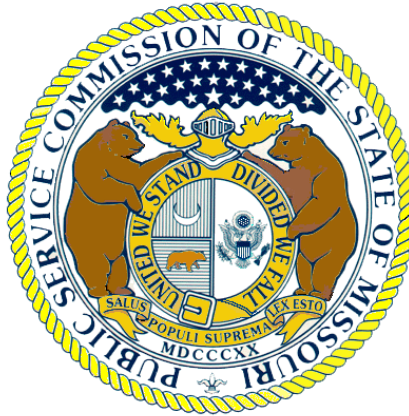


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



Staff of the
Missouri Public Service Commission,

Complainant,

v.

Consolidated Public Water Supply District
C-1 of Jefferson County, Missouri,
and
City of Pevely, Missouri,

Respondents.

File No. WC-2014-0018

REPORT AND ORDER

Issue Date: January 21, 2015

Effective Date: February 20, 2015

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and)
City of Pevely, Missouri,)
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Respondents.)

File No. WC-2014-0018

REPORT AND ORDER

APPEARANCES

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REGULATORY LAW JUDGE: Kim S. Burton

Procedural History

On July 19, 2013, the Staff of the Missouri Public Service Commission filed a complaint against Respondents Consolidated Public Water Supply District C-1 of Jefferson County, Missouri and the City of Pevely, Missouri (jointly, “Respondents”). Staff’s complaint asserted Respondents had violated § 247.172, RSMo.¹ On September 20, 2013, Respondents filed a Joint Motion to Dismiss. The Commission denied Respondent’s motion. On November 4, 2013, Respondents filed a Motion for Rehearing, which the Commission denied on November 26, 2013. Respondents then filed a writ of prohibition before the Missouri Western District Court of Appeals. The Commission suspended all actions on the complaint until after the court denied Respondents’ request. An evidentiary hearing was held on June 11, 2014. Post hearing briefs and reply briefs were filed by the parties.

General Findings of Fact

1. The Consolidated Public Water Supply District No. C-1 of Jefferson County, Missouri (“District”) is a public entity organized pursuant to the provisions of Chapter 247 of the Revised Statutes of Missouri.² District distributes potable water to customers within its corporate boundaries in Jefferson County.³ Also located in

¹ All statutory references are to the 2013 Cumulative Supplement of the Revised Statutes of Missouri, unless otherwise indicated.

² Ex. 5, p. 1.

³ § 247.020 RSMo. Affidavit James Busch; Schedule JAB-2-1.

Jefferson County, the City of Pevely (“Pevely”), a municipal corporation, provides its residents potable water as a municipal service.⁴

2. While disputing territorial parameters,⁵ on November 12, 2007, Pevely and District entered into a written agreement (“Agreement”).⁶ Captioned, “Territorial Agreement between the Consolidated Public Water Supply District C-1 of Jefferson County, Missouri and the City of Pevely, Missouri,” the Agreement detailed the geographical service areas for Respondents.⁷ As part of the Agreement, Respondents stipulated that any future development within the corporate boundaries of both Pevely and District would be served by the District unless District assigned to Pevely in writing its rights to serve the development.⁸ The Respondents intended for the Agreement to be a permanent determination as to which entity would provide water service in the area.⁹

3. Valle Creek Condominiums (“Valle Creek”) was explicitly identified in the Agreement as a development located within the corporate boundaries of both Pevely and the District that would be served by District.¹⁰ Valle Creek is operated by H&H Development Group, Inc. (“H&H”).

4. Although Valle Creek was within District’s service area, District’s water mains did not extend to Valle Creek. However, Pevely’s water mains did. On June 30,

⁴ Ex. 5, Pevely is a city of the fourth class; Affidavit James Busch; Schedule JAB-2-1.

⁵ Id. Respondents filed an action in St. Louis County Court, Case No. 23CV306-1286, but reached a settlement without requesting the court’s approval. Tr. P. (Attorney for District’s oral arguments).

⁶ Ex. 1, Sch. JAB-2.

⁷ Id.

⁸ Id., ¶6.

⁹ Id., ¶5.

¹⁰ Id at ¶3 of the Agreement.

