BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	**File No. WC-2014-0018**
Consolidated Public Water Supply District, C-1 of Jefferson County, Missouri,	)	
and	)	
City of Pevely, Missouri,	)	
Respondents.	)	

RESPONDENT CITY OF PEVELY'S INITIAL POST-HEARING BRIEF

COMES NOW Respondent, City of Pevely, Missouri ("Pevely"), and for its *Initial Post-Hearing Brief* pursuant to 4 CSR 240-2.140, states as follows:

INTRODUCTION

This case is about an agreement entered into almost seven years ago titled "territorial agreement" that is not being followed, and the Staff of the Missouri Public Service Commission's ("Staff") attempt to expand the Public Service Commission's ("Commission") authority and thereby force the parties to submit to the Commission for its approval an agreement it neither follows nor wants to have in effect. The matter is moot.

In addition, Staff has admitted that it has never before taken affirmative action to assert jurisdiction over an alleged territorial agreement like it has done in the present case. However, the agreement in question is itself outside the scope of the statute, and the relief sought by Staff not afforded by the statute. Staff seeks to have the Commission determine that Respondents' unapproved agreement violates the law; to force the Respondents to submit that agreement to the

Commission for its approval even if they do not want it; to then force them to abide by that agreement; or to force them to create a new agreement or to seek an order ending the agreement they did not want at the time of submittal. Nothing in the statute provides for that relief. Instead, if the agreement should have been submitted and it was not, then the remedy is that provided by the statute's plain language – it is ineffective. That is consistent with the purpose of regulating territorial agreements in the first place – to regulate the displacement of competition. If Pevely and the District later decide to operate under a territorial agreement that qualifies for the Commission's jurisdiction, then the issue of submission of that agreement to the Commission is ripe at that time.

Staff seeks with this case to expand the authority of the Commission to one it simply does not have under Missouri law. And, the statute under which Staff seeks to do so is vague, has never before been interpreted to apply in this instance, and does not authorize the relief sought. The Commission should reject Staff's attempt.

FACTS

In 2007, Pevely and the Consolidated Public Water Supply District C-1 of Jefferson County, Missouri (the "District") entered into an agreement for the provision of water that they titled "territorial agreement" (the "Agreement").[1] Respondents have denied that since that time, they have acted upon that Agreement as determining which water service provider customers must use for their water service.[2] In fact, not abiding by that Agreement and determining which water service provider customers must use for their water service led to a lawsuit between Respondents in 2012;[3] the Respondents removal and replacement of each others' water meters;[4]

[1] *Evid. Hearing Ex.* 5, pg. 76-81.
[2] *Pevely's Answer,* ¶ 11; *District's Answer* ¶ 11.
[3] *Evid. Hearing Ex.* 5, pg. 109-137. The lawsuit brought by the District was later dismissed.
[4] *Evid. Hearing Ex.* 5, pg. 108, 138.

and the factual basis for Staff's Complaint against Respondents in this very action. To be sure, Staff has not cited one instance where competition was actually impeded between Respondents on account of the Agreement.

The specific facts giving rise to Staff's Complaint against Respondents stem from the events occurring at Valle Creek Condominiums ("Valle Creek"). Valle Creek lies in the territorial boundaries of the District,[5] as well as the municipal boundaries of Pevely.[6] The District lacked the infrastructure to serve the area in which Valle Creek is located,[7] but Pevely could.[8] Upon information and belief, the District and the developer of Valle Creek, H & H Development Company, Inc. ("H & H"), entered into an agreement providing for H & H's connection to the District's water system, clearly evincing competition.[9] At the request of H & H, Pevely provided water to Valle Creek for a period of 6 months, as it had the water mains to do so.[10] Notably, 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.[11]

That initial period passed and Valle Creek had still not connected to the District's water system, so Pevely continued to provide water to Valle Creek.[12] At the threat of water being denied to Valle Creek by the District, Pevely willingly continued to provide water directly to Valle Creek and requested that the District's meters be removed and Pevely's meters installed.[13]

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[5] *Evid. Hearing Ex.* 5, pg. 83.
[6] *Evid. Hearing Ex.* 2, pg. 2, lines 7-8.
[7] *Evid. Hearing Ex.* 2, pg. 2, lines 8-9.
[8] *Evid. Hearing Ex.* 2, pg. 2, lines 12-13.
[9] *Evid. Hearing Ex.* 5, pg. 88.
[10] *Evid. Hearing Ex.* 2, pg. 2, lines 11-12.
[11] *Evid. Hearing Ex.* 2, pg. 2, lines 13-15.
[12] *Evid. Hearing Ex.* 2, pg. 2, lines 15-17.
[13] *Evid. Hearing Ex.* 5, pg. 97.

