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

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| Staff of the Missouri Public Service Commission, | ) | |
| Complainant, | ) | |
| v. | ) | **Case No. WC-2014-0018** |
| Consolidated Public Water Supply District C-1 of Jefferson County, Missouri, | ) | |
| and | ) | |
| City of Pevely, Missouri, | ) | |
| Respondents. | ) | |

## STAFF'S REPLY TO RESPONDENTS' RESPONSES CONCERNING THEIR DENOMINATED AFFIRMATIVE DEFENSES

**COMES NOW** the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Reply to Respondents' Responses Concerning Their Denominated Affirmative Defenses*, states as follows:

## Introduction

1. On July 19, 2013, Staff filed its *Complaint*, asserting that Respondents Consolidated Public Water Supply District C-1 of Jefferson County, Missouri ("CPWSD C-1"), and the City of Pevely ("Pevely" or "the City"), had violated § 247.172, RSMo.,[1] by entering into a Territorial Agreement without the approval of the Commission.

2. The Respondents filed their nearly identical *Answers* on December 5, 2013 (Pevely), and on December 10, 2013 (CPWSD C-1).

[1] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri ("RSMo"), revision of 2000, as amended and cumulatively supplemented.

3. On March 28, 2014, Staff filed its *Motion for Summary Determination* with supporting *Suggestions* and affidavits, and its *Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination.*

4. On April 25, 2014, each of the Respondents filed its *Response to Complainant's Reply to Their Denominated Affirmative Defenses.* These documents are substantively identical.

**Affirmative Defenses**

5. An affirmative defense admits all or part of the complainant's cause of action but nonetheless avoids liability by new allegations constituting a legally sufficient excuse, justification or other matter negating the complainant's cause of action.[2] The respondent bears the burden of proof on its affirmative defenses and must take care to plead all of the necessary elements.[3]

6. A complainant moving for summary judgment must establish that each affirmative defense fails as a matter of law, as explained by the Missouri Supreme Court:

> where the defendant has raised an affirmative defense, a claimant's right to judgment depends just as much on the non-viability of that affirmative defense as it does on the viability of the claimant's claim. It does not matter that the non-movant will bear the burden on this issue at trial. Summary judgment permits the "claimant" to avoid trial; in order to do so, the claimant must meet the burden imposed by Rule 74.04(c) by showing a right to judgment as a matter of law. **Therefore, a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law.** Unlike the burden of establishing all of the facts necessary to his claim, however, **the claimant may defeat an affirmative defense by establishing that any one of the facts necessary to support the defense is absent.** At this stage of the proceeding, the analysis centers on Rule 74.04(c); it is

[2] J.R. Devine, **Missouri Civil Pleading and Practice,** § 15-2 (The Harrison Co.: Norcross, GA. 1986).

[3] *Id.*

irrelevant what the non-movant has or has not said or done.[4]

It was for this reason that Staff filed its *Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination.*

**Respondents' First Affirmative Defense:**
**The Commission has not previously exercised any authority under § 247.172 RSMo. 2000, to govern agreements the type of which the Respondents are alleged have entered.[5]**

7. With its *Reply,* Staff provided a list of all of the Territorial Agreements relating to water service that the Commission has adjudicated over the past twenty years. Respondents, in their *Responses,* raise two points: first, that the twenty-three Territorial Agreements listed by Staff all involved voluntary applications for Commission approval and not affirmative acts to assert jurisdiction as in the present case; and second, that not all of the twenty-three cases listed by Staff involved only a public water supply district and a municipal water utility or an exercise of authority under § 247.172, RSMo.

As pointed out above, a viable affirmative defense must avoid liability even if the complaint is true. However, the point raised by Respondents as their First Affirmative Defense does not constitute an avoidance of liability. Section 247.172, RSMo., provides in pertinent part:

> 1. Competition to sell and distribute water, as between and among public water supply districts, water corporations subject to public service commission jurisdiction, and municipally owned utilities may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section.
>
> * * *

[4] ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 381 (Mo. banc 1993) (emphasis added).

[5] CPWSD C-1's *Answer,* ¶ 24; Pevely's *Answer,* ¶ 24.