2008, H&H entered into a written agreement (“Main Extension Agreement”) with District whereby H&H agreed to install at its expense a water main extension to connect Valle Creek to District’s system. Until the installation of the water main extension, Valle Creek would be connected to Pevely’s water service line, but billed through District’s water meters.¹¹

5. As part of a verbal agreement between Pevely and District, District billed H&H monthly for service to Valle Creek. District would then reimburse Pevely on a semi-annual basis for the cost of the water. This arrangement was meant to be a temporary arrangement until H&H constructed the water main extension. Under the terms of the Main Extension Agreement, if H&H failed to complete the main extension by March 1, 2009, then the water service line from Pevely would terminate and District’s water meters would be removed.¹²

6. Despite H&H never completing the main extension, from June 30, 2008 until October 1, 2012, Pevely continued to provide water to Valle Creek, which District would then bill on its meters. In August of 2012, the St. Louis County Circuit Court appointed John Holborow the receiver for the management and operations of H&H. After a territorial dispute arose between Pevely and District, on October 1, 2012, Pevely removed District’s meters from Valle Creek and replaced them with its own.¹³

7. In a letter to District, Pevely asserted that District was in violation of the terms of the Agreement by failing to either extend service to H&H or notify Pevely within

¹¹ Exhibit No. 3 - Affidavit of John Holborow.

¹² Exhibit No. 3 - Affidavit of John Holborow.

¹³ Affidavit of John F. Holborow, ¶ 11.

60 days of its lack of ability to provide such service.¹⁴ In the letter, dated August 28, 2012, Pevely's attorney assured District that, "Pevely will continue to honor the territorial agreement as we go forward."¹⁵

8. Pevely then billed H&H directly for the water service provided to Valle Creek.¹⁶ District responded in April 2013 by removing Pevely's meters from Valle Creek and installing District's meters. District then recommenced billing H&H for the water service.¹⁷ Also in April 2013, District sent a letter demanding H&H complete the main extension within 180 days or face termination.

9. Due to a lack of funds, H&H did not complete the water main extension.¹⁸

10. Respondents never sought the approval of the Commission before entering into the Agreement. In 2012, District filed suit in circuit court against Pevely for failure to comply with the terms of the Agreement. At no point did Respondents request the Commission resolve their dispute. The Staff of the Commission became aware of the Agreement and the dispute over service at Valle Creek in 2013.

CONCLUSIONS OF LAW

As a creature of statute, the Commission's authority is limited to what is specifically granted by statute or warranted by clear implication as necessary to implement a specifically granted power.¹⁹ Pursuant to § 386.390, a complaint may be made by the Commission setting forth "any act or thing done or omitted to be done by

¹⁴ Ex. 5, p. 134.

¹⁵ Ex. 5, p. 135 (Letter from attorney David Korum to District).

¹⁶ Id.

¹⁷ Affidavit of John F. Holborow, ¶13.

¹⁸ Affidavit of John F. Holborow, ¶¶ 8, 15.

¹⁹ *State ex rel. Int'l Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 686 (Mo.App. W.D. 1991).

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....” In Commission Rule 4 CSR 240-2.070(1), the Commission authorized the Commission’s Staff to file complaints on its behalf. Respondents are both corporations since Pevely is a “body corporate” as defined in § 79.010 and District is a “political corporation” as described in § 247.020. Therefore, the Commission has the authority to hear the Complaint brought by Staff against Respondents.

In its Complaint, Staff alleges that Respondents violated § 247.172. The statute grants the Commission jurisdiction to approve certain territorial agreements for water service that the Commission finds not to be detrimental to the public interest.

Section 247.172 states:

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.

...

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. ... 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. (Emphasis added.)

Respondents argue that § 247.172 does not apply to their Agreement and therefore the Commission does not have jurisdiction because a “water corporation subject to public service commission jurisdiction” is not a party to their territorial agreement. Respondents’ argument disregards a key part of the statutory language in § 247.172.1. The Commission interprets the use of “as between and among” in the subsection to identify the statute’s applicability to an agreement entered into by any two of the three recognized water distributors; not as a mandate of the participation of a Commission regulated water corporation before a territorial agreement is subject to the Commission’s jurisdiction. It is presumed that the legislature intended every word, clause, sentence or provision of a statute to have meaning.²⁰ Respondents’ interpretation of the statute presumes the inclusions of redundant language, which is not a reasonable construction.

²⁰ *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005).

When construing a statute it is appropriate to take into consideration statutes involving similar or related subject matter.²¹ Respondents fail to show how under the facts presented, a different statute should apply. Chapter 247 offers three available actions when a municipality and water district dispute their water supply rights within the same service territory. First, under § 247.160, the parties may reach an agreement for a water supply district to operate a waterworks system within an area annexed by the municipality or for the district to sell or convey its equipment in that annexed territory to the municipality. Although Respondents disagree with this interpretation, claiming instead that § 247.160 grants them the authority to reach a territorial agreement without seeking the Commission's approval; reviewing courts have previously interpreted § 247.160 as enabling a district to transfer its facilities in an annexed area to a city.²² That is not the situation that existed between Respondents. The Agreement does not involve the District leasing, contracting to sell, or conveying its equipment to Pevely. For this reason, § 247.160 does not apply.

