BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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 BRIEF

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Reply Brief,* states as follows:

Argument

Jurisdiction – Is the Commission authorized to hear and decide this case?

Both Respondents assert that the Commission lacks jurisdiction. They have made this argument repeatedly in this case, raising it at every opportunity. The Commission has rejected it already,[1] but it is worthwhile to examine the issue again and lay all doubts to rest.

As the Respondents point out, the Commission is a creature of statute and has only that authority expressly delegated to it by the General Assembly. Both

[1] ***Staff v. Consolidated Public Water Supply District C-1 of Jefferson County, Missouri, and the City of Pevely,*** Case No. WC-2014-0018 (***Order Denying Motion to Dismiss,*** iss'd Oct. 23, 2013) and, also in this docket, ***Order Denying Motion for Reconsideration,*** iss'd Nov. 26, 2013.

Respondents insist that the Commission lacks jurisdiction to even hear and determine Staff's *Complaint.* However, the Respondents are wrong as an examination of § 386.390.1, RSMo., makes abundantly clear:

> Complaint may be made by the commission of its own motion . . . 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 elements of a cause of action under § 386.390.1, RSMo., are:

1. An authorized complainant;

2. An allegation of an act or omission violating a statute, rule or Commission order; and

3. Respondent is a person, corporation or public utility.

Is the Staff an authorized complainant? It is true that § 386.390.1, RSMo., does not list the Commission's Staff among the entities authorized to bring a complaint;[2] but the Commission itself has so authorized Staff by Rule 4 CSR 240-2.070(1): "A complaint may also be filed by . . . the commission staff through the staff counsel . . . ."[3]

Does the *Complaint* include an allegation of an act or omission violating a statute, rule or Commission order? Missouri courts have held that a complaint brought under § 386.390.1, RSMo., must include an allegation of the violation of a statute, rule

[2] They are, in addition to the Commission itself: "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"; *see* § 386.390.1, RSMo.

[3] Technically, therefore, a complaint brought by the Staff is actually a complaint made by the Commission on its own motion, as the statute expressly contemplates.

or Commission order.[4] In this case, Staff contends that the Respondents have violated § 247.172, RSMo., a statute, by failing to seek Commission approval of their territorial agreement, by litigating the agreement before a circuit court rather than before this Commission, and by failing to seek Commission approval of an amendment to their territorial agreement. Yes, the *Complaint* does include an allegation of an act or omission violating a statute, rule or Commission order.

Is each Respondent a person, corporation or public utility? Respondent Pevely, by its own admission, is a city of the fourth class.[5] It is a "body corporate" as § 79.010 makes clear:

> Any city of the fourth class in this state may become a body corporate under the provisions of this chapter, in the manner provided by law, under the name of "The city of . . . .", and by that name shall have perpetual succession, may sue and be sued, implead and be impleaded, defend and be defended in all courts of law and equity and in all actions whatever; may receive and hold property, both real and personal, within such city, and may purchase, receive and hold real estate within or without such city for the burial of the dead; and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire; may receive bequests, gifts and donations of all kinds of property, and may have and hold one common seal, and may break, change or alter the same at pleasure, and all courts of this state shall take judicial notice thereof.

CPWSD C-1, in turn, and also by its own admission, is a public water supply district.[6] It is a "political corporation of the state of Missouri" pursuant to § 247.020, RSMo.:

> The districts to be formed under sections 247.010 to 247.220 shall be known as public water supply districts of the counties in which districts are located, and shall be political corporations of the state of Missouri. Each district shall carry with it a number, which shall not be the same as any existing district of the county, and, when incorporated and organized

[4] ***St. ex rel. Ozark Border Electric Cooperative v. PSC,*** 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

[5] Ex. 5, DRs 1-3, 36 and 37.

[6] *Id.*

> as herein provided, shall have and be invested with all the powers conferred upon them by the provisions of sections 247.010 to 247.220 and no other.

Each Respondent, therefore, is by law a species of corporation and thus subject to this Commission's complaint authority at § 386.390.1, RSMo.

All three elements required by § 386.390.1, RSMo., are unmistakably present. Staff is an authorized complainant; the *Complaint* alleges act and omissions that violate a statute; and each Respondent is a corporation. The Respondents' assertions that the Commission is not authorized to hear and determine this case are absolutely without merit.