> 4. Before becoming effective, all territorial agreements entered into under the provisions of this section, including any subsequent amendments to such agreements, or the transfer or assignment of the agreement or any rights or obligations of any party to an agreement, shall receive the approval of the public service commission by report and order. Applications for commission approval shall be made and notice of such filing shall be given to other water suppliers pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity. Unless otherwise ordered by the commission for good cause shown, the commission shall rule on such applications not later than one hundred twenty days after the application is properly filed with the secretary of the commission.

The Public Service Commission is a creature of statute and has only such authority as the General Assembly has delegated to it.[6] That delegated authority includes the authority granted in § 247.172, RSMo., to approve Territorial Agreements "between and among" public water supply districts, privately-owned public utilities, and municipally-owned public utilities. The statute also provides that those entities may not enter into Territorial Agreements without the Commission's approval.[7] The fact that the peculiar combination of circumstances presented by this case has not arisen previously does not negate either the statutory grant of authority to the Commission or the corresponding restriction on the conduct of public water supply districts and municipally-owned utilities. Respondents' First Affirmative Defense is not viable as a matter of law.

**Respondents' Second Affirmative Defense:**
**The Commission has not previously exercised any authority with respect to the alleged agreement since November 12, 2007.[8]**

8. In its *Reply,* Staff admitted that this allegation was true, but pointed out that it does not constitute an avoidance of Staff's complaint. In their *Responses,* the

[6] ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 47 (Mo. banc 1979); ***State ex rel. City of West Plains v. Public Service Commission,*** 310 S.W.2d 925, 928 (Mo. banc 1958).

[7] Section 247.172, 1 and 4, RSMo.

[8] CPWSD C-1's *Answer,* ¶ 25; Pevely's *Answer,* ¶ 25.

Respondents assert that Staff's admission supports their Eleventh Affirmative Defense of laches. Staff will defer its discussion of laches until later.

**Respondents' Third Affirmative Defense:**
**The Commission and Complainant have not given any prior notice to the Respondents that it intended to enforce § 247.172 RSMo. 2000, so as to have any application to the alleged agreement.**[9]

9. In its *Reply,* Staff explained that the General Assembly has given Respondents all necessary notice by enacting § 247.172, RSMo., because all persons are presumed to know the law.[10] In their *Responses,* the Respondents assert that the enactment of § 247.172, RSMo., constitutes insufficient notice that their conduct of entering into a Territorial Agreement without Commission approval would violate the law because it is "open to interpretation." Respondents' ask, "How could Respondents have notice of Staff's interpretation of the statute when Staff itself only recently formulated that interpretation? As discussed . . . the statute at issue has not provided Respondents with constitutional notice that its conduct would violate the law."

Respondents complain of both the vagueness of the law and Staff's "recent interpretation." Due process requires that statutes speak with sufficient clarity to prevent arbitrary and discriminatory enforcement by the government and to permit a person of ordinary intelligence to understand the conduct the statute prohibits.[11] Sub-sections 1 and 4 of § 247.172, RSMo., are not vague. Had Respondents consulted the statute prior to entering into their Territorial Agreement, they would have known full well that the conduct they intended was prohibited. As to Staff's supposed recent interpretation of the law, Staff did not know about Respondents' Territorial Agreement

[9] CPWSD C-1's *Answer,* ¶ 26; Pevely's *Answer,* ¶ 26.

[10] ***State v. Collins,*** 413 S.W.3d 689, 700 (Mo. App., S.D. 2013).

[11] ***State v. Gentry,*** 936 S.W.2d 790, 792 (Mo. banc 1996).

until shortly before the *Complaint* herein was filed in 2013. Had Respondents consulted Staff before entering into their Territorial Agreement, Staff would have advised them that Commission approval was required. *Ignorantia legis non excusat.*[12] Respondents' Third Affirmative Defense is not viable as a matter of law.