H & H eventually failed as a development, resulting in a court appointing a receiver, John F. Holborrow ("Mr. Holborrow"), for the company.[14] Mr. Holborrow demonstrated an intent not to connect to the District's water system and a desire that Pevely continue to provide water service to Valle Creek; Pevely was again willing to do so.[15] Accordingly, Pevely's former attorney requested that the District remove its meters from Valle Creek.[16] Thereafter, Pevely removed the District's meters, installed Pevely's meters at the property, and directly billed the owner of Valle Creek for water service.[17] This led to the District's filing suit against Pevely in November 2012.[18] Then, in April 2013, the District entered onto the property of Valle Creek, removed Pevely's meters, replaced them with meters belonging to the District, and thereafter billed the receiver of Valle Creek.[19] Pevely has advised Mr. Holborrow that it is willing to meet the future water service needs of Valle Creek.[20] Nevertheless, Mr. Holborrow submitted a letter to the Commission, describing the occurrences between Pevely and the District relating to Valle Creek and inquiring as to whether the District had the right to cut service to Valle Creek.[21] Notably, Mr. Holborrow's letter does not contain a complaint about the Agreement, but rather, only inquires as to the ability of the District to cut service to Valle Creek.

Staff filed its Complaint against Respondents primarily because they never submitted their Agreement – an agreement that is not being followed and has not displaced competition – to the Commission for its approval.[22] However, if Pevely thought that it was required to submit the Agreement to the Commission pursuant to Missouri Revised Statutes § 247.172 such that its

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[14] *Evid. Hearing Ex.* 5, pg. 99.
[15] *Evid. Hearing Ex.* 5, pg. 100.
[16] *Evid. Hearing Ex.* 5, pg. 100.
[17] *Evid. Hearing Ex.* 5, pg. 108.
[18] *Evid. Hearing Ex.* 5, pg. 109-137. That lawsuit was dismissed without prejudice. See *Evid. Hearing Tr.*, pg. 57, lines 15-22.
[19] *Evid. Hearing Ex.* 5, pg. 138
[20] *Evid. Hearing Ex.* 2, pg. 2, lines 17-18.
[21] *Pevely's Ex.* O, pg. 3-4.
[22] *Evid. Hearing Ex.* 5, pg. 10, 82.

conduct would be considered to violate that law, then it would have sought the Commission's approval of the Agreement.[23] Pevely received no notice from the Commission prior to these proceedings that it intended to enforce the provisions of § 247.172 against the Agreement.[24]

Pevely continues to be willing to provide water services to those within its municipal boundaries.[25]

ARGUMENT

With this case, Staff is stretching the language of § 247.172 to apply to an agreement over which the Commission has no jurisdiction and which Respondents themselves are not following. Staff is also stretching the language of § 247.172 to provide a basis for the Commission to order Respondents to submit their Agreement to the Commission for its approval and regulation and to find that Respondents have committed certain violations of law, when the statute expressly provides that unapproved agreements are simply ineffective. Finally, Staff also asks that the Commission find that Respondents have violated a vague statute, which has never before been interpreted to apply in this instance and the lack of which Respondents relied, and for the award of penalties based on such violation. Staff's actions and requested relief are not authorized by Missouri law.

In addition to the arguments set forth below, Pevely hereby incorporates by reference the arguments made by the District in its initial post-hearing brief.

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[23] *Evid. Hearing Ex.* 2, pg. 1, lines 19-21. All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri, revision of 2000, as amended and cumulatively supplemented.
[24] *Evid. Hearing Ex.* 2, pg. 1, lines 21-23.
[25] *Evid. Hearing Ex.* 2, pg. 1, lines 24-25.

I. The Commission lacks the authority to exercise jurisdiction over this Agreement and to grant the relief that Staff requests.