Jurisdiction – Is the Respondents' agreement a Territorial Agreement subject to § 247.172, RSMo.?

The Respondents also assert – and have repeatedly asserted -- that the Commission lacks jurisdiction over them and their agreement under § 247.172, RSMo. That section has nine subsections, as follows:

> 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.
>
> 2. Such territorial agreements shall specifically designate the boundaries of the water service area of each water supplier subject to the agreement, any and all powers granted to a public water supply district by a municipality, pursuant to the agreement, to operate within the corporate boundaries of that municipality, notwithstanding the provisions of sections 247.010 to 247.670 to the contrary, and any and all powers granted to a municipally owned utility, pursuant to the agreement, to operate in areas beyond the corporate municipal boundaries of its municipality.
>
> 3. Where the parties cannot agree upon the boundaries of the water service areas that are to be set forth in the agreement, they may, by mutual consent of all parties involved, petition the public service commission to designate the boundaries of the water service areas to be

served by each party and such designations by the commission shall be binding on all such parties. Petitions shall be made pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity and the commission shall hold evidentiary hearings on all petitions so received as required in subsection 5 of this section. The commission shall base its final determination regarding such petitions upon a finding that the commission's designation of water service areas is in the public interest.

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.

5. The commission shall hold evidentiary hearings to determine whether such territorial agreements should be approved or disapproved, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties, such hearings may be waived by agreement of the parties. The commission may approve the application if it determines that approval of the territorial agreement in total is not detrimental to the public interest. Review of commission decisions under this section shall be governed by the provisions of sections 386.500 to 386.550.

6. Commission approval of any territorial agreement entered into under the provisions of this section shall in no way affect or diminish the rights and duties of any water supplier not a party to the agreement to provide service within the boundaries designated in such territorial agreement. In the event any water corporation which is not a party to the territorial agreement and which is subject to the jurisdiction, control and regulation of the commission under chapters 386 and 393 has sought or hereafter seeks authorization from the commission to sell and distribute water or construct, operate and maintain water supply facilities within the boundaries designated in any such territorial agreement, the commission, in making its determination regarding such requested authority, shall give no consideration or weight to the existence of any such territorial agreement and any actual rendition of retail water supply services by any of the parties to such territorial agreement will not preclude the commission from granting the requested authority.

7. The commission shall have jurisdiction to entertain and hear complaints involving any commission-approved territorial agreement. Such complaints shall be brought and prosecuted in the same manner as other complaints before the commission. The commission shall hold an evidentiary hearing regarding such complaints, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties, such hearings may be waived by agreement of the parties. If the commission determines that a territorial agreement that is the subject of a complaint is no longer in the public interest, it shall have the authority to suspend or revoke the territorial agreement. If the commission determines that the territorial agreement is still in the public interest, such territorial agreement shall remain in full force and effect. Except as provided in this section, 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.

8. Notwithstanding the provisions of section 386.410, the commission shall by rule set a schedule of fees based upon its costs in reviewing proposed territorial agreements for approval or disapproval. Responsibility for payment of the fees shall be that of the parties to the proceeding as ordered by the commission in each case. The fees shall be paid to the director of revenue who shall remit such payments to the state treasurer. The state treasurer shall credit such payments to the public service commission fund, or its successor fund, as established in section 33.571. 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 and except as provided in this section, nothing shall affect the rights, privileges or duties of public water supply districts, water corporations subject to public service commission jurisdiction or municipally owned utilities.

9. Notwithstanding any other provisions of this section, the commission may hold a hearing regarding any application, complaint or petition filed under this section upon its own motion.

What are the necessary elements of a cause of action under § 247.172, RSMo.?

The elements are:

1. A written territorial agreement;

2. “Between and among” specified entities;

3. That displaces competition.

The Respondents argue that an additional required element is that such a territorial agreement specify the powers granted by each entity to the other to provide service within its boundaries. That assertion is incorrect. Section 247.172.2, RSMo., requires that *if* any such powers are granted, then they must be enumerated in the Territorial Agreement, but it does not require that there be such a grant.

