

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

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

**STAFF'S REPLY TO RESPONDENTS' SUGGESTIONS IN SUPPORT OF ITS  
ANSWERS AND OBJECTIONS TO COMPLAINANT'S MOTION FOR  
SUMMARY DETERMINATION**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Reply to Respondents' Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination (Reply)* pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

**INTRODUCTION**

Respondents' individual *Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination* are substantively identical and therefore Staff will address them together in its *Reply*. Respondents allege that Staff is not entitled to summary determination because there are still genuine issues as to

material facts and because Staff has not shown that it is entitled to relief as a matter of law.

The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest<sup>1</sup>.

(Emphasis added). Respondents' alleged issues as to material facts are in fact issues of law or are immaterial facts. Staff has shown that it is entitled to relief as a matter of law and that resolving this case by summary determination is in the public interest.

### **THERE ARE NO MATERIAL FACTS WHICH PRECLUDE**

#### **SUMMARY DETERMINATION**

Respondents contend that four issues of fact are still in dispute: (1) whether an active territorial agreement existed between the Respondents; (2) whether the Respondents' agreement was a territorial agreement as that term is used in §247.172, RSMo.; (3) whether the Respondents' Territorial Agreement displaced competition between Respondents; and (4) whether H&H Development Group (H&H) or CPWSD C-1 requested Pevely to provide water service to Valle Creek Condominiums ("Valle Creek") for an interim period. All of these alleged issues of fact are actually either issues of law or are immaterial to the resolution of this case.

#### ***Was there an active Territorial Agreement between Respondents?***

Respondents allege that there is a material issue as to whether an active territorial agreement existed between them; however, having an active territorial agreement is not a requirement of §247.172, RSMo., and therefore that is not a material

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<sup>1</sup> Rule 4 CSR 240-2.117(1)(E).

issue of fact relevant to this case. What is relevant is that both Respondents have admitted that on November 12, 2007, they entered into an agreement with each other, which they titled *Territorial Agreement Between The Consolidated Public Water Supply District No C-1 Of Jefferson County, Missouri, And The City Of Pevely, Missouri*.<sup>2</sup> The term of this agreement is ten years.<sup>3</sup> This Territorial Agreement specifically designates the boundaries of each of the Respondents' water service areas and it enumerates any and all powers granted to each party by the other to provide service within one another's boundaries.<sup>4</sup> On November 1, 2012, CPWSD C-1 filed a complaint in circuit court when Pevely allegedly breached the terms of the Territorial Agreement by providing service directly to Valle Creek Condominiums.<sup>5</sup> Whether the Respondents were actively observing their Territorial Agreement at the time Staff filed its *Complaint* is not a fact that is either in dispute or material. In fact, the existence of this Territorial Agreement would likely not have come to the attention of Staff but for the Respondents' inability to observe its terms. Since there is no dispute that the Respondents were not observing their Territorial Agreement at the time Staff filed its *Complaint*, this issue should not preclude the Commission from granting summary determination.

***Is Respondents' Agreement a Territorial Agreement?***

Respondents allege that there is a genuine issue of material fact as to whether their agreement was a territorial agreement at all because their Territorial Agreement did not designate any and all powers granted to Pevely to provide water service in areas

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<sup>2</sup> CPWSD C-1 response to Staff Data Request No. 4; Pevely response to Staff data Request No. 38.

<sup>3</sup> *Affidavit of John Holborow*.

<sup>4</sup> *Territorial Agreement Between The Consolidated Public Water Supply District No C-1 Of Jefferson County, Missouri, And The City Of Pevely, Missouri*.

<sup>5</sup> CPWSD C-1 response to Staff Data Request No. 27; Pevely response to Staff Data Request No. 61.

beyond its corporate municipal boundaries. That Respondents' agreement does not grant any authority to Pevely to provide service outside its municipal boundaries is not at issue. Staff admits that the Respondents' agreement does not designate any powers granted to Pevely to provide water service beyond its municipal boundaries, although it does authorize Pevely to provide water service in designated areas within the District.<sup>6</sup> Additionally, Respondents' agreement prohibits Pevely from seeking to detach any additional territory within the boundaries of CPWSD C-1; from providing service to any other additional territory now within the boundaries of CPWSD C-1; from seeking to annex any territory of CPWSD C-1; and from holding itself out as an alternative service provider in any dissolution proceeding.<sup>7</sup> The only issue that is in dispute is whether §247.172, RSMo., requires a territorial agreement to designate powers to a municipality to provide service outside its corporate boundaries for the territorial agreement to be under the authority of the Commission. This is a question of law, not fact.