The statute at issue in this case, § 247.172, provides:

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 by 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 the 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 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 property 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.... The commission may approve the application if it determines that approval of the territorial agreement in total is not detrimental to the public interest....
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 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.

...

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.[26]

Based on Staff's assertion that Respondents have violated this statute, Staff has requested that the Commission authorize its General Counsel to seek penalties against Respondents in circuit court pursuant to §§ 386.590 and 386.600. Penal statutes must be strictly and literally construed, and can be given no broader application than is warranted by the statutes' plain and unambiguous terms; these rules of statutory construction apply to civil penalties.[27] For example, in Schwab v. National Dealers Warranty, Inc., the court considered the definition of "commission" as set forth in § 407.911 for the imposition of statutory penalties under § 407.913.[28] In rejecting the employees' argument that the definition of "commission" included their payment structure, the court looked to the language of the statute and reasoned that statutes imposing civil penalties must be strictly construed.[29]

A. The Commission does not have jurisdiction over the Agreement.

To begin, Pevely incorporates the arguments set forth in Respondents' *Joint Motion to Dismiss for Failure to State Claim Upon Which Relief Can be Granted, Memorandum in Support*

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[26] (Emphasis added).

[27] See Schwab v. Nat'l Dealers Warranty, Inc., 298 S.W.3d 87, 92 (Mo. Ct. App. 2009) (in construing "commission" for determination of statutory penalties authorized under § 407.913, reasoning that statutes that impose penalties must be strictly construed); Mikulich v. Wright, 85 S.W.3d 117, 119-20 (Mo. Ct. App. 2002) (noting that § 407.410 provides for double damages and is therefore penal in nature; "Courts must construe penal statutes strictly and literally – that is, courts can give penal statutes no broader application than is warranted by its plain and unambiguous language." (internal quotations and citation omitted)); State ex rel. Danforth v. European Health Spa, Inc., 611 S.W.2d 259, 261-62 (Mo. Ct. App. 1981) (rejecting attorney general's attempt to seek civil penalties under § 407.110 for violation of a voluntary assurance; applying statutory construction principles governing penal statutes, court could not rewrite statute passed by Legislature and could not impose penalty where Legislature has not in fact provided clear expression of intent for a penalty). Pevely notes that at page 85-86 of the evidentiary hearing transcript, Judge Burton requests case citations providing that statutes imposing civil penalties must be strictly construed.

[28] Schwab, 298 S.W.3d at 88-90.

[29] Schwab, 298 S.W.3d at 92 (citing Hoffman v. Van Pak Corp., 16 S.W.3d 684, 689 (Mo. App. E.D. 2000)).

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 the Commission previously heard and denied. The alleged Agreement does not include as a party a water corporation subject to the Commission's jurisdiction, a requirement of the statute.[30] In addition, the Commission is acting beyond the jurisdiction conferred to it in § 386.250(3) by entertaining this case, which expressly states that "[n]othing in this section shall be construed as conferring jurisdiction upon the commission over the service or rates of any municipally owned water plant or system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality."[31] Although the Agreement is broad enough to include areas outside of the municipal boundaries, the fact remains that Pevely does not provide water service beyond its corporate municipal boundaries and lacks the infrastructure to do so. The issue is hypothetical.[32] Thus, even if the Commission's jurisdiction may exist under Chapter 247 for *water supply districts* in certain instances, any interpretation of § 247.172 should be read consistently with § 386.250 and its limitation regarding jurisdiction over municipalities who actually provide water service beyond their corporate limits.

B. The Agreement does not fall under § 247.172 because it does not displace competition.

The specific language set forth in § 247.172 refers to the displacement of competition by agreement; in other words, the purpose of the statute is to ensure competition. Here, the Agreement did not displace competition; rather, the dispute that gave rise to Staff's Complaint arose exactly because of competition. Specifically, competition is demonstrated by the fact that

[30] The Commission previously rejected Respondents' arguments made in their *Joint Motion to Dismiss for Failure to State 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*. Pevely will not repeat the entirety of those arguments here.

[31] (Emphasis added).

[32] *Evid. Hearing Ex.* 2, pg. 2, line 3.