**Respondents' Fourth Affirmative Defense:**
**The Commission and the Complainant have failed to give § 247.172 RSMo. 2000 its most liberal interpretation despite the fact that it contains penal provisions.**[13]

10. In its *Reply,* Staff stated that it and the Commission have given § 247.172, RSMo., the interpretation required by its plain language. In their *Responses,* the Respondents raise four points, none of which have any relation to the language of their Fourth Affirmative Defense. Respondents assert:

(1) § 247.172, RSMo., does not apply to this case by its plain language because no water corporation is involved and because the dispute does not involve an approved agreement;

(2) Staff has not proven that an agreement existed between Respondents, much less one that constitutes a "territorial agreement" as that term is used in § 247.172, RSMo.;

(3) Even if a territorial agreement as contemplated by the statute existed, the plain language of the statute indicates that the legislature only grants the Commission jurisdiction to hear complaints over agreements they have approved;

(4) § 247.172, RSMo., did not provide Respondents with constitutional notice that

[12] "Ignorance of the law is no excuse." **Black's Law Dictionary** 749-750 (West: St. Paul, MN. 7th ed., 1999). This maxim has been applied by Missouri courts in civil matters as well as criminal, e.g., ***Sontag v. Stix,*** 355 Mo. 972, 984, 199 S.W.2d 371, 376 (Mo. banc 1947) ("As a matter of necessity, in many circumstances a person whose acts cause or help to cause damage will not be permitted to plead ignorance of the law as an excuse.").

[13] CPWSD C-1's *Answer,* ¶ 27; Pevely's *Answer,* ¶ 27.

its conduct would violate the law.

Taking Respondents several assertions in order:

**(1) § 247.172, RSMo., does not apply to this case by its plain language because no water corporation is involved and because the dispute does not involve an approved agreement.**

The Commission has already disposed of this argument, *Order Denying Motion to Dismiss,* issued October 23, 2013, and *Order Denying Motion for Reconsideration,* issued November 26, 2013. The Commission has authority to hear and determine Staff's *Complaint* pursuant to its general complaint authority at § 386.390.1, RSMo.:

> Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for 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[.]

The gravamen of Staff's *Complaint* is the Respondents' violation of § 247.172, RSMo., not any purported violations of their Territorial Agreement.

**(2) Staff has not proven that an agreement existed between Respondents, much less one that constitutes a "territorial agreement" as that term is used in § 247.172, RSMo.**

This assertion is a misstatement of fact. Both Respondents admitted in their *Answers* that in 2007, they entered into a written agreement designating the boundaries of the water service area of each entity and the powers granted to each entity to operate

within the boundaries of the other.[14] The Territorial Agreement itself is attached to the *Affidavit of John Holborow,* filed in support of Staff's *Motion for Summary Determination.* It is unmistakably entitled, "Territorial Agreement." On April 25, 2014, Staff filed the sworn Direct Testimony of James A. Busch, in which Mr. Busch testifies as follows:[15]

> Q. Have you examined the territorial agreement in question?
>
> A. Yes. It was supplied to Staff by Mr. Holborow and is attached to this testimony as Schedule JAB-2.
>
> Q. Why do you characterize it as a territorial agreement?
>
> A. It is titled, "Territorial Agreement Between the Consolidated Public Water Supply District No. C-1 of Jefferson County, Missouri, and the City of Pevely, Missouri." It states that its purpose is "to stipulate and agree with respect to the geographic areas which each will serve, in order to facilitate development of areas within the City of Pevely and the Consolidated Public Water Supply District No. C-1 of Jefferson County, Missouri." It provides that the parties will respect each other's territorial boundaries and specifies certain exceptions where Pevely is authorized to provide water service within the District. It is similar to many other territorial agreements submitted to the Commission for approval by districts, municipalities, and public utilities.

There is no question that an agreement existed between Respondents and that it constitutes a "territorial agreement" as that term is used in § 247.172, RSMo.

**(3) Even if a territorial agreement as contemplated by the statute existed, the plain language of the statute indicates that the legislature only grants the Commission jurisdiction to hear complaints over agreements they *(sic)* have approved.**

As noted above, the Commission's authority to hear and determine Staff's *Complaint* is found at § 386.390.1, RSMo., not § 247.172, RSMo.

[14] *CPWSD C-1 Answer,* ¶ 7; *Pevely Answer,* ¶ 7.

[15] Staff incorporates Mr. Busch's sworn testimony herein by reference.

**(4) § 247.172, RSMo., did not provide Respondents with constitutional notice that its conduct would violate the law.**

This assertion reproduces Respondents' Third Affirmative Defense, which Staff has disposed of above.