Section 247.172.2, RSMo., provides:

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.

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<sup>6</sup> Evidently, the boundaries of Pevely and the District overlap.

<sup>7</sup> *Territorial Agreement Between The Consolidated Public Water Supply District No C-1 Of Jefferson County, Missouri, And The City Of Pevely, Missouri*, ¶4. Exhibit No.1, Staff Data Request No. 5

Turning to the Respondents' agreement,<sup>8</sup> the introductory declarations include:

**WHEREAS**, City is presently providing potable water to areas within the District generally located within all or parts of subdivisions known as "Hunters Glen", "Tiara at the Abbey", and "Vinyards at Bushberg"; and

**WHEREAS**, the parties desire 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.

The Respondents' Territorial Agreement goes on to specify, in ¶ 1, that the parties will respect each other's existing corporate boundaries; in ¶ 2, that Pevely shall continue to provide service to the three developments within the District cited in the declarations; in ¶ 3, that Pevely shall not serve any other locations within the District except with the District's specific written permission; in ¶ 4, how Pevely will handle any future requests to provide service within the District; in ¶ 5, that the Territorial Agreement is permanent and unalterable; in ¶ 6, that Pevely will not take certain actions inimical to the District; in ¶ 7, that the term of the Territorial Agreement is ten years, unless sooner terminated by the District; in ¶ 8, that each party shall approve the Territorial Agreement by resolution or ordinance; in ¶ 9, that the Territorial Agreement is effective upon approval; in ¶ 10, that pending litigation shall be dismissed and claims released upon approval; in ¶ 11, the addresses to which notice shall be sent.

The Respondents' agreement is certainly a Territorial Agreement within the intendments of § 247.172, RSMo. It is entitled "Territorial Agreement"; it resolves disputes between the parties and allots to each a designated service territory; it authorizes Pevely to continue to serve certain designated areas within the District.

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<sup>8</sup> The Respondents' Territorial Agreement is attached to the *Affidavit of John Holborow*, filed by Staff in support of its *Motion for Summary Determination*.

The Direct Testimony of James A. Busch, filed herein by Staff, contains Mr. Busch's sworn testimony that the Respondents' agreement is a territorial agreement and similar to other such agreements with which he is familiar. As a matter of law, the Respondents' agreement is a Territorial Agreement.

***Does the Respondents' Agreement displace competition between them?***

Respondents' allege that there is a factual dispute regarding whether their Territorial Agreement displaced competition between them as required by §247.172, RSMo., because the Respondents stopped abiding by their Territorial Agreement in October 2012. Again, the issue is not whether Respondents were abiding by their Territorial Agreement at the time Staff filed its Complaint, but whether the Respondents had a territorial agreement that was not approved by the Commission and that displaced competition between them. The Respondents, by the terms of their Territorial Agreement, certainly *intended* to displace competition with each other for purposes of providing water service and to facilitate development within their shared territory.<sup>9</sup> The Respondents raise this issue as part of their effort to convince the Commission that their agreement was not a territorial agreement within the intendments of § 247.172, RSMo. This is a question of law, not fact. And, in the prior section of this pleading, Staff has shown that the Respondents' agreement certainly was a Territorial Agreement for the purposes of § 247.172, RSMo.

