

**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 CITY OF PEVELY'S ANSWERS AND OBJECTIONS TO
COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION**

COMES NOW Respondent, City of Pevely, Missouri ("Pevely"), and for its *Answers and Objections to Complainant's Motion for Summary Determination*, pursuant to 4 CSR 240-2.117, states as follows:

INTRODUCTION

Pevely objects to *Staff's Motion for Summary Determination* because it does not comply with either the Commission's rules or the Rules of Civil Procedure. The requirements for motions for summary determination are set forth in 4 CSR 240-2.117(1)(B), which provides:

Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted and testimony, discovery, or affidavits not previously filed that are relied on in the motion....

(emphasis added). Similarly, Missouri Rule of Civil Procedure 74.04(c)(1) provides:

(1) Motions for Summary Judgment. A motion for summary judgment shall summarily state the legal basis for the motion.

A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts....

...

Movant shall file a separate legal memorandum explaining why summary judgment should be granted.

(emphasis added).

In this case, the enumerated paragraphs of *Staff's Motion for Summary Determination* include both statements of facts as well as legal arguments, in violation of these rules. By non-exhaustive example, paragraphs 10-12 contain statements of law which are in dispute.¹

In addition, discovery is not closed in this case.² Despite this, Pevely has attempted to respond to each asserted statement of undisputed material fact below, as required by 4 CSR 240-2.117(1)(C).

I. RESPONSES TO STAFF'S FACTUAL STATEMENTS

Pursuant to Commission Rule 4 CSR 240-2.117(1)(C), Pevely provides the following response to the Staff of the Missouri Public Service Commission's ("Staff") factual statements:

1. Pevely admits that Staff filed its Complaint on July 19, 2013, asserting that Respondents entered into territorial agreement in 2007 without seeking the Commission's approval, in violation of § 247.172, RSMo.³ Pevely denies that Staff's prayers for relief request

¹ Because Staff has conflated its legal argument with its statement of material facts, the Commission should strike *Staff's Motion for Summary Determination*.

² Pevely understands why Staff needed to file its *Motion for Summary Determination* when it did in order to comply with the 60-day rule set forth in 4 CSR 240-2.11(1)(A). Nevertheless, discovery is ongoing and the facts are not settled.

³ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri ("RSMO"), revision of 2000, as amended and cumulatively supplemented.

that the Commission authorize its General Counsel to seek penalties in circuit court only if Respondents do not seek approval of their territorial agreement.⁴

2. Pevely admits the statements set forth in Paragraph 2.

3. Pevely admits the statements set forth in Paragraph 3.

4. Pevely admits the statements set forth in Paragraph 4.

5. Pevely denies that there are no genuine issues as to the material facts set forth in ¶¶ 6 through 27 of *Staff's Motion for Summary Determination*, as supported by *Pevely's Responses to Staff's Data Requests*, *Staff's Responses to Pevely's First Set of DRs*, and the *Affidavit of Terry Thomas* which is attached hereto and incorporated herein by reference as authorized by Rule 4 CSR 240-2.117(1)(C).

6. Pevely admits the statements set forth in Paragraph 6.

7. Pevely admits the statements set forth in Paragraph 7.

8. Pevely is without sufficient knowledge or information sufficient to form a belief as to the statements set forth in Paragraph 8, and therefore denies Paragraph 8.

9. Pevely admits the statements set forth in Paragraph 9.

10. Pevely denies the statements set forth in Paragraph 10. For the reasons set forth in Respondent's *Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted*, *Memorandum in Support of Their Motion to Dismiss*, *Joint Reply to Staff's Response to Motion to Dismiss*, and *Petition for Rehearing Regarding Order Denying Motion to Dismiss*, which are incorporated herein by reference, the Commission does not have authority to hear any complaint involving the alleged territorial agreement between Respondents. In addition, as set forth more fully in *Pevely's Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination*, Staff has failed to prove that there was an

⁴ See *Staff's Complaint*, Count I prayer (pg. 3); Count II prayer (pg. 4); Count III prayer (pg. 5).

active agreement between the Respondents, much less one that constitutes a “territorial agreement” as that term is used in § 247.172 such that the Commission may hear a complaint regarding that alleged agreement.⁵

11. Pevely denies the statements set forth in Paragraph 11. For the reasons set forth in Respondent’s *Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, Memorandum in Support of Their Motion to Dismiss, Joint Reply to Staff’s Response to Motion to Dismiss*, and *Petition for Rehearing Regarding Order Denying Motion to Dismiss*, which are incorporated herein by reference, the Commission does not have authority to hear any complaint involving the alleged territorial agreement between Respondents. In addition, as set forth more fully in *Pevely’s Suggestions in Support of its Answers and Objections to Complainant’s Motion for Summary Determination*, Staff has failed to prove that there was an active agreement between the Respondents, much less one that constitutes a “territorial agreement” as that term is used in § 247.172 such that the Commission may hear a complaint regarding that alleged agreement.⁶