The several assertions that compose Respondents' Fourth Affirmative Defense are either not viable as a matter of law or are based on misstatements of fact.

**Respondents' Fifth Affirmative Defense:**
**Respondent had the right to rely on the procedures and methods of the Commission as administered as to agreements which are the subject of Complainant's allegations.**

11. In its *Reply,* Staff stated that it did not understand Respondents' assertion and therefore denied it. Staff went on to say, "[t]his case is unique and thus unlike any other Commission proceeding concerning Territorial Agreements. However, even if Respondents' assertion were true, it would not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in favor of Staff."

In their *Responses,* the Respondents state that Staff's admission that this case is unique "is precisely the point that [Respondents' have] made in [their] affirmative defense[.] Because this case is unique, Respondents contend it is a departure from the Commission's "procedures and methods." They further assert that "these facts support [Respondents'] claim for estoppel. Staff will address estoppel later in this pleading.

**Respondents' Sixth Affirmative Defense:**
**Any fine imposed as a result of this Complaint would be borne by Respondent and its citizens.**[16]

12. In its *Reply,* Staff stated that this assertion is true. Staff went on to state

[16] CPWSD C-1's *Answer,* ¶ 29; Pevely's *Answer,* ¶ 29.

that this fact does not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in favor of Staff.

In their *Responses,* the Respondents assert that this fact means that summary determination cannot be granted under Rule 4 CSR 240-2.117(E) because it could not be in the public interest for Respondents' citizens to be burdened with fines as a result of Respondents' lawless conduct. Respondents misunderstand the process by which penalties are imposed for the violation of Commission-administered statutes.

The Commission itself does not impose monetary penalties. Rather, the Commission may authorize its General Counsel to seek penalties in circuit court:

> An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law 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. No filing or docket fee shall be required of the general counsel. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this chapter, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.[17]

In such a case, the entire proceeding is re-tried in circuit court. Any penalty imposed is imposed by the court, not by the Commission, in an amount determined by the court. Any penalties imposed and paid are deposited in the state's Public School

[17] Section 386.600, RSMo.

Fund.[18] With these facts in mind, it is abundantly clear that Respondents' Sixth Affirmative Defense is unavailing:

- The Commission can grant summary determination to Staff and yet refuse to authorize its General Counsel to seek penalties.
- If the General Counsel is authorized to seek penalties, the court may refuse to impose them.
- If penalties are imposed and collected, they are paid into the state's Public School Fund. The public interest would not be offended if Respondents were required to pay a penalty into the Public School Fund.

For all of these reasons, Staff suggests that Respondents' Sixth Affirmative Defense is not viable as a matter of law.

**Respondents' Seventh Affirmative Defense:**

**No citizen of the State of Missouri has made any complaint regarding the agreement between the Respondents.[19]**

In its *Reply,* Staff stated that this assertion is factually inaccurate. Staff further stated that it learned about this matter through the complaint of John F. Holborow, receiver of H and H Development Group, Inc., and acting proprietor of Valle Creek Condominiums. Staff pointed out that Mr. Holborow's address is in Chesterfield, Missouri, and that he presumably is a Missouri citizen. Finally, Staff noted that, even if he were not, that fact would not constitute a factual or legal avoidance of Staff's *Complaint* and it is therefore not an impediment to summary determination in Staff's favor.

[18] *See, e.g.,* ***Missouri Public Service Commission v. Hurricane Deck Holding Co.,*** 302 S.W.3d 786 (Mo. App., W.D. 2010).

[19] CPWSD C-1's *Answer,* ¶ 30; Pevely's *Answer,* ¶ 30.

In their *Responses,* the Respondents make an argument that is, frankly, unintelligible. It is worth repeating here in full:

> Staff asserts that this claim is factually inaccurate and claims that it learned about this matter from the complaint of John F. Holborow, receiver of H & H Development Group, Inc. As part of its data requests, Pevely received from Staff the alleged complaint made by Mr. Holborow. A review of Mr. Holborow's affidavit, however, reveals that he did not complain about the agreement between Respondents but rather, that he fears due to the breach of agreement by H&H, the Consolidated Public Water Supply District C-1 of Jefferson County Missouri (the "District") will seek to cut service to Valle Creek Condominiums ("Valle Creek"). His affidavit demonstrates that the Respondents were not living up to the document they titled "territorial agreement" nor had the agreement displaced competition between them, as required by § 247.172.[20]

What was Mr. Holborow's statement to Staff about Respondents, one wonders, if not a complaint? Further, Respondents actually attempt to bootstrap their failure to comply with their own Territorial Agreement into evidence that it was nothing of the kind, since it was ineffective to displace competition between them.