Respondents are not abiding by the Agreement; by the letter to the Commission from Mr. Holborrow; by the 2012 lawsuit between Respondents; as well as by the actions of Respondents in removing and replacing one another's water meters at Valle Creek in the months leading up to the 2012 lawsuit and even after that lawsuit. Pevely has provided water to Valle Creek and has made it clear that it is willing to fulfill the water service needs of Valle Creek as well as others within its municipal boundaries as requested. Thus, Respondents have actually acted in conformance with § 247.172 by not displacing competition between each other by virtue of an agreement.

Nor has Staff cited any instance where competition was actually displaced by the Agreement. The facts remain that, despite the language of the Agreement, Pevely provides water to Valle Creek, continues to provide water to Valle Creek, and has expressed its willingness to meet the future water service needs of Valle Creek despite the language of the Agreement. Competition was not displaced here.[33]

C. No active Agreement exists, rendering the case before the Commission moot.

In addition, no active Agreement exists between Respondents. The parties are not abiding by the terms of their Agreement.[34] Therefore, there is simply no agreement to submit to the Commission or any reason to do so. When an unapproved agreement is no longer being followed, that restores the parties to the status quo. Even if the Commission had jurisdiction over such an (ineffective) agreement, there is no reason to exercise such jurisdiction. The issue before the Commission is moot, just as the issue was moot in State ex rel. Public Counsel v. Public Service Commission of the State of Missouri.[35]

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[33] See *Evid. Hearing Tr.*, pg. 49, lines 6-13 (Staff stating that it is obvious that Respondents are competing).
[34] *Evid. Hearing Tr.*, pg. 46, lines 16-21 (Staff stating that he does not believe anyone has had water shut off or been denied because of dispute between Respondents).
[35] 328 S.W.3d 347 (Mo. Ct. App. 2010).

In that case, the Public Counsel contended that the Commission erred during an interim rate increase proceeding and violated due process considerations by seeking third-party expert opinions and admitting into evidence their reports and associated testimony.[36] A mootness issue arose because Public Counsel appealed an interim rate increase determination that was superseded by the Commission's subsequent approval of a permanent rate increase.[37] The court explained that a case becomes moot when the matter presented for review seeks a decision "upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy" or "when circumstances change so as to alter the position of the parties or subject matter so that the controversy ceases and a decision can grant no relief."[38] The court concluded that "the appeal was moot because an opinion would have no practical effect on the parties involved."[39] The court specifically rejected the argument that the case should nevertheless be heard because it was a case of general public interest that involved a reoccurring unsettled issue and reasoned that the Public Counsel did not provide any evidence or argument indicating a similar factual scenario has ever previously occurred or is likely to occur in the future.[40] In this case, Staff has similarly not provided any evidence indicating a similar factual scenario has ever previously occurred or is likely to occur, and in fact the opposite is true – Staff's has admitted that this case is unlike any case ever before the Commission concerning territorial agreements.[41] The question is of academic interest at best. In addition, the case before the Commission is not one of general public interest because the Agreement is not even being followed nor is it displacing competition.

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[36] State ex rel. Public Counsel, 328 S.W.3d at 351-52.
[37] State ex rel. Public Counsel, 328 S.W.3d at 352.
[38] State ex rel. Public Counsel, 328 S.W.3d at 352.
[39] State ex rel. Public Counsel, 328 S.W.3d at 352.
[40] State ex rel. Public Counsel, 328 S.W.3d at 353.
[41] *Staff's Reply to Respondents' Denominating Affirmative Defenses in Support of its Motion for Summary Determination*, pg. 4; *Pevely's Ex.* O, pg. 1.

Simply put, if there is going to be a test case where the Commission decides that it has jurisdiction over an agreement similar to that entered into between Respondents in 2007, it should be in a situation where the parties are following it and where it is clearly displacing competition; in addition, it should be in a situation that clearly falls under a strict interpretation of § 247.172. A decision by the Commission in this case would have no practical effect on the parties because the Agreement is not being followed and competition is not being displaced. A decision by the Commission in this case would also come at the price of exercising first-ever affirmative jurisdiction over an agreement that is not clearly contemplated by a strict interpretation of § 247.172.

