area at the same time.

approved agreement for the purposes of disputes on that agreement as Respondents and the public have relied upon that agreement for six years.

Section 386.390 provides authority for this Complaint before the Commission, and Sections 386.570 and 386.600 provide for penalties against Respondents for their violation of Section 247.172.

12. Respondents argue that, if the Commission has jurisdiction over territorial agreements, unapproved territorial agreements are simply void. They further argue that the Commission has no authority to hear the Complaint Staff has submitted and that there is no authority for the Commission to assess fines against Respondents for having violated the law. Respondents imply that they should incur no consequences for having made and acted upon a monopolistic service agreement in violation of Section 247.172. However, Respondents ignore the authority given the Commission in Section 386.390 to hear this Complaint and the authority in Sections 386.570 and 386.600 to assess and recover penalties against Respondents for their violation.

13. Section 386.390 provides, “Complaint may be made by the commission of its own motion. . . setting forth any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission”

14. Section 386.570 provides:

- 1) Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission . . . is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

- 2) Every violation of the provisions of this or any other law . . . of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

15. Section 386.600 provides that, "An action to recover a penalty . . . may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission."

16. The Commission has consistently applied these Complaint and penalty statutes against entities, regulated and unregulated, who have violated the Commission's rules, statutes, and Orders.

17. If, for any reason, the Commission determines it does not have the power to decide the matters alleged in Staff's Complaint, Staff requests the Commission authorize its General Counsel to pursue enforcement of the Commission's authority over Respondents' actions in circuit court.

18. Arguing that the Commission has neither to authority to hear this Complaint nor the authority to pursue the issue in court would, of course, result in the nonsensical conclusion that the Commission has no recourse for enforcement of its laws.

WHEREFORE, Staff submits this response to *Respondents' Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted* and asks the Commission to deny that Motion and grant the relief requested in this Response and in Staff's Complaint.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 1st day of October, 2013.

/s/ Amy E. Moore