This purported affirmative defense does not require extended discussion. It is not viable as a matter of law.

**Respondents' Eighth Affirmative Defense:**

**The Commission lacks jurisdiction over the subject matter of the Complaint.[21]**

13. In its *Reply,* Staff pointed out that the Commission has already disposed of this argument, *Order Denying Motion to Dismiss,* issued October 23, 2013, and *Order Denying Motion for Reconsideration,* issued November 26, 2013. In their *Responses,* the Respondents seek to reargue this point again. The Commission should therefore ignore it.

[20] CPWSD C-1's *Response,* pp. 6-7; footnotes deleted.

[21] CPWSD C-1's *Answer,* ¶ 31; Pevely's *Answer,* ¶ 31.

**Respondents' Ninth Affirmative Defense:**

**Enforcement of § 247.172 RSMo. 2000 as the Complainant seeks would violate the due process rights of the Respondent pursuant to the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution.[22]**

In its *Reply,* Staff stated that this assertion is untrue. Due process requires that the government must give notice and provide an opportunity for a hearing appropriate to the nature of the case.[23] The Commission's adjudicatory rules, procedures and processes have provided Respondents with notice as required by statute and a meaningful opportunity to be heard. The requisites of due process have been afforded Respondents.

In their *Responses,* the Respondents note that their Ninth Affirmative Defense is related to their Third Affirmative Defense (insufficient notice) and Fourth Affirmative Defense (failure to interpret penal provision liberally). Respondents assert that § 247.172, RSMo., is unconstitutionally vague and that its application to them is thus a denial of Due Process under the federal and state constitutions.

The "void for vagueness" doctrine reflects the principle that a statute that either forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess at its meaning and differ as to its interpretation violates the first essential of due process of the law.[24] The doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary enforcement.[25] The doctrine applies not only to laws that proscribe conduct, but also to penalties

[22] CPWSD C-1's *Answer,* ¶ 32; Pevely's *Answer,* ¶ 32.

[23] ***Dabin v. Director of Revenue,*** 9 S.W.3d 610, 615 (Mo. banc 2000); ***Session v. Director of Revenue,*** 417 S.W.3d 898, 905 (Mo. App., W.D. 2014).

[24] ***Goins v. Goins,*** 406 S.W.3d 886, 890 (Mo. banc 2013), citing ***Roberts v. United States Jaycees,*** 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

[25] ***Goins,*** *supra;* ***State v. Pribble,*** 285 S.W.3d 310, 314 (Mo. banc 2009).

without standards for imposition.[26] "The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[27] A statute will not be found to be vague "if it is susceptible to any reasonable construction that will sustain it."[28] Absolute certainty is not required in determining whether terms are impermissibly vague; if a permissible application of the law may be made, courts should make that application.[29]

Section 247.172, RSMo., is not void for vagueness. Its subsections 1 and 4, taken together, provide:

> Competition to sell and distribute water, as between and among public water supply districts, water corporations subject to public service commission jurisdiction, and municipally owned utilities may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section. * * * Before becoming effective, all territorial agreements entered into under the provisions of this section . . . shall receive the approval of the public service commission by report and order.

The proscribed conduct is perfectly clear to a reader of ordinary intelligence: it is a territorial agreement involving *any combination* of public water supply districts, private water utilities or municipal water utilities. This is a reasonable construction and so the statute is not infirm.

However often and however loudly the Respondents assert this argument, it is in fact frivolous. Respondents' Ninth Affirmative Defense is not viable as a matter of law.

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[26] ***Goins,*** *supra;* ***Pribble,*** *supra,* citing ***Pacific Mutual Life Ins. Co. v. Haslip,*** 499 U.S. 1, 44, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

[27] ***State v. Brown,*** 140 S.W.3d 51 (Mo. banc 2004).