Finally, Staff's requests lead to an absurd result. Under Staff's view, Respondents should be required to submit their unapproved, unwanted, and ineffective Agreement to the Commission for its review and approval, even though that Agreement is not being followed. Respondents would then, under Staff's view, be required to enter into an agreement they do not agree on and then request the Commission to allow them to terminate the Agreement. This makes no sense, especially considering that the Respondents have already reached the outcome favored by the statute – no agreement displacing competition. Even if Staff's position is correct in this case, nothing prevents it from asserting the Commission's jurisdiction in the future over a case that clearly falls within the terms and purposes of § 247.172 or to advise providers of this new interpretation before seeking penalties.

D. <u>The Commission lacks the authority to grant the relief that Staff requests.</u>

Even if this case is not moot, the Commission must decide it within the authority granted to it by statute. At the evidentiary hearing, Staff explained that the only relief it seeks is for the

Commission to determine that it has jurisdiction over the Agreement.[42] Staff later contended that, in addition to adjudicating whether a violation occurred, the Commission could direct the Respondents to have their Agreement approved or to bring in a new and better agreement for approval.[43] In Staff's own words: "I think that [the Agreement] needed to be brought in here for approval, and if that's done belatedly, nonetheless, I think that's what the law requires. Evidently they now don't want that agreement, but it appears to me they need something...."[44] This is also consistent with the testimony of Staff's expert witness, James Busch, who recommended that the Commission order Respondents to submit their Agreement to the Commission.[45] Finally, Staff's position is that under § 247.172, "not only do you need Commission authorization to make the agreement in the first place, you also need Commission authorization to modify or amend the agreement or to cancel it."[46]

The Commission is a creature of statute and its powers are limited by statute.[47] If a power is not granted to the Commission by a Missouri statute, then it does not have that power.[48] Nothing in § 247.172 provides that unapproved agreements violate that law or grants the Commission the authority to make a finding to that effect; or to order parties to submit an unwanted agreement to it for its approval; or to come up with a new and better agreement for approval; or to require that parties submit an unwanted territorial agreement to the Commission so that it may approve a modification or amendment or revoke it.[49] Instead, the statute expressly

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[42] *Evid.Hearing Tr.*, pg 31, lines 9-11.
[43] *Evid. Hearing Tr.*, pg 54, lines 9-14.
[44] *Evid. Hearing Tr.*, pg. 55, lines 3-7.
[45] *Evid. Hearing Ex.* 1, pg. 5, lines 3-4.
[46] *Evid. Hearing Tr.*, pg. 47, lines14-18.
[47] See State ex rel. MoGas Pipeline LLC v. Missouri Public Service Commission, 366 S.W.3d 493, 496 (Mo. 2012).
[48] State ex rel. MoGas Pipeline, 366 S.W.3d at 496.
[49] Cf. State ex rel. Cass County v. Public Service Commission, 259 S.W.3d 544 (Mo. Ct. App. 2008) (Commission exceeded its statutory authority when it attempted to provide *post hoc* approval for construction of power plant; § 393.170 requires utility to get permission and approval for construction before constructing facility and authority to grant *post hoc* approval could not be found in statute)

provides the remedy here – unapproved territorial agreements are ineffective, period. Parties cannot operate under them. This restores the competition between the parties, the displacement of which is the purpose of § 247.172's regulation. Thus, even *if* the Commission may hear a complaint regarding an unwanted and unapproved territorial agreement, it is not authorized to grant the relief that Staff seeks here. The relief provided by the statute is simply that the agreement is ineffective. In this regard, unapproved agreements do not "evade" review, but rather, the fact that they are not reviewed renders them ineffective. Their being ineffective is a limitation not only on the parties' rights under the agreement, but also as described above, on the Commission's authority to regulate the agreement.[50]

II. Staff is estopped from enforcing the statute against the Agreement.

The doctrine of equitable estoppel may apply against the state in certain circumstances.[51] In JGJ Properties, LLC v. City of Ellisville, the court considered a challenge to the denial of rezoning request, including the argument that the city was estopped to deny rezoning because of reliance on written and oral representations made by City Planner and the issuance of commercial building permits.[52] The court outlined the elements of equitable estoppel as follows: "(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

[50] By its terms, § 247.172(7) only applies to approved territorial agreements. Thus, a territorial agreement that was not approved by the Commission – never coming into effect so that it may be revoked or allowed to remain – is not subject to the Commission's regulation under this subsection.