Is the Respondents' agreement a "written territorial agreement" as required by § 247.172, RSMo.? Undeniably, it is. It's written; it's an agreement; and it's titled "Territorial Agreement between the Consolidated Public Water Supply District C-1 of Jefferson County, Missouri, and the City of Pevely, Missouri." That's the first element.

Is it "between and among" entities of the type identified in § 247.172.1, RSMo.? Yes, it is. The statute lists "public water supply districts, water corporations subject to public service commission jurisdiction, and municipally owned utilities." Respondent CPWSD C-1 is a public water supply district. Respondent Pevely is a municipality with a water utility. The agreement is undeniably between the two Respondents.

The Respondents have insisted throughout this matter that the absence of an entity of the third type listed, a "water corporation subject to public service commission jurisdiction," means that their territorial agreement is not subject to § 247.172, RSMo. As previously noted, the Commission has already considered and rejected this argument based upon an analysis of the statutory language.[7] Unfortunately, there are no appellate court decisions on point. One other avenue of investigation, however, in the effort to determine the intent of the General Assembly, is to examine Chapter 247 to

[7] *See* Footnote 1, *supra.*

ascertain whether some other statutory provision exists that applies to the facts at hand. The reasoning is that, if some other provision exists that fits the Respondents' situation, then perhaps they are right that § 247.172, RSMo., only applies when all three types of entity are involved. A review of Chapter 247 reveals four candidates.

The first candidate is § 247.050(15), RSMo., which authorizes a public water supply district:

> To sell and distribute water to the inhabitants of the district and to consumers outside the district, delivered within or at the boundaries of the district; to contract with another water district or a municipality to sell water within such water district or municipality according to the terms and provisions of such contract; to contract with another water district or municipality for such water district or municipality to sell water within the district according to the terms and provisions of such contract[.]

Doesn't § 247.050(15), RSMo., contemplate and address the exact circumstance presented by this case? In fact, it does not. It addresses the case of a water district that *adjoins* a municipality, but not the case at hand, which is a water district that *overlaps* a municipality. The factual peculiarity of the present case, that brings it squarely within § 247.172, RSMo., is that both Respondents have an equal right under the law to provide water service in the disputed area because it is within both the City and the District. That is not the circumstance contemplated by § 247.050(15), RSMo.

The second candidate is § 247.165.1, RSMo., which provides:

> Whenever all or any part of a territory located within a public water supply district organized pursuant to sections 247.010 to 247.220 is included by annexation within the corporate limits of a municipality, but is not receiving water service from such district or such municipality at the time of such annexation, the municipality and the board of directors of the district may, within six months after such annexation becomes effective, develop an agreement to provide water service to the annexed territory. Such an agreement may also be developed within six months after August 28, 2001, for territory that was annexed between January 1, 1996, and August 28, 2001, but was not receiving water service from such district or such municipality on August 28, 2001, except that such territory annexed

> in a county of the first classification without a charter form of government and with a population of more than sixty-three thousand eight hundred but less than seventy thousand inhabitants must have been annexed between January 1, 1999, and August 28, 2001. For the purposes of this section, "not receiving water service" shall mean that no water is being sold within the annexed territory by such district or municipality. If the municipality and district reach an agreement that detaches any territory from such district, the agreement shall be submitted to the circuit court originally incorporating such district, and the court shall make an order and judgment detaching the territory described in the agreement from the remainder of the district and stating the boundary lines of the district after such detachment. The court shall also make any changes in subdistrict boundary lines it deems necessary to meet the requirements of sections 247.110 to 247.227. Such subdistrict lines shall not become effective until the next election after the effective date of the agreement. At such time that the court's order and judgment becomes final, the clerk of the circuit court shall file certified copies of such order and judgment with the secretary of state and with the recorder of deeds and the county clerk of the county or counties in which the district is located. If an agreement is developed between a municipality and a water district pursuant to this subsection, subsections 2 to 8 of this section shall not apply to such agreement.

The area of overlap between the Respondents was indeed created by an annexation. Nonetheless, § 247.165.1, RSMo., does not apply to the present case. Why? Because, by its express terms, it applies *only* to an area that "is not receiving water service from such district or such municipality at the time of such annexation." The statute goes on to specify that "[f]or the purposes of this section, "not receiving water service" shall mean that no water is being sold within the annexed territory by such district or municipality." In the present case, there is no evidence that the disputed area was without service from either Respondent at the time of annexation.