Section 247.165 only applies to an agreement when part of a public water supply district's territory is annexed into the corporate limits of a municipality, but is not receiving water service at the time of the annexation. As Staff points out, no evidence was presented that the disputed area lacked service prior to its annexation.

Finally, § 247.170 provides for the detachment of an area of a public water supply district into the corporate limits of a city. A detachment would exclude the detached area from the district's service territory. No detachment action occurred

²¹ *Citizens Elec. Corp. v. Dir. of Dep't of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989).

²² *Public Water Supply Dist. No. 1 v. City of Poplar Bluff*, 12 S.W.3d 741 (Mo.App. S.D. 1999)(citing *Public Water Supply Dist. No. 16 v. City of Buckner*, 951 S.W.2d 743 (Mo.App. 1997).

between District and Pevely. Under the terms of the Agreement, Pevely agreed not to seek a detachment action without the written agreement of District.²³

The Agreement entered into by Respondents was a “territorial agreement” under § 247.172. District is a public water supply district and Pevely is a municipally owned utility that entered into a written territorial agreement designating the boundaries of their water service area. The Agreement designated the powers granted to District by Pevely to operate within Pevely’s boundaries and the powers granted to Pevely to operate outside of the municipality.

The Commission concludes that Respondents violated § 247.172 by: 1) failing to seek Commission approval of their territorial agreement before entering into it on November 12, 2007; 2) litigating the Agreement before a circuit court rather than seeking Commission resolution of the dispute; and, 3) failing to seek Commission approval of an amendment to their territorial agreement.

District argues that even if the Agreement is a territorial agreement as contemplated by § 247.172, the Commission does not have authority to require Respondents to file the agreement or to assess penalties against Respondents since the Agreement, as a matter of law, is void under the provisions of § 432.070. Section 432.070 states in pertinent part:

“No county, city, town, village...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....” District argues that *if* § 247.172 applies, since the Agreement was not submitted for Commission approval, it is not authorized by law and is therefore void

²³ Ex. 1, Sch. JAB-2, ¶ 6.

and unenforceable. District ignores one key point; the Commission is not attempting to enforce the Agreement, but rather, determine if Respondents violated the requirements of § 247.172. As previously stated, Respondents did violate multiple requirements of the statute, beginning with the adoption of the Agreement and continuing through the circuit court action to revoke the Agreement.

The Commission's authority under § 247.172.9 extends to conducting hearings on any complaint filed under the statute. The inclusion of this language would be meaningless if, as Respondents assert, failure to comply with the statute results in ensuing actions being beyond review. Furthermore, § 386.570 authorizes the Commission to seek penalties against "[a]ny corporation, person or public utility which violates or fails to comply with any provisions...of this or any other law....subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."

Section 386.570.2 states that every violation of a law is a separate and distinct offense, for which each day's continuing violation is deemed a separate and distinct offense.²⁴ For this reason, Respondents argument that the complaint is moot since Respondents are no longer attempting to enforce the Agreement is also unpersuasive. It ignores the duty of the Commission to insure safe and adequate service for the public and to determine if the violation of a law occurred.

Pevely failed to present facts supporting its equitable estoppel argument. In addition, while Pevely presents a Due Process argument by claiming § 247.172 is

²⁴ Pursuant to § 386.590, all penalties pursuant to Chapter 386 are cumulative.

unconstitutionally vague, the Commission is not a judicial body that can rule on a constitutional challenge.²⁵

THE COMMISSION ORDERS THAT:

1. Consolidated Public Water Supply District C-1 of Jefferson County, Missouri and the City of Pevely, Missouri shall submit a territorial agreement for Commission approval no later than February 27, 2015.

2. Should the Respondents fail to comply with Paragraph 1 of this order, the Commission's Staff shall notify the Commission in a timely manner, so that the Commission may consider further action.

3. This order shall be effective on February 20, 2015.

BY THE COMMISSION



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp CC., concur.

Burton, Regulatory Law Judge,

²⁵ See *Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524 (Mo. App. E.D. 1988). Since administrative agencies lack the jurisdiction to determine the constitutionality of statutes, the court found no logical reason to require a constitutional challenge to the validity of a statute before an administrative agency