

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

Staff of the)
Missouri Public Service Commission,)
)
Complainant,)
)
vs.)
)
Consolidated Public Water Supply District,)
C-1 of Jefferson County, Missouri,)
)
and)
)
City of Pevely, Missouri,)
)
Respondents.)

File No. WC-2014-0018

**RESPONDENT CONSOLIDATED PUBLIC
WATER SUPPLY DISTRICT, C-1 OF JEFFERSON COUNTY, MISSOURI
MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR REHEARING**

COMES NOW Respondent Consolidated Public Water Supply District, C-1 of Jefferson County, Missouri (hereinafter referred to as "C-1") and for its Memorandum in Support of Its Application for Rehearing pursuant to section 386.500 RSMo states to the Missouri Public Service Commission as follows:

The Order and Report of January 21, 2015 is based on the finding that section 247.172 RSMo grants the Public Service Commission jurisdiction over an agreement which the Respondents entitled Territorial Agreement and entered into in 2007. The Public Service Commission only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable implication and has no authority to interpret a statute in such a way that is contrary to the plain terms of the statute. James Evans, et al. v. Empire District Electric Company, 346 S.W.2d 313, 318 (Mo. App. W. D. 2011) and State ex rel Mogas Pipeline, LLC v. Missouri Public Service Commission, 366 S.W.3d

493, 496 (Mo. 2012). The Public Service Commission “is a creature of statute and can only function in accordance with its enabling statutes.” Id. “If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power.” Id.

The general jurisdiction granted to the Public Service Commission is set forth in Section 386.250 RSMo (2013) which specifically provides that the Public Service Commission has no jurisdiction “over the service or rates of any municipally owned water plant or system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality.” Section 247.172 RSMo gives the Public Service Commission limited and specific jurisdiction over municipalities and public water supply districts regarding territorial agreements entered into “between and among public water supply districts, water corporations subject to public service commission jurisdiction, and municipally owned utilities” and which displace competition.

A. The Territorial Agreement does not Displace Competition

For a territorial agreement to fall under the provisions of section 247.172 RSMo, it must displace competition. As between a public water supply district and a municipality, the Missouri Courts have held that the “legislature did not intend that both [a municipality] and a [public] water district distribute water in the same area at the same time.” Camden County Public Water Supply District #4, et al. v. Village of Sunset Beach, City of Lake Ozark, et al., 281 S.W.3d 893, 901 (Mo. App. S.D. 2009) quoting Mathison v. Pub. Water Supply Dist. No. 2 of Jackson County, 401 S.W.2d 424, 431 (Mo. 1966). The court’s rationale was that if the legislature intended competition between these two governmental entities, “the legislature would not have...provided a method ([section] 247.170, [Cum. Supp. 2003,]) whereby [a municipality] could, as it grew, acquire the assets of a [public water] district lying within an area annexed by

the [municipality], without the consent or agreement of the [public water] district.” Id. Missouri Courts have further stated that prior to a city servicing areas that the city has annexed that also are within the boundaries of a public water supply district, “the city was obligated to comply with the procedures for acquiring the right to service such area as set out in §247.170.” City of Harrisonville, Missouri v. Public Water Supply District No. 9 of Cass County, Missouri, 49 S.W.3d 225, 234 (Mo. App. W.D. 2001) quoting Public Water Supply District No. 10 of Cass County v. City of Peculiar, 971 S.W.2d 849, 850 (Mo. App. W.D. 1998). As such, when providing service within their boundaries, Respondents are not in competition with each other.

As the legislature did not intend competition between the Respondents in the areas where their boundaries overlapped, the only time that Respondents could be in competition with each other is if they are providing service outside of their corporate boundaries. Each entity has the power to sell water to customers outside of their corporate boundaries. *See §247.050(15) RSMo and §91.100 RSMo*. However, if the legislature did not intend for a municipality and water district to compete, the inference would be that a city could not serve outside its district if said customer was within a water district and vice versa. If this were not the case, the legislature would not have passed §91.055 RSMo which is applicable to Jackson County. It is in the situation of service outside of both of their corporate boundaries that an agreement between Respondents would displace competition.

The agreement in question though did not attempt to address territory to which the legislature intended that the entities be able to compete. Respondents’ Agreement only dealt with areas where the boundaries of each Respondent overlapped or those areas solely in the boundaries of C-1. There is no dispute that the territories set forth in the agreement, specifically the subdivisions, Tiara at the Abbey, Hunters Glen and Vinyards at Bushberg, and the Valle

Creek Condominium development are within the city limits of Respondent Pevely and the territorial boundary of Respondent C-1. It is clear from paragraphs 3 and 6 of the Agreement that the Respondents intended the Agreement to apply only to those areas to which the boundary currently overlapped or might in the future overlap. (Ex pgs 58-59).