The third candidate is § 247.160, RSMo., which provides in pertinent part as follows:

> 1. Whenever all or any part of the territory of any public water supply district organized under sections 247.010 to 247.220 is or has been included by annexation within the corporate limits of a municipality, the board of directors of any such district shall have the power to contract with

> such municipality for operating the waterworks system within such annexed area, or the board of directors may, subject to the provisions of this section and section 247.170, lease, contract to sell, sell or convey any or all of its water mains, plant or equipment located within such annexed area to such municipality and such contract shall also provide for the detachment and exclusion from such public water supply district of that part thereof located within the corporate limits of such city; provided, that in case of sale or conveyance, all bonds of the district, whether general obligation bonds constituting a lien on the property located within the district, or special obligation or revenue bonds constituting a lien on the income and revenues arising from the operation of the water system * * *

While at first glance § 247.160, RSMo., appears to apply to the present case, in fact it does not. Why not? Because the mains, facilities and "waterworks system" within the area of overlap in the present case belong to Pevely and not to the District. Section 247.160, RSMo., contemplates an annexation by a municipality of an area in which the neighboring district has existing infrastructure. That is not the case here, so far as the record reveals. In the case of the Valle Creek Condominiums, the existing infrastructure belongs to the City, not to the District. Section 247.160, RSMo., simply does not apply.

The fourth and final candidate is § 247.170, RSMo., which provides:

> 1. Whenever any city owning a waterworks or water supply system extends its corporate limits to include any part of the area in a public water supply district, and the city and the board of directors of the district are unable to agree upon a service, lease or sale agreement, or are unable to proceed under section 247.160, then upon the expiration of ninety days after the effective date of the extension of the city limits, that part of the area of the district included within the corporate limits of the city may be detached and excluded from the district in the following manner * * *

It appears that the Respondents could have proceeded under § 247.170, RSMo., but they have evidently elected not to do so. Section 247.170, RSMo., contemplates the detachment of the annexed area from the district – perhaps detachment was not desired by one or both of the Respondents. Their Territorial Agreement acknowledges

the possibility of detachment[8] and includes a waiver by Pevely of that type of relief:

> The parties further agree that all other territory within the District boundaries shall remain the exclusive territory of the District, and Pevely covenants and agrees that during the terms of this Agreement as specified hereafter **it shall not, without the written consent of the District (a) seek detachment of any additional territory now within the boundaries of the District;** (b) provide water service to any additional territory now within the boundaries of the District that is hereafter detached from the District; (c) seek to develop an agreement to provide water service to any additional territory now within the boundaries of the District that may be hereafter annexed by the city; and (d) directly or indirectly seek to dissolve the District or hold itself out as an alternative water supplier in any dissolution proceeding.[9]

Upon review of Chapter 247, RSMo., only one other provision can be found that applies to the circumstances of this case. That provision, § 247.170, RSMo., provides for the detachment of the annexed area from the district and its subsequent, permanent legal incorporation into the annexing municipality. In that case, only the municipality would be left with a legal right to provide water service in the annexed area. The Respondents, for whatever reason, did not pursue detachment; instead, they elected to continue the situation in which both of them retain equal legal right to provide water service within the annexed area. That describes competition and competition is the situation to which § 247.172, RSMo., applies. Upon review of § 247.172, RSMo., Respondents' jurisdictional arguments are revealed to be absolutely without merit. They are subject to § 247.172, RSMo., because it is the *only* statutory provision that applies to their situation, that is, one in which they are necessarily competing with each other within the overlap because each of them is authorized to provide water service

[8] *See* Paragraph 1, Sch. JAB-2, attached to Ex. 1: "The parties hereto acknowledge the geographical corporate boundaries of each entity and agree that such boundaries shall be in full force and effect as they presently exist and as may be subsequently modified by annexation and/or **detachment** in conformance with applicable provisions of Missouri Law pertaining to cities of the Fourth Class and Public Water supply Districts." (Emphasis added.)

[9] Sch. JAB-2, ¶ 6 (emphasis added).

within it. Thus, their Territorial Agreement, which specifies which of them will serve what portion of the annexed area, necessarily displaces competition within the meaning of § 247.172, RSMo., because each of them voluntarily waived its right to serve part of that territory.