[28] ***City of Pagedale v. Murphy,*** 142 S.W.3d 775, 778 (Mo. App., E.D. 2004).

[29] ***Turner v. Missouri Dep't of Conservation,*** 349 S.W.3d 434, 444 (Mo. App., S.D. 2011).

**Respondents' Tenth Affirmative Defense:**
**Complainant and the Commission are estopped to enforce § 247.172 RSMo. 2000, as sought in the Complaint.**

14. In its *Reply,* Staff set out the law of estoppel. Estoppel is a doctrine under which a party may not change position to the detriment of another party which acted in reliance upon the first asserted position. It is an equitable affirmative defense based upon the notion of good-faith detrimental reliance upon a misleading representation.[30] It is founded on the concept of fairness. Equitable estoppel has three elements: "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon; (2) action by another party on the faith of such admission, statement, or act; and (3) injury to such other party, resulting from allowing contradiction of the admission, statement, or act."[31] When an estoppel claim is made against the government, in addition to these three elements, the party must also show that the governmental conduct on which the claim is based constitutes affirmative misconduct.[32] Staff then explained that Respondents' purported defense of estoppel must fail due to their failure to plead the required elements.

In their *Responses,* the Respondents assert that they did, in fact, plead the necessary elements, referring to their First Affirmative Defense (the Commission has never before affirmatively sought to exercise jurisdiction over a Territorial Agreement between a public water supply district and a municipal utility) and their Fifth Affirmative Defense (Respondents' right to rely on the Commission's procedures and methods). They even claim to find the necessary element of governmental affirmative misconduct:

[30] ***Black's Law Dictionary,*** 570 (7th ed., 1999).

[31] ***JGJ Properties, LLC v. City of Ellisville,*** 303 S.W.3d 642, 650 -652 (Mo. App., E.D. 2010), *citing* ***Fraternal Order of Police Lodge # 2 v. City of St. Joseph,*** 8 S.W.3d 257, 263 (Mo. App., W.D.1999).

[32] *Id.*

"Staff's affirmative misconduct is demonstrated by the fact that it admittedly never gave C-1 any notice that it intended to apply § 247.172 to the agreement at issue, nor has it ever affirmatively sought to exercise authority over such agreements, and now is seeking to enforce that statute against C-1, along with seeking penalties against C-1 for supposedly violating that statute."[33] This purported affirmative defense, too, is frivolous.

| REQUIRED ELEMENT | | RESPONDENTS' CASE |
|---|---|---|
| 1. | An admission, statement or act inconsistent with the claim afterwards asserted and sued upon | The Commission has never attempted to affirmatively exercise jurisdiction over an alleged territorial agreement between a municipal water district and a public water supply district and by attempting to exercise jurisdiction in this case, the Commission's exercise of authority is inconsistent with its prior procedures and methods. |
| 2. | Action by another party on the faith of such admission, statement, or act | Respondents had a right to rely on the Commission's procedures and methods [and thus to enter into their Territorial Agreement without fear of sanction.] |
| 3. | Injury to such other party, resulting from allowing contradiction of the admission, statement, or act | Respondents have thereby been injured in the form of the Commission's Complaint and the potential to face penalties |
| 4. | The governmental conduct on which the claim is based constitutes affirmative misconduct | Staff's affirmative misconduct is demonstrated by the fact that it admittedly never gave Respondents any notice that it intended to apply § 247.172 to the agreement at issue, nor has it ever affirmatively sought to exercise authority over such agreements, and now is seeking to enforce that statute against Respondents, along with seeking penalties against Respondents for supposedly violating that statute. |

[33] CPWSD C-1's *Response,* p. 9.