As the Agreement of Respondents does not displace competition as contemplated by the legislature, section 247.172 RSMo does not apply and the Public Service Commission does not have jurisdiction over same. The post Agreement “competitive” acts and alleged violations of the Agreement asserted by Respondent C-1 against Respondent Pevely do not change the court’s interpretations of the law that the legislature did not intend for municipalities and public water supply districts to compete. It is only when a territorial agreement displaces competition that jurisdiction is placed with the Public Service Commission.

Section B. As Between and Among Public Water Supply Districts, Water Corporations subject to Public Service Commission Jurisdiction, And Municipally Owned Utilities

Even if Respondents’ Agreement did displace competition, Section 247.172 RSMo additionally only applies to territorial agreements entered “as between and among public water supply districts, water corporations subject to Public Service Commission jurisdiction, and municipally owned utilities.” (Emphasis added). No water corporation subject to Public Service Commission jurisdiction is a party to the agreement in question. The phrasing of the statute requires all three entities to be parties to a territorial agreement in order to trigger Public Service Commission jurisdiction. Had the legislature intended otherwise the conjunction “or” would have been used. “The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute...we enforce statutes as written, not as they might

have been written.” Hogan v. Board of Police Commissioners of Kansas City, 337 S.W.3d 124, 131 (Mo. App. W.D. 2011).

Section C. Jurisdiction over Commission-Approved Agreement

The plain language of section 247.172.7 RSMo (2013) provides “The commission shall have jurisdiction to entertain and hear complaints involving any commission-approved agreement.” By the plain language of the statute, the only complaints that can be heard are in regard to territorial agreements which have previously been presented to the commission and have received approval of the Public Service Commission by report and order. “A presumption exists that the legislature does not insert idle verbiage or superfluous language in the statute. Cook v. Newman, 142 S.W.3d 880, 892 (Mo. App. W.D. 2004). Rather, we presume that the legislature intends that every word, clause, sentence, and provision of a statute have effect. Id.” State ex rel Vincent v. D.C., Inc., 265 S.W.3d 303, 308 (Mo. App. E.D. 2008). If the Public Service Commission had jurisdiction to hear the complaint pursuant to §386.390 RSMo, and order the filing of an agreement, the language of §247.172.7 stating “the commission shall have jurisdiction to entertain and hear complaints involving any commission-approved territorial agreement” would be superfluous and of no effect.

After entering the agreement in 2007, C-1 and Pevely did not apply to receive approval of the Public Service Commission as these entities did not believe the agreement fell under the provisions of section 247.172 RSMo. Pursuant to the terms of section 247.172 RSMo, if a territorial agreement subject to the statute is not presented, it is not effective until presented. Nothing within the plain language of the statute gives the Public Service Commission jurisdiction to bring a complaint over an agreement that has not been presented or approved or to require C-1 and Pevely to file the territorial agreement. Under a plain reading of the statute, the Public Service

Commission only has jurisdiction to hear complaints over territorial agreements as between and among public water supply districts, water corporations subject to Public Service Commission jurisdiction, and municipally owned utilities which, after an evidentiary hearing, Public Service Commission has approved by report and order. Section 247.172.7 further provides, "nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting, or management of any public water supply district or municipally owned utility, or to amend, modify, or otherwise limit the rights of public water supply districts to provide service as otherwise provided by law." As such the Commission has no jurisdiction unless the steps delineated under the statute have been taken.

Section D. Pursuant to section 432.070 RSMo, the Agreement is void

Further, if the Agreement was required by law, specifically §247.172.4 RSMo, to be brought before the Commission to be effective and is not, the Agreement then is not in conformance with the law and pursuant to the Missouri statutes governing contracts of municipalities and public water supply districts is void and therefore unenforceable. Section 247.080.5 RSMo (2013) provides that "all contracts made by the district shall conform to law governing contracts of other municipal corporations." Section 432.070 RSMo (2013) provides "No county, city, town, village, school township, school district, or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law..." For the purpose of §432.070 RSMo, public water supply districts are municipal corporations. Public Water Supply District No. 16 v. City of Buckner, 44 S.W.3d 860, 864 (Mo. App. W.D. 2001). The courts have held that the provisions of §432.070 RSMo are mandatory and that if the contract is not within the scope of the entity's powers or authorized by law the contract is void and unenforceable.

In State ex rel Taylor v. Reorganized School Dist., 257 S.W. 2d 262 (Mo. App. E.D. 1953) a release of portions of a school district for annexation into another was challenged partially regarding claims that the districts pre-release and annexation bargaining precluded the district from later annexing the property and was instead a rejection of the territory. The court held that any conditional acceptance alleged was not within the district's powers and therefore a nullity. Id at 268. In Software A.G. of North America, Inc. v. The City of Columbia, Missouri, a software company sued Columbia over an annual technical services contract which required in advance payment for the year wherein the city did not give a written notice of its intent to cancel until seven months into the year and the city refused to tender the amount due. 903 S.W.2d 641, 642 (Mo. App. W.D. 1995). The court found that contract was void and unenforceable because the contract exceeded five years without any public rebidding in violation of the ordinances of the City of Columbia. Id. At 644. See also Homebuilders Ass'n of Greater Kansas City v. Kansas City, 431 S.W.2d 111, 113 (Mo. banc 1968) (Contracts entered into beyond scope of authority of city are void).