12. Pevely denies the statements set forth in Paragraph 12. For the reasons set forth in Respondent’s *Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, Memorandum in Support of Their Motion to Dismiss, Joint Reply to Staff’s Response to Motion to Dismiss*, and *Petition for Rehearing Regarding Order Denying Motion to Dismiss*, which are incorporated herein by reference, the Commission does not have authority to approve the alleged territorial agreement between Respondents. In addition, as set forth more fully in *Pevely’s Suggestions in Support of its Answers and Objections to Complainant’s Motion for*

⁵ *Thomas Affidavit* ¶¶ 6-12; *Pevely’s Response to Staff’s Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

⁶ *Thomas Affidavit* ¶¶ 6-12; *Pevely’s Response to Staff’s Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

Summary Determination, Staff has failed to prove that there was an active agreement between the Respondents, much less one that constitutes a “territorial agreement” as that term is used in § 247.172 such that the Commission may have any authority to approve that alleged agreement.⁷ Finally, Mo. Rev. Stat. §§ 247.160 , 247.165, and 247.170, all contemplate court approval of agreements, including the approval of territorial agreements between public water districts and municipalities in Mo. Rev. Stat. § 247.165; accordingly, the Commission does not have exclusive authority to approve territorial agreements.

13. Pevely admits that Respondents provided the answers cited by Staff, but denies that Staff has proven that there was an active agreement between the Respondents, much less one that constitutes a “territorial agreement” as that term is used in § 247.172.⁸ As set forth more fully in *Pevely’s Suggestions in Support of its Answers and Objections to Complainant’s Motion for Summary Determination*, the agreement does not specifically designate any and all powers granted to Pevely to operate beyond its corporate municipal boundaries nor did it displace competition, as required by § 247.172. In fact, Pevely does not provide water service beyond its corporate municipal boundaries.⁹ And, the Respondents have not been abiding the agreement but rather, have been competing with one another.¹⁰ Staff admits as much in its statement providing that the competition between Respondents has been expensive and prolonged, among other things.¹¹

14. Pevely denies the statements set forth in paragraph 14. As set forth more fully in *Pevely’s Suggestions in Support of its Answers and Objections to Complainant’s Motion for*

⁷ *Thomas Affidavit* ¶¶ 6-12; *Pevely’s Response to Staff’s Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

⁸ *Thomas Affidavit* ¶¶ 6-12; *Pevely’s Response to Staff’s Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

⁹ *Thomas Affidavit* ¶ 7.

¹⁰ *Thomas Affidavit* ¶ 8-12; *Pevely’s Response to Staff’s Data Request No. 49-54, 56-60, 63, 66; Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

¹¹ *Staff’s Suggestions in Support of its Motion for Summary Determination*, pg. 6.

Summary Determination, Pevely denies that Staff has proven that there was an active agreement between the Respondents, much less one that constitutes a “territorial agreement” as that term is used in § 247.172.¹² The agreement does not specifically designate any and all powers granted to Pevely to operate beyond its corporate municipal boundaries nor does it displace competition, as required by § 247.172. In fact, Pevely does not provide water services beyond its corporate boundaries, and Valle Creek Condominiums (“Valle Creek”) is located within the boundaries of Pevely.¹³ Moreover, the Respondents have not been abiding by the agreement but rather, have been competing with one another.¹⁴ Staff admits as much in its statement providing that the competition between Respondents has been expensive and prolonged, among other things.¹⁵

15. Pevely admits that it never sought or obtained approval by this Commission of the alleged territorial agreement. For the reasons set forth in Respondent’s *Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted*, *Memorandum in Support of Their Motion to Dismiss*, *Joint Reply to Staff’s Response to Motion to Dismiss*, and *Petition for Rehearing Regarding Order Denying Motion to Dismiss*, which are incorporated herein by reference, the Commission does not have authority to approve the alleged territorial agreement between Respondents. If Pevely thought that § 247.172 applied to the agreement at issue such that its conduct would be considered to violate the law, then it would have sought the Commission’s approval.¹⁶ Pevely received no notice from the Commission prior to these proceedings that it intended to enforce the provisions of § 247.172 against the agreement at

¹² *Thomas Affidavit* ¶¶ 6-12; *Pevely’s Response to Staff’s Data Request No. 38-41, 49-54, 56-60, 63, 66*; *Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

¹³ *Thomas Affidavit* ¶¶ 6-7.