Let's review Respondents' asserted claim in the light of the law:[34]

- The "admission, statement or act" on which Respondents claim they relied to their detriment, is in fact nothing of the sort. Neither the Commission nor the Staff has ever made any affirmative statement or act on which Respondents have relied. Rather, Responden5ts claim they have relied on the fact that, a case of this sort not having arisen before, the Commission and the Staff have had no occasion to undertake a similar proceeding in the past.
- The detrimental reliance by Respondents, in fact, was their action of making an unlawful territorial agreement. How can the Commission or the Staff somehow ratify their violation of the law?
- Staff's *Complaint* and the possibility of statutory penalties are not the sort of injury contemplated by the doctrine of estoppel.
- Staff has never engaged in any affirmative misconduct. As soon as Staff learned of the Territorial Agreement between Pevely and the District, it took immediate steps to advise them that they were in violation of the law. Upon their refusal to reform their conduct, Staff filed its *Complaint.*

When Respondents' estoppel defense is scrutinized, it is clear that it is nonsensical. That is strong language, but it is warranted here. After all, the Respondents have maligned Staff by accusing it of affirmative misconduct. This asserted affirmative defense is frivolous and is not viable as a matter of law.

[34] *Id.*

**Respondents' Eleventh Affirmative Defense:**
**Complainant may not seek to enforce § 247.172 RSMo. 2000, as set out in this Complaint by reason of laches.[35]**

15. In its *Reply,* Staff explained that laches is an equitable doctrine. It is the neglect to act, for an unreasonable and unexplained length of time, under circumstances permitting diligence, where the law requires action.[36] "There is no fixed period within which a person must assert his claim or be barred by laches."[37] Most importantly, **"[l]aches is a question of fact** to be determined from all the evidence and circumstances adduced at trial."[38] The doctrine is not favored by equity and is used primarily to prevent injustice.[39] "Mere delay in asserting a right does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the defendant."[40]

Staff went on to explain in its *Reply* that Respondents' attempted affirmative defense of laches must fail as a matter of law because they pleaded no facts showing that Staff unaccountably neglected to act over a prolonged period of time. As the *Affidavit of James A. Busch shows,* Staff brought its *Complaint* as soon as it was made aware of the circumstances. Equally fatal to this asserted defense, Respondents did not plead any facts showing that they have been unfairly disadvantaged or prejudiced.

In their *Responses,* the Respondents grab onto the phrase "adduced at trial" from Staff's quotation from the ***Metropolitan St. Louis Sewer District v. Zykan*** case.

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[35] CPWSD C-1's *Answer,* ¶ 30; Pevely's *Answer,* ¶ 30.

[36] ***Metro. St. Louis Sewer Dist. v. Zykan,*** 495 S.W.2d 643, 656 (Mo. 1973).

[37] *Id.*

[38] *Id.,* at 657 (emphasis added).

[39] ***Moore v. Weeks,*** 85 S.W.3d 709, 721 (Mo. App., W.D 2002).

[40] ***Zykan,*** *supra,* 495 S.W.2d at 656–57 (internal quotation omitted).

They evidently believe that a genuine issue of material fact exists where:

- Staff admits that it took no action with respect to Respondents' Territorial Agreement between November 12, 2007, and the filing of this *Complaint* on July 19, 2013; and
- Mr. Busch's *Affidavit* to the effect that Staff acted as soon as it learned of the situation.

The facts now before the Commission allow it to determine that Staff was as diligent as the circumstances permitted. Thus, there is no genuine issue of material fact. As to prejudice, Respondents ask the Commission to find it in the additional number of days of violation for which penalties potentially lie. Staff suggests that Respondents' predicament is the result of their *own* inaction, not Staff's. Even now, Respondents can end their peril by filing an application seeking Commission approval for their Territorial Agreement.

## Conclusion

Part of Staff's burden on its *Motion for Summary Judgment* is to show "the non-viability" of Respondents' affirmative defenses.[41] Staff has done so in its *Reply* and again in this pleading, taking each purported affirmative defense and showing that it is either factually incorrect, factually unsupported, legally inadequate, or simply not an avoidance to Staff's *Motion for Summary Determination.* For that reason, the Commission should grant Staff's *Motion for Summary Determination.*

[41] ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 381 (Mo. banc 1993) (emphasis added).

**WHEREFORE,** on account of all the foregoing, Staff prays the Commission will summarily grant the relief sought in Staff's *Complaint;* and grant such other and further relief as the Commission deems just in the premises.

Respectfully submitted,

**/s/ Kevin A. Thompson**
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **7th day of May, 2014,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

**/s/ Kevin A. Thompson**