Section 432.070 RSMo is given a strict and literal interpretation "unrelieved by considerations of equity which relieve against hardship and unjust enrichment of private persons..." Pace v. Land Clearance for Redevelopment Authority, 713 S.W.2d 34, 36 (Mo. App. W.D. 1986). "The purpose of [§432.070 RSMo] is to protect the governmental entity upon which another seeks to impose or enforce some claimed contractual obligation or agreement...It is not for the protection of the person seeking to impose the contractual agreement upon the governmental entity." Public Water Supply District No. 16 v. City of Buckner, 44 S.W.3d 860, 864 (Mo. App. W.D. 2001). When reading §247.172 RSMo in conjunction with the provisions of §432.070 RSMo and the case law thereunder, it is clear why the legislature only granted the Public

Service Commission authority over those territorial agreements that were approved via application and hearing as any territorial agreement subject to §247.172 RSMo entered into by a municipality or a public water supply district that was not presented for approval would be void and unenforceable. Further, because jurisdiction does not fall to the Public Service Commission for an unapproved agreement, the Public Service Commission lacks the authority to require C-1 and Pevely to file the territorial agreement as the Public Service Commission lacks the authority to impose the agreement upon C-1 and Pevely without the consent of both entities.

Further, as it is *void ab initio* as an *ultra vires* contract, there is no need to present it to the Public Service Commission in order to revoke or amend said agreement. Under the provisions of §432.070 RSMo and §432.070 RSMo, the Respondents cannot be forced to present said agreement to the Public Service Commission.

Further, because it is an *ultra vires* contract if §247.172 RSMo applies to the agreement, the Public Service Commission does not have the authority to seek penalties for any acts of the Respondents in conformance with the agreement as the Public Service Commission cannot under §432.070 RSMo seek to impose the agreement on the Respondents. "The fact a municipality has received the benefit of a performance by the other party does not make the municipality liable either on the theory of a ratification, estoppel or implied contract." Allen v. City of Fredericktown, 591 S.W.2d 723, 725 (quoting Mo. Int'l Investigators, Inc. v. City of Pacific, 545 S.W.2d 684 (Mo. App. 1976); Kansas City v. Rathford, 353 Mo. 1130, 186 S.W.2d 570, 574 (Mo. 1945)). Under section 432.070, "it is as much *ultra vires* for a Missouri municipality to incur a liability in the nature of a contractual obligation in the absence of a writing as to incur a liability not within the scope of its corporate powers or one not expressly authorized by law." Donovan v. Kansas City, 175 S.W.2d 874, 882 (Mo banc 1943). See also Duckett Creek Sewer Dist. v. Golden

Triangle Dev. Corp., 32 S.W.3d 178 (Mo. App. E.D. 2000). The Commission found that the law required the agreement of the Respondents to have been filed before becoming effective, then pursuant to §432.070 RSMo, the agreement is void ab initio and unenforceable. It is not a violation of law, it is merely an ineffective and unenforceable agreement.

Respondent C-1 further incorporates by this reference additional arguments set forth in its previously filed Memorandum in Support of Respondent's Motion to Dismiss and Answer and Memorandum in Opposition to the Motion for Summary Judgment.

WHEREFORE Respondent Consolidated Public Water Supply District C-1 of Jefferson County, prays the Missouri Public Service Commission grant its Motion for Rehearing and for such other and further orders as are just under the circumstances.

Respectfully submitted,

/s/ Bianca L. Eden

Bianca L. Eden #50301
WEGMANN, STEWART, TESREAU, EDEN,
MIKALE & BISHOP, P.C.
P.O. Box 740
455 Maple Street
Hillsboro, MO 63050
(636) 797-2665 or 296-5769
beden@wegmannlaw.com
Attorneys for Respondent Consolidated Public
Water Supply District C-1 of Jefferson County,
Missouri

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed by U.S. Mail on this 18th day of January, 2015, unless served electronically via EFIS to:

Kevin A. Thompson
Chief Staff Counsel
Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
kevin.thompson@psc.mo.gov

Office of Public Counsel
P.O. Box 2230
200 Madison Street
Suite 650
Jefferson City, MO 65102
opcservice@ded.mo.gov

Terrance J. Good
LASHLY & BAER, P.C.
Attorneys for Respondent
City of Pevely, Missouri
714 Locust Street
St. Louis, Missouri 63101
tjgood@lashlybaer.com

/s/ Bianca L. Eden