¹⁴ *Thomas Affidavit* ¶¶ 8-12; *Pevely’s Response to Staff’s Data Request No. 49-54, 56-60, 63, 66*; *Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11; *Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

¹⁵ *Staff’s Suggestions in Support of its Motion for Summary Determination*, pg. 6.

¹⁶ *Thomas Affidavit* ¶ 4.

issue.¹⁷ In fact, Staff has admitted that this case is unlike any other proceeding involving “territorial agreements” ever before the Commission.¹⁸

In addition, as set forth more fully in Pevely’s *Suggestions in Support of its Answers and Objections to Complainant’s Motion for Summary Determination*, Staff has failed to prove that there was an active agreement between the Respondents, much less one that constitutes a “territorial agreement” as that term is used in § 247.172 such that the Commission may have any authority to approve that alleged agreement.¹⁹

16. Pevely admits that Valle Creek is located within the territorial boundaries of the Consolidated Public Water Supply District C-1 of Jefferson County, Missouri (the “District”).²⁰ However, Valle Creek also lies within the municipal boundaries of Pevely.²¹ The District’s infrastructure does not extend to Valle Creek, resulting in the District being unable to compete to provide water services to Valle Creek.²² Pevely’s water mains do extend to Valle Creek, which allowed it to provide water services to Valle Creek upon H & H Development Group, Inc.’s (“H & H”) request.²³

17. Upon information and belief, Pevely admits that the District and H & H entered into an agreement providing for H & H’s connection to the District’s water system.²⁴ Except as so specifically admitted, Pevely is without knowledge or information sufficient to form a belief as to the truth of Paragraph 17, and therefore, denies Paragraph 17.

18. Pevely is without sufficient knowledge or information sufficient to form a belief

¹⁷ Thomas Affidavit ¶ 5.

¹⁸ See Staff’s Reply to Respondent’s Denominated Affirmative Defenses in Support of its Motion for Summary Determination, pg. 4.

¹⁹ Thomas Affidavit ¶¶ 6-12; Pevely’s Response to Staff’s Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely’s Answer ¶ 11; District’s Answer ¶ 11; Staff’s Responses to Pevely’s First Set of DRs (Holborow letter).

²⁰ Pevely’s Response to Staff’s Data Request No.41.

²¹ Thomas Affidavit ¶ 6.

²² Thomas Affidavit ¶ 8; Pevely’s Response to Staff’s Data Request No. 46-48.

²³ Thomas Affidavit ¶ 10; Pevely’s Response to Staff’s Data Request No. 49.

²⁴ Pevely’s Response to Staff’s Data Request No.46.

as to the statements set forth in Paragraph 18 and, therefore, denies Paragraph 18.

19. Pevely admits that H & H never connected to the District's water system.²⁵ Except as so specifically admitted, Pevely is without knowledge or information sufficient to form a belief as to the truth of Paragraph 19, and therefore, denies Paragraph 19.

20. At the request of H & H, Pevely agreed to provide water to Valle Creek for a period of six months.²⁶ Pevely would have directly provided water to Valle Creek if H & H had not entered into an agreement with the District to connect to the District's water system.²⁷ To the extent that paragraph 20 alleges that Respondents amended their agreement, Pevely denies that this agreement was a modification of an alleged "territorial agreement" subject to § 247.172.²⁸ Except as so specifically admitted, Pevely is without knowledge or information sufficient to form a belief as to the truth of Paragraph 20, and therefore, denies Paragraph 20.

21. Pevely admits that it provided water to Valle Creek beyond the 6 month period because it had not connected to the District's water system and Pevely wanted to ensure that Valle Creek received water.²⁹ Pevely denies that its provision of water was a modification of an alleged "territorial agreement" subject to § 247.172.³⁰ Except as so specifically admitted, Pevely is without knowledge or information sufficient to form a belief as to the truth of Paragraph 21, and therefore, denies Paragraph 21.

22. Pevely denies that a "territorial dispute" arose between Respondents as contemplated by § 247.172. For the reasons set forth in Respondent's *Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, Memorandum in Support of*

²⁵ Thomas Affidavit ¶ 11; Pevely's Response to Staff's Data Request No. 48.

²⁶ Thomas Affidavit ¶ 9; Pevely's Response to Staff's Data Request No. 49.

²⁷ Thomas Affidavit ¶ 9; Pevely's Response to Staff's Data Request No. 49.

