

**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 SUGGESTIONS IN SUPPORT OF ITS ANSWERS
AND OBJECTIONS TO COMPLAINANT’S MOTION FOR SUMMARY
DETERMINATION**

COMES NOW Respondent, City of Pevely, Missouri (“Pevely”), and for its *Suggestions in Support of its Answers and Objections to Complainant’s Motion for Summary Determination* pursuant to 4 CSR 240-2.117(1)(C), states as follows:

INTRODUCTION

The majority of *Staff’s Suggestions in Support of its Motion for Summary Determination* recites the Staff of the Missouri Public Service Commission’s (“Staff”) version of “undisputed” facts.¹ As Pevely has demonstrated in its *Answers and Objections to Staff’s Motion for Summary Determination*, however, genuine issues of material fact remain in this case. In addition, “[t]he key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question.”² On its burden of demonstrating its undisputed right to judgment as

¹ See *Staff’s Suggestions in Support of its Motion for Summary Determination*, pg. 3-5.

² *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc. 1993) (emphasis added).

a matter of law, Staff has also failed.

In sum, material issues of fact exist regarding (1) whether an active agreement existed between the Respondents in light of the fact that Respondents were not abiding by the document they previously entered into, and (2) whether any alleged agreement was a “territorial agreement” as that term is used in § 247.172.³ At best, Staff has proven that the Respondents previously signed a piece of paper that they titled “territorial agreement.” In addition, to the extent Staff argues that Pevely’s provision of water to Valle Creek Condominiums was an amendment of their alleged “territorial agreement,” a dispute also exists with regard to who requested Pevely to provide such water. Finally, discovery is ongoing in this case.

As for the law, in addition to its prior arguments regarding the Commission’s lack of jurisdiction in this case, Staff has not proven that Respondents entered into a “territorial agreement” subject to Mo. Rev. Stat. § 247.172 in light of the fact that Pevely does not provide water service beyond its corporate municipal boundaries and that competition was not displaced by the alleged agreement.

I. DISPUTED FACTS EXIST PRECLUDING SUMMARY DETERMINATION

Staff insists that this case presents only a legal controversy and that no facts are in dispute. While Pevely agrees that this case presents a host of disputed legal issues, it disagrees that Staff has met its burden of establishing no genuine issue of fact. In addition, the facts are not settled in this case because discovery is ongoing.⁴

In 2007, Respondents signed a piece of paper they titled “territorial agreement.” As established in *Pevely’s Answers and Objections to Staff’s Motion for Summary Determination*,

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

⁴ 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).

there is a factual dispute regarding whether an active agreement existed between the parties and whether that agreement constitutes a “territorial agreement” as contemplated by § 247.172.⁵

An active agreement did not exist in this case because Respondents were not observing their alleged “territorial agreement.” Both Respondents have denied that they had “[s]ince 2007, . . . acted upon the terms of their service boundaries agreement in such matters as determining which water service provider customers must use for their water service.”⁶ In addition, Pevely would have provided water service to Valle Creek Condominiums (“Valle Creek”) if it had not been aware of H & H Development Group, Inc.’s (“H & H”) agreement with the Consolidated Public Water Supply District C-1 of Jefferson County, Missouri (the “District”) to connect to the District’s water system, and in fact, Pevely provided water to Valle Creek upon H & H’s request.⁷ This led to the removal and replacement of water meters and a lawsuit between Respondents in 2012.⁸ Pevely has advised the receiver of H & H that it is willing to meet the future water service needs of Valle Creek.⁹ Thus, there is a factual dispute as to whether there was any active agreement between the parties.

In addition, there is a factual dispute regarding whether any alleged agreement constituted a “territorial agreement” as that term is used in the § 247.172 because it did not specifically designate any and all powers granted to Pevely to operate in areas beyond its corporate municipal boundaries. Pevely denies that provides water service beyond its corporate municipal boundaries.¹⁰ Thus, a dispute exists as to whether the alleged agreement constitutes a “territorial agreement” under the statute.

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 *Pevely’s Answer* ¶ 11; *District’s Answer* ¶ 11.

⁷ *Thomas Affidavit* ¶ 9-12; *Pevely’s Response to Staff’s Data Request No. 49, 52.*

⁸ *Pevely’s Response to Staff’s Data Request No. 53, 56-64; Staff’s Responses to Pevely’s First Set of DRs* (Holborow letter).

⁹ *Thomas Affidavit* ¶ 12; *Pevely’s Response to Staff’s Data Request No. 66.*

¹⁰ *Thomas Affidavit* ¶ 7.

There is also a factual dispute regarding whether the alleged agreement displaced competition between Respondents as required by § 247.172. The competition existing between Respondents is demonstrated by the fact that the Respondents were not abiding by the alleged agreement; by the letter to the Commission from H & H's receiver; as well as the actions of Respondents in removing and replacing one another's water meters in the months leading up to the 2012 lawsuit between Respondents and even after that lawsuit.¹¹ That competition was not displaced is further supported by the fact that the District was unable to compete in the area of Valle Creek because it lacked the infrastructure.¹² Staff actually admits that competition was not displaced per the agreement in its statement providing that the competition between Respondents has been expensive and prolonged, among other things.¹³

Lastly, a factual dispute exists regarding who asked Pevely to provide water services to Valle Creek. Staff's *Motion for Summary Determination* ¶ 20 is not clear regarding who made the agreement to provide services to Valle Creek. Pevely asserts that it provided services upon H & H's request.¹⁴

Accordingly, Staff has not established the absence of material issues of fact in this case.