All three elements required by § 247.172.1, RSMo., are met. The Respondents' agreement is (1) a written Territorial Agreement; (2) "between and among" entities of the required type; and (3) it displaces competition. Because their agreement is a Territorial Agreement subject to § 247.172, RSMo., their compliance with that statute is *mandatory:* "Competition . . . may be displaced by written territorial agreements, **but only to the extent hereinafter provided for in this section."** (Emphasis added.)

There is no doubt that (1) the Commission is authorized to hear and determine this case under § 386.390.1, RSMo., and (2) the Respondents' are required to submit their Territorial Agreement to the Commission for approval. What's more, they are also required to obtain the Commission's approval to terminate their Territorial Agreement.

Mootness:

Along with their jurisdictional arguments, the Respondents insist that this case is moot because they don't even want their unlawful Territorial Agreement any more. But they cannot just walk away from it. Subsections 4 and 7 of § 247.172, RSMo., require that amendment and recission of Territorial Agreements must also be approved by the Commission. If the Respondents want out of their Territorial Agreement, they must petition the Commission to allow them to do so. This case is hardly moot: the Respondents need permission from the Commission to continue their Territorial Agreement and they need permission from the Commission to cancel it.

Estoppel:

Respondent Pevely also argues that the Staff is estopped from bringing this action against it. 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 defense based upon the notion of good-faith detrimental reliance upon a misleading representation.[10] 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."[11] 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.[12]

The following language is found in the case relied on by Pevely:

> Equitable estoppel is normally not applicable against a governmental entity. The application of equitable estoppel against governmental entities or public officers is limited to exceptional circumstances where right of justice or the prevention of manifest injustice requires its application. This doctrine is not favored by law and is not to be casually invoked. **Equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy.** The underlying principle behind its limited application to governmental entities and public officials is that public rights should yield only if private parties possess greater equitable rights, (internal citations omitted).[13]

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

[11] ***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).

[12] *Id.*

[13] ***JGJ Properties, LLC v. City of Ellisville,*** 303 S.W.3d 642, 650 -651 (Mo. App., E.D. 2010);

Pevely contends that all four necessary elements are met:

Element 1 -- An admission, statement or act inconsistent with the claim afterwards asserted: Pevely asserts that this element is satisfied by Staff's admission that it has not brought a complaint like this one before.

Element 2 -- Action by another in reliance on faith of such admission, act or statement: Pevely asserts that this element is satisfied by the fact that Pevely engaged in the course of conduct that is the basis of this case in reliance on the fact that no similar claim has ever been asserted in from of this Commission.

Element 3 – Resulting injury: Pevely asserts that it has been injured by having to defend against Staff's *Complaint.*

Element 4 – Affirmative misconduct by the governmental party: Pevely states, "Staff's affirmative misconduct is demonstrated by the fact that the first notice Pevely received was service of the Complaint for violating the statute and seeking civil fines."[14]

Pevely's estoppel defense is not well-taken. The very case Pevely relies on declares, "Equitable estoppel is not applicable if it will . . . curtail the exercise of the state's police power . . . ." Staff's *Complaint* is necessarily brought as an exercise of the state's police power.

Nor was there any detrimental reliance by the Respondents in this case on a position previously stated by the Staff or the Commission. Staff's interpretation of

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quoting ***Fraternal Order of Police Lodge No. 2 v. City of St. Joseph,*** 8 S.W.3d 257, 263 (Mo. App., W.D. 1999) (emphasis added).

[14] ***Respondent City of Pevely's Initial Post-Hearing Brief,*** p. 14. Staff does not know whether this assertion is true as this matter was originally in the hands of the Commission's External Litigation Section in the General Counsel's Office. Certainly, the undersigned did not communicate with either Respondent before filing this *Complaint.*

§ 247.172, RSMo., 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 at least eleven territorial agreement cases between municipalities and public water supply districts without the involvement of a regulated entity.[15] Staff found no cases in which the Commission rejected such an application for lack of jurisdiction. In all of these cases, the Commission summarized 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

[15] 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 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.***

public water supply district and a municipality enter into a territorial agreement, the agreement must be approved by the Commission after hearing."[16]