[51] See JGJ Properties, LLC v. City of Ellisville, 303 S.W.3d 642, 650-51 (Mo. Ct. App. 2010) (in appeal challenging denial of rezoning request, court considered argument that City was estopped to deny rezoning because of written and oral representations made by City Planner and issuance of commercial building permits; outlining estoppel factors as applied to governmental entity); Missouri Gas Energy v. Public Service Commission State of Missouri, 978 S.W.2d 434, 439 (Mo. Ct. App. 1998) (in appeal arguing that higher rate of return was required to be included in rate award because of use in preceding Accounting Authority Orders, court noted that doctrine of estoppel may run against state in certain circumstances).

[52] JGJ Properties, 303 S.W.3d at 650-51.

to such other party, resulting from allowing contradiction of the admission, statement, or act."[53] In addition to these three elements, when a claim of estoppel is made against the government, affirmative misconduct must be shown.[54]

In this case Staff has never before acted to affirmatively exercise jurisdiction over an alleged territorial agreement between a municipal water district and a public water supply district under § 247.172 and has admitted as much. By attempting to exercise jurisdiction in this case, the Commission's exercise of authority is inconsistent with its prior procedures and methods. Pevely had a right to rely on the Commission's procedures and methods and has been injured in the form of Staff's Complaint and potential to face penalties. Staff's affirmative misconduct is demonstrated by the fact that the first notice Pevely received was the service of the Complaint for violating the statute and seeking civil fines. Pevely never before received notice of Staff's interpretation, nor has Staff previously exercised any authority with respect to the Agreement since November 2007. The *voluntary* submission of agreements between water districts and municipalities – as has been the case with all the agreements Staff has relied on to support its position – does not provide notice of Staff's interpretation of § 247.172. The fact that other districts or municipalities may have submitted agreements out of an abundance of caution or their own interpretation is not dispositive in any way as to the correct construction. Staff is seeking to enforce a statute against Respondents that does not apply by its plain terms and to hold Respondents liable for penalties, all as a test case for the Commission's jurisdiction.

It is unjust for Staff to bring a test case to determine the scope of § 247.172 against Respondents who are actually acting in conformance with that statute; to claim that Respondents violated a statute pursuant to an interpretation that is not supported by the language of that statute

[53] JGJ Properties, 303 S.W.3d at 650-51.
[54] JGJ Properties, 303 S.W.3d at 650-51.

and, in fact, is one that Staff only recently crafted; and to expose Respondents and its citizens to penalties for such alleged violations. Although Respondents might be bound to know the existence of § 247.172 as a basic matter, they are not bound to know the new interpretation that Staff might craft to apply to this situation and one that is not supported by the plain language of the statute, and how could they? Respondents should not be penalized because they reached an opposite conclusion about the applicability of a statute that has never been interpreted to apply in this situation, nor has ever been judicially tested. If Staff and the Commission feel that *some* statute should apply to the situation at hand in order to regulate the conduct at issue here, the remedy is not to stretch the language of a statute to give the Commission greater authority than it has in clear violation of Missouri law and in clear disregard of principles of statutory construction. The remedy is with the Legislature to address this situation if it feels it is necessary in light of the entirety of Missouri law governing this area.

III. The Statute is unconstitutionally vague and did not provide notice to Respondents that their conduct would violate the law.

Finally, Staff seeks to hold Respondents liable for violation of a vague statute, in clear disregard of Respondents' due process rights. When the terms of a statute are so unclear that persons of common intelligence must necessarily guess at its meaning, the statute is vague and violates due process.[55] In addition, the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute so that the possibility of arbitrary and discriminatory application is avoided.[56]

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[55] See Conseco Finance Servicing Corp. v. Missouri Dep't of Revenue, 195 S.W.3d 410, 415 (Mo. banc. 2006); see also State v. Young, 695 S.W.2d 882 (Mo. banc 1985) (determining that statute was unconstitutionally vague in contravention of due process clause of Amendments V and XIV of the U.S. Constitution and Article 1, Section 10 of the Missouri Constitution).

[56] Conseco, 195 S.W.3d at 415.