II. STAFF HAS FAILED TO PROVE ITS UNDISPUTED RIGHT TO JUDGMENT AS A MATTER OF LAW

Staff has failed to prove its undisputed right to judgment as a matter of law because it has failed to prove (1) that an active agreement existed between the parties, beyond the existence of a piece of paper the parties titled "territorial agreement" and (2) that the alleged agreement constituted a "territorial agreement" subject to the Commission's jurisdiction.

¹¹ *Pevely's Response to Staff's Data Request No.53*, 56-64; *Staff's Responses to Pevely's First Set of DRs* (Holborow letter).

¹² *Thomas Affidavit* ¶ 8; *Pevely's Response to Staff's Data Request No. 46*, 48; *Staff's Responses to Pevely's First Set of DRs* (Holborow letter).

¹³ *Staff's Suggestions in Support of its Motion for Summary Determination*, pg. 6.

¹⁴ *Thomas Affidavit* ¶ 9; *Pevely's Response to Staff's Data Request No.49*.

First, Staff has not proven that any active agreement existed between Respondents. Rather, the Respondents were not abiding by the piece of paper they titled “territorial agreement.”

Second, as stated in Respondents’ *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*, the Commission lacks jurisdiction over this case because the alleged agreement does not include as a party a water corporation subject to the Commission’s jurisdiction and because the Commission lacks jurisdiction to hear complaints involving non-approved agreements. Pursuant to the terms of § 247.172, if a “territorial agreement” subject to the statute is not presented to the Commission for approval, it is simply not effective. Thus, to the extent § 247.172 applies to the Respondents’ alleged agreement, it only renders the agreement void. Moreover, the language of the statute only grants the Commission jurisdiction over complaints involving “commission-approved territorial agreements.” Nothing within the plain language of the statute gives the Commission jurisdiction over an agreement that has not been presented or approved, such as the agreement between Respondents. Accordingly, the Commission lacks jurisdiction over this case.

The Commission also lacks jurisdiction over this case because the alleged agreement does not specifically designate any and all powers granted to Pevely to operate in areas beyond its corporate municipal boundaries nor does it displace competition between the Respondents. To constitute a territorial agreement under § 247.172.2,

such territorial agreement shall specifically designate [1] the boundaries of the water service area of each water supplier subject to the agreement, [2] 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 section 247.010 to 247.67 to the contrary, and [3] 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.

(alteration and emphasis added). As set forth in the statute, a territorial agreement must designate any and all powers granted to a municipally owned utility to operate in areas beyond its corporate municipal boundaries. This is consistent with the jurisdiction granted to the Commission in § 386.250:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter....

(3) To all water corporations, ... except that nothing contained 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.

Here, the alleged “territorial agreement” does not specifically designate Pevely’s powers to operate beyond its corporate municipal boundaries. In fact, Pevely does not provide water service beyond its corporate municipal boundaries. Thus, the Commission lacks jurisdiction over this alleged agreement.

The statute also requires that a “territorial agreement” displace competition. Specifically, Missouri Revised Statutes § 247.172.1 provides:

Competition to sell and distribute water ... may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section.

Although Staff admits that the parties were in competition and suggests that such actions were “evil”,¹⁵ their behavior was actually sanctioned by § 247.172 in that they had not displaced competition between each other by virtue of an agreement.

¹⁵ *Staff's Suggestions in Support of Its Motion for Summary Determination*, pg. 6. Staff does not cite authority for the proposition that Respondents’ behavior is exactly the type of “evil” that the General Assembly sought to address by enacting § 247.172. Given the language of the statute governing the displacement of competition, Staff’s position that § 247.172 was enacted to address competition is peculiar.

As previously stated, Pevely would have provided water services to Valle Creek directly if it had not been aware of the agreement between H & H and the District providing for Valle Creek's connection to the District's water system and, in fact, it did provide water to Valle Creek upon H & H's request. After all, Pevely's act of providing water to Valle Creek is what led to the District's lawsuit against Pevely for breach of the alleged agreement in 2012. Pevely did not view the territorial agreement as a barrier to providing services to Valle Creek.

That competition was not displaced is also consistent with Respondents' Answers denying that they had "[s]ince 2007, ... acted upon the terms of their service boundaries agreement in such matters as determining which water service provider customers must use for their water service." It is likewise supported by the fact that the District was actually unable to compete to provide water services to Valle Creek by virtue of its lack of infrastructure in that area. Finally, a review of Mr. Holborow's letter to the Commission only further reveals the extent of competition between the Respondents and the willingness of Pevely to continue to serve Valle Creek in the future.

Thus, per the language of the statute, territorial agreements are regulated because they displace competition. That is simply not the case here. Instead, Pevely agreed upon H & H's request to provide water services to Valle Creek and continued to do so.

CONCLUSION

Staff has failed to meet the standard for the Commission's grant of summary determination. Specifically, as demonstrated by *Pevely's Answer and Objections to Staff's Motion for Summary Determination*, genuine issues of fact remain in this case. In addition, Staff has failed to prove its undisputed right to judgment as a matter of law concerning this alleged "territorial agreement" or that the public interest favors granting summary determination in a

case that is apparently unlike any other case ever before the Commission. Nor has Staff met its burden of negating all of Pevely's affirmative defenses, as discussed in *Pevely's Response to Complainant's Reply to Pevely's Denominated Affirmative Defenses in Support of Its Motion for Summary Determination* 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.

Respectfully submitted,

/s/ Terrance J. Good

Terrance J. Good

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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 25th day of April, 2014, unless served electronically via EFIS to:

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