***Was there an Interim Agreement concerning service to Valle Creek?***

Respondent Pevely alleges that there is a factual dispute as to whether the request for Pevely to provide temporary water service to Valle Creek originated from

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<sup>9</sup> *Id.*

H&H or from CPWSD C-1. This fact is immaterial. What is material is that Respondent Pevely made a verbal agreement to provide Valle Creek with temporary water service.<sup>10</sup> Under the temporary service agreement, Pevely provided water to Valle Creek from June 30, 2008, until October 1, 2012. During that period, the meters on the lines by which Pevely served the Development belonged to CPWSD C-1, which billed H&H monthly for the water provided to Valle Creek and reimbursed Pevely semi-annually for the cost of the water.<sup>11</sup> Respondent Pevely states that the request for temporary water service was made by H&H rather than Respondent CPWSD C-1.<sup>12</sup> All three parties to this temporary service agreement benefitted from this agreement. H&H received the water it needed for Valle Creek, CPWSD C-1 received the revenues it billed H&H for the metered water sales, and Pevely received the payments from CPWSD C-1 for the water used by H&H. Whether H&H or CPWSD C-1 made the initial request to Pevely to provide temporary water service to Valle Creek is immaterial and should not preclude the Commission from granting summary determination.

### **STAFF IS ENTITLED TO RELIEF AS A MATTER OF LAW**

Staff is entitled to relief as a matter of law because Respondents violated the provisions of §247.172, RSMo., by entering in to a Territorial Agreement without seeking and obtaining Commission approval, by modifying or amending that Territorial Agreement without seeking and obtaining Commission approval, by taking their disputes to the Circuit Court rather than to this Commission, and by seeking relief from the Circuit Court that only this Commission can grant.

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<sup>10</sup> Staff's Motion for Summary Determination ¶20.

<sup>11</sup> Id at ¶21.

<sup>12</sup> Pevely's Response to Staff's Data Request No. 49.

Respondents allege that Staff has not shown that an active Territorial Agreement existed between them, and therefore Staff is not entitled to relief as a matter of law. However, having an active Territorial Agreement is not a requirement of §247.172, RSMo., and therefore should not preclude the Commission from granting Staff relief by summary determination. As stated in Staff's *Complaint* and *Motion for Summary Determination*, Staff is seeking relief for Respondents' past violations of §247.172, RSMo., not for their ongoing violations. In fact, the existence of this Territorial Agreement would likely not have come to the attention of Staff if not for the Respondents' inability to observe its terms. Since there is no requirement of having an active Territorial Agreement in §247.172, RSMo., and Staff is seeking relief only for past violations, this issue should not preclude the Commission from determining that Staff is entitled to relief as a matter of law and granting summary determination. Additionally, the term of the Respondents' Territorial Agreement is ten years, starting in November 2007, and there is nothing in the record suggesting that it has been terminated.<sup>13</sup>

Respondents allege that the Commission lacks jurisdiction because their Territorial Agreement does not include as a party a water corporation subject to the Commission's authority. The Commission has already determined this argument against the Respondents.<sup>14</sup> The term "as between and among" indicates that territorial agreements under the jurisdiction of the Commission may involve any combination of two or more municipalities, public water supply districts, and regulated water

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<sup>13</sup> *Affidavit of John Holborow.*

<sup>14</sup> *Order Denying Motion to Dismiss*, issued October 23, 2013; *Order Denying Motion for Reconsideration*, issued November 26, 2013.



corporations. “Between” implies two choices; “among” implies more than two choices. Using both terms allows for combinations of two and also more than two.

Respondents allege that the Commission lacks jurisdiction in this case because the Commission lacks jurisdiction to hear complaints involving non-approved territorial agreements. Perhaps Respondents have not read § 247.172.9, RSMo., “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.” This subsection does not refer to Commission-approved territorial agreements. In any event, 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.

Respondents allege that the Commission lacks jurisdiction in this case because their Territorial Agreement does not designate any and all powers granted to Pevely to provide service in areas beyond its corporate municipal boundaries. Respondents’ misunderstand the requirement of the statute. Section 247.172, RSMo., requires that if any powers are granted to a municipality to operate outside of its corporate boundaries then all of those granted powers shall be designated in the territorial agreement.