²⁸ Thomas Affidavit ¶¶ 6-12; Pevely's Response to Staff's Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely's Answer ¶ 11; District's Answer ¶ 11; Staff's Responses to Pevely's First Set of DRs (Holborow letter).

²⁹ Thomas Affidavit ¶ 11; Pevely's Response to Staff's Data Request No. 49-52

³⁰ Thomas Affidavit ¶¶ 6-12; Pevely's Response to Staff's Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely's Answer ¶ 11; District's Answer ¶ 11; Staff's Responses to Pevely's First Set of DRs (Holborow letter).

Their Motion to Dismiss, Joint Reply to Staff's Response to Motion to Dismiss, and Petition for Rehearing Regarding Order Denying Motion to Dismiss, which are incorporated herein by reference, the Commission does not have authority to hear any complaint involving the alleged territorial agreement between Respondents. In addition, as set forth more fully in Pevely's *Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination*, Staff has failed to prove that there was an active agreement between the Respondents, much less one that constitutes a "territorial agreement" as that term is used in § 247.172 such that the Commission may hear a complaint regarding that alleged agreement.³¹

Pevely admits that its agents or employees removed the meters of the District from Valle Creek and installed Pevely's meters at the property and thereafter billed the owner of Valle Creek for water service, although Pevely is unsure of the date of this occurrence.³²

23. Pevely admits that the District filed a lawsuit, which speaks for itself.³³ Except as so specifically admitted, Pevely is without knowledge or information sufficient to form a belief as to the truth of Paragraph 23, and therefore, denies Paragraph 23.

24. Pevely denies the statements set forth in Paragraph 24. For the reasons set forth in Respondent's *Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, Memorandum in Support of Their Motion to Dismiss, Joint Reply to Staff's Response to Motion to Dismiss, and Petition for Rehearing Regarding Order Denying Motion to Dismiss*, which are incorporated herein by reference, the Commission does not have authority to hear any complaint involving the alleged territorial agreement between Respondents. In addition, as set forth more fully in Pevely's *Suggestions in Support of its Answers and Objections to*

³¹ *Thomas Affidavit* ¶¶ 6-12; *Pevely's Response to Staff's Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely's Answer* ¶ 11; *District's Answer* ¶ 11; *Staff's Responses to Pevely's First Set of DRs* (Holborow letter).

³² *Pevely's Response to Staff's Data Request No. 60.*

³³ *Pevely's Response to Staff's Data Request No. 61.*

Complainant's Motion for Summary Determination, Staff has failed to prove that there was an active agreement between the Respondents, much less one that constitutes a "territorial agreement" as that term is used in § 247.172 such that the Commission may hear a complaint regarding that alleged agreement.³⁴

25. Pevely admits that sometime in April 2013, agents or employees of the District removed Pevely's meters from Valle Creek, replaced them with the District's meters, and thereafter billed H & H directly for water service.³⁵

26. Pevely is without sufficient knowledge or information sufficient to form a belief as to the statements set forth in Paragraph 26 and, therefore, denies Paragraph 26.

27. Pevely is without sufficient knowledge or information sufficient to form a belief as to the statements set forth in Paragraph 27, and therefore, denies Paragraph 27. Pevely has advised the receiver of H & H that it is willing to meet the future water service needs of Valle Creek.³⁶

28. Pevely has responded to *Staff's Reply to Respondents' Denominated Affirmative Defenses in Support of its Motion for Summary Determination* in a separate document filed simultaneously herewith.

WHEREFORE, the City of Pevely prays that the Commission will deny Staff's *Motion for Summary Determination*, and grant such other and further relief as the Commission deems just.

³⁴ *Thomas Affidavit* ¶¶ 6-12; *Pevely's Response to Staff's Data Request No. 38-41, 49-54, 56-60, 63, 66; Pevely's Answer* ¶ 11; *District's Answer* ¶ 11; *Staff's Responses to Pevely's First Set of DRs* (Holborow letter).

³⁵ *Pevely's Response to Staff's Data Request No. 63*.

³⁶ *Thomas Affidavit* ¶ 12; *Pevely's Response to Staff's Data Request No. 66*.

Respectfully submitted,

/s/ Terrance J. Good

Terrance J. Good

#25336

LASHLY & BAER, P.C.

714 Locust Street

St. Louis, Missouri 63101

(314) 621-2939

(314) 621-6844/Fax

tjgood@lashlybaer.com

Attorneys for Respondent City of Pevely, Missouri

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed by U.S. Mail on this 25th day of April, 2014, unless served electronically via EFIS to:

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

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

Bianca L. Eden
WEGMANN, STEWART, TESREAU,
SHERMAN, 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

/s/ Terrance J. Good