Staff has a constitutional duty to give notice to entities that their conduct violates the law before it seeks penalties for such conduct. Pevely received no prior notice that its conduct may be considered to violate the statute. Instead, the first notice Pevely received was the service of the Complaint for violating the statute. Nor did Staff ever previously exercise any authority with respect to the Agreement since November 2007. Pevely had no notice of Staff's newly crafted interpretation, either by the language of the statute or by the Commission's prior actions. Staff's assertion that their Complaint itself was notice is disingenuous and misinterprets its notice obligations. Not only does it have to give notice of the charge it first has to give notice of what would be a violation. Otherwise, simply being charged with a crime would be sufficient notice.

Here, § 247.172 is vague in various ways.

First, Staff has admitted that it has never interpreted § 247.172 to apply to the present situation; its doing so now demonstrates that one must guess at the statute's meaning, as well as the lack of standards leading to arbitrary application. The instances upon which Staff relies for its jurisdiction all involved the voluntary submission of agreements between public water districts and municipal water districts who either believed that they were required by statute to do so or who did so out of an abundance of caution. Thus, that one must guess at the meaning of the statute and the statute's arbitrary application is supported by the fact that Staff has only recently interpreted the statute to apply in the present situation, as well by the fact that parties to the agreements themselves disagree as to whether an agreement must be submitted. The statute's vagueness is also supported by the fact that the statute provides that unapproved territorial agreements are simply ineffective; it provides no notice to parties that their conduct may be considered to merit civil fines and penalties. As set forth above, statutes imposing penalties must be strictly construed.

The statute is vague regarding the nature of territorial agreements – who must be a party, what they must consist of, and what effect they must have. Staff and Respondents have disagreed at length as to whom must be a party to a territorial agreement under § 247.172 – Respondents' position being that a territorial agreement must include as a party a water corporation because the Commission only has jurisdiction over water corporations. The use of "between and among" in the statute simply does not inform entities that entering into an agreement which does not include as a party a Commission-regulated water corporation violates the law, nor does it protect against arbitrary enforcement.

What territorial agreements must consist of and effectuate is also vague. The position of Staff's expert witness, James Busch, is basically that he knows a territorial agreement when he sees it – that the Agreement at issue in the present case is similar to many other territorial agreements that have been submitted to the Commission for its approval.[57] Even Staff struggles in identifying what territorial agreements must consist of: "The Commission has jurisdiction over 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."[58] Staff's description appears nowhere in the statute. If Staff wavers in describing what a territorial agreement must set forth in order to fall under the Commission's jurisdiction pursuant to § 247.172, how are others supposed to know? What is more, the one thing that does appear in the statute – the displacement of competition – is apparently not even relevant for Staff in

[57] *Evid. Hearing Ex.* 1, pg. 3, lines 11-22.
[58] *Staff's Reply to Respondents' Suggestions in Support of its Answers and Objections to Complainant's Motion for Summary Determination*, pg. 10.

determining what is and is not a territorial agreement or whether an agreement violates § 247.172.[59]

If Pevely had thought § 247.172 applied to the Agreement such that its conduct would be considered to violate the law, it would have sought the Commission's approval of the Agreement, but the statute does not. And even if the statute applies, it only provides that the Respondents' Agreement is ineffective. Neither Staff's active enforcement, provision of an opportunity to be heard, nor offer to forgo fines if Respondents agree to submit to the Commission alters the due process analysis. The simple fact remains that Staff is seeking to enforce a statute against Respondents that did not provide adequate notice that Respondents' conduct would violate that statute nor adequate standards for Staff's enforcement. The first notice that Pevely received that its conduct violated the law was the issuance of the Complaint in the present case. Accordingly, the statute is vague and it violates due process to apply it in this instance.

CONCLUSION

The matter is moot. The Commission lacks the authority to either exercise jurisdiction over the Respondents' Agreement or to provide the relief requested. Staff is estopped from enforcing § 247.172 against the Respondents' Agreement. And, § 247.172 violates due process and therefore cannot be enforced.

[59] *Evid. Hearing Tr.*, pg 48, line 19-25; pg. 49, lines 1-5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed by U.S. Mail on this 23rd day of July, 2014, unless served electronically via EFIS to:

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