Compare the facts in this case with one in which a government entity was actually found to be estopped:

> In ***Casey's,***[17] the property owner purchased a parcel of land where it intended to build a new convenience store. Prior to purchasing the property, the property owner was assured by city officials that nothing would prevent the operation of the convenience store on the property to be acquired. After the property was purchased, and while the property owner was in the process of obtaining the necessary permits to operate the convenience store, the City of Louisiana declared the parcel to be part of a residential area. Given the factual and legal situation of that case, this Court found the trial court erred in failing to hold the city equitably estopped from denying issuance of the building permit.[18]

Unlike the property owner in ***Casey's,*** Respondents never consulted Staff or reviewed any Commission decisions before they entered into their Territorial Agreement. No one ever assured them that their proposed course of conduct would be lawful. The fact is that Respondents acted in reliance upon nothing other than their own flawed interpretation of § 247.172, RSMo.

Finally, Pevely's assertion that Staff has engaged in affirmative misconduct in this matter is frankly outrageous. As the Commission's investigative and enforcement arm, Staff has done nothing more and nothing less than to act to enforce the law. Staff was under no obligation to discuss the matter with Respondents prior to filing its

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[16] ***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-2004-0163 (***Report & Order,*** iss'd Jan. 20, 2004), pp. 4-5.

[17] ***State ex rel. Casey's Gen. Stores, Inc. v. City of Louisiana,*** 734 S.W.3d 890 (Mo. App., E.D. 1987).

[18] ***JGJ Properties,*** *supra,* 303 S.W.3d at 652 (internal citations omitted).

Complaint.[19] The Respondents could have ended this case at any point simply by agreeing to seek the Commission's approval of their Territorial Agreement.

Due Process:

Respondent Pevely also raises creative, but meritless, Due Process arguments. Pevely complains that § 247.172, RSMo., is unconstitutionally vague. 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.[20] Staff denies that § 247.172, RSMo., is vague. A regular stream of other water districts and cities have brought their territorial agreements to the Commission for approval over the years; evidently they were able to understand it.[21]

A statute will not be found to be vague "if it is susceptible to any reasonable construction that will sustain it."[22] 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.[23] 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

[19] In fact, the attorney handling this matter last summer did have conversations with counsel for the District prior to filing the *Complaint.* At that time, Pevely had fired its attorney and had not yet retained new counsel, so there was no one Staff could talk to at Pevely. In its brief, Pevely asserts, "Staff has a constitutional duty to give notice to entities that their conduct violates the law before it seeks penalties for such conduct." Notably, no authority for this assertion is provided.

[20] ***Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue,*** 195 S.W.3d 410, 415 (Mo. banc 2006).

[21] Pevely insists that this "voluntary" behavior is meaningless.

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

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

> 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.

Pevely also complains of Staff's "recent interpretation." As noted previously, Staff's interpretation is the same as that stated by the Commission in a dozen orders over the last decade. The Respondents simply did not bother to consult the Staff or the Commission's several prior decisions or even to closely read Chapter 247, RSMo. Had they done so, they would have determined that *only* § 247.172, RSMo., covers the situation in which they found themselves.

Had the Respondents bothered to do the basic research prior to entering into their Territorial Agreement, they would have known full well that Commission approval was required. *Ignorantia legis non excusat.*

Conclusion

Contrary to Respondents' repeated assertions, the Commission has jurisdiction over their Territorial Agreement and has jurisdiction over this complaint case. This case is not moot; Respondents now want to walk away from their unapproved Territorial Agreement, an action that also requires Commission approval. The very case on which Pevely relies for its estoppel argument states unequivocally that estoppel will not lie to prevent an exercise of the State's police power, which this case most assuredly is.

Finally, there is no constitutional infirmity in either § 247.172, RSMo., or in Staff's enforcement of it.

The Respondents have repeatedly violated § 247.172, RSMo. For some reason, they have refused to rectify the situation by belatedly seeking Commission approval. That is their choice and no one else's. The Commission, a creature of statute, has no option but to enforce the law as enacted by the General Assembly.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will sustain its *Complaint*; and grant such other and further relief as the Commission deems just.

Respectfully submitted,

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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 **6th day of August, 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