Omitting any of the powers granted to a municipality to operate outside of its corporate boundaries would be grounds for the Commission to disapprove a territorial agreement. However, the statute does not require that some powers be granted to a municipality to operate outside of its corporate boundaries as a prerequisite to Commission jurisdiction over the territorial agreement. There is no dispute that the Respondents' Territorial Agreement does not confer any powers to Pevely to operate outside its corporate boundaries, although it *does* authorize Pevely to provide service within the District's boundaries in certain specified instances. The Territorial Agreement is compliant with §247.172, RSMo., in this regard. The Commission has jurisdiction over the Respondents' Territorial Agreement because it authorizes Pevely to provide service within the District; and the Commission would have jurisdiction over the Respondents' Territorial Agreement even if it did not authorize Pevely to provide service within the District.

Respondents allege that the Commission lacks jurisdiction because the Territorial Agreement did not displace competition between them as required by § 247.172, RSMo. However, by the express terms of their Territorial Agreement, the Respondents certainly *intended* to displace competition with each other for purposes of providing water service and facilitating development within their shared territory.<sup>15</sup> If not for the Territorial Agreement, H&H could have negotiated with both of the Respondents for water service to Valle Creek and chosen the one that offered the best deal. However, because the Territorial Agreement states that Valle Creek shall be served by CPWSD C-1, Pevely was obligated to notify CPWSD C-1 of H&H's request for water

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<sup>15</sup> *Territorial Agreement Between The Consolidated Public Water Supply District No C-1 Of Jefferson County, Missouri, And The City Of Pevely, Missouri*, ¶4, Exhibit No.1, Staff Data Request No. 5

service and to direct H&H to the offices of CPWSD C-1, and it did so.<sup>16</sup> The Respondents displaced competition by the terms of their Territorial Agreement and by their actions in compliance with it. Because the Respondents' Territorial Agreement displaced competition for water service between them, the Commission has jurisdiction over the Territorial Agreement under §247.172, RSMo. The Respondents violated the provisions of §247.172, RSMo., by entering in to their Territorial Agreement without seeking and obtaining Commission approval; by modifying or amending that Territorial Agreement without seeking and obtaining Commission approval; by taking their disputes to the Circuit Court rather than to this Commission; and by seeking relief from the Circuit Court that only this Commission can grant. For these reasons, Staff is entitled to relief by summary determination as a matter of law.

#### **SUMMARY DETERMINATION IS IN THE PUBLIC INTEREST**

Resolution of this case by summary determination is in the public interest because it will conserve scarce resources, administrative, fiscal and human, for the Commission and for all the parties.<sup>17</sup> Evidentiary hearings are lengthy and expensive and the Commission would gain nothing thereby that it cannot get from holding an oral argument on Staff's motion and Respondents' opposition to that motion as is contemplated by Rule 4 CSR 240-2.117(1)(G).

#### **CONCLUSION**

Staff suggests that its *Reply*, motion, affidavits, testimony, and suggestions demonstrate that there is no dispute of material fact, that Staff is entitled to relief as a matter of law and that the public interest demands that Staff's complaint be sustained.

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<sup>16</sup> *Korum Letter, Exhibit No. 3, Staff Data Request No. 23.*

<sup>17</sup> See ***Smith v. Aquila, Inc.***, 229 S.W.3d 106, 124 (Mo. App., W.D 2007).

**WHEREFORE,** Staff prays that the Commission will grant summary determination of its *Complaint* filed herein and enter its order finding (1) that Respondents CPWSD C-1 and Pevely are a public water supply district and a municipally-owned water utility, respectively; (2) that Respondents CPWSD C-1 and Pevely violated § 247.172, .4 and .5, RSMo., by entering into a Territorial Agreement without seeking and obtaining the approval of this Commission; (3) that Respondents CPWSD C-1 and Pevely have further violated § 247.172.7, RSMo., by seeking adjudication of complaints concerning their Territorial Agreement in the circuit court rather than before this Commission; (4) that Respondents CPWSD C-1 and Pevely have further violated § 247.172.7, RSMo., by requesting that the circuit court rather than this Commission revoke their Territorial Agreement; (5) that the Commission authorize its General Counsel to seek penalties against Respondents in circuit court pursuant to §§ 386.590 and 386.600, RSMo.; and granting such other and further relief as the Commission deems just.

Respectfully submitted,

**/s/ Alexander Antal**

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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/ Alexander Antal**