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 POST-HEARING REPLY BRIEF

Staff of the Missouri Public Service Commission ("Staff") is wrong both as to whether the agreement at issue in this case falls within the scope of § 247.172[1] and as to whether the findings it seeks from the Commission are supported by § 247.172. In addition, and most importantly, this case is moot. And, even if it were not, enforcement of § 247.172 as requested violates due process.

A. The Agreement and Staff's requested relief are beyond the scope of § 247.172.

The agreement (the "Agreement") between Pevely and the Consolidated Public Water Supply District C-1 of Jefferson County, Missouri (the "District") does not fall within the plain language of § 247.172 both because it does not displace competition between the two and secondly does not contain a water corporation subject to the Commission's jurisdiction as a party. Yet, despite the plain language of § 247.172 regarding the displacement of competition,

[1] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri, revision of 2000, as amended and cumulatively supplemented.

Staff insists that the very opposite, the competition existing between Respondents, should be the basis for the Commission finding in its favor.[2] And even if it were an agreement subject to § 247.172, nothing in the plain language of that statute authorizes the relief that Staff seeks from the Commission. This is further supported by the principle that statutes imposing penalties must be strictly and literally construed.[3]

In its *Intial Brief*, Staff requests that the Commission find that Pevely and the District violated § 247.172 by (1) entering into the Agreement without seeking approval from the Commission; (2) by filing a complaint related to the Agreement in court rather than before the Commission; (3) by seeking to modify or amend the Agreement in court rather than before the Commission; and (4) by seeking to revoke or suspend the Agreement in court rather than before the Commission on its determination that the Agreement is no longer in the public interest.[4] Nowhere in § 247.172 does it state that an alleged territorial agreement which is not approved by the Commission violates the law – instead, the plain language of that statute provides that such an agreement is simply ineffective. It is not effective without the Commission's approval. The same goes for modifications made without the Commission's approval – they are ineffective. With regard to the status of such agreements, Staff itself acknowledges this: "It may be voidable in the sense that you could ask a court of competent jurisdiction to set it aside because approval was lacking and declare that it didn't exist...."[5] Thus, the finding mandated by § 247.172 is that the agreement is not effective, not that the agreement "violates" the law. To be sure, as set forth

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[2] See Staff's *Initial Brief*, pg. 12.
[3] Schwab v. Nat'l Dealers Warranty, Inc., 298 S.W.3d 87, 92 (Mo. Ct. App. 2009) (applying principles of strict construction to statutory penalties).
[4] Staff's *Initial Brief*, pg. 1-2.
[5] *Evid. Hearing Tr.*, pg. 55, lines 15-20.

more fully later, nothing in § 247.172 provides notice that Respondents' conduct could be considered to violate the law.

Similarly, Staff is stretching the language of subsection 7 of § 247.172 to treat an unapproved agreement the same as an approved agreement when it argues that Respondents committed violations by not bringing their dispute to the Commission and by seeking modification or suspension of the Agreement from the court.[6] By its terms, § 247.172.7 only applies to Commission-approved agreements. Nowhere in § 247.172 does it state that complaints related to an alleged territorial agreement not approved by the Commission must be brought before the Commission or that an alleged territorial agreement not approved by the Commission can only be modified or revoked before the Commission. As noted before and below, this leads to the absurd result of the Staff asking that an unapproved, ineffective agreement which at least one of the parties does not even want to exist in any form must be brought to the Commission for modification.

B. This case is moot and Staff has presented no evidence that the issue is recurring in nature.

Staff is also incorrect in arguing that the issue before the Commission is not moot. Instead, the cases cited in Staff's *Initial Brief* support the conclusion that this case is moot, and that an exception to the mootness doctrine does not apply.[7] A decision in this case would have

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[6] Staff's *Initial Brief*, pg. 10-11 (arguing that the District violated § 247.172.7 by filing a complaint in court seeking certain relief); pg. 11 (arguing that under § 247.172.7 only the Commission can allow Respondents to get out of their Agreement).

[7] A case cited by Staff, Public Service Commission of the State of Missouri v. Missouri Gas Energy, 388 S.W.3d 221, 230 (Mo. Ct. App. 2012), also illustrates that the Commission's authority is limited by statute and a court's review of the Commission's authority. In that case, the court considered whether the Commission could allow a utility company to include an exculpatory clause in a tariff that immunizes the company from liability for any personal injury or property damage caused by the company's negligence occurring on the customer's property and gas utilization equipment. Id. at 229. In considering this issue, the court stated that "[t]he

no "practical effect upon any then-existing controversy" because the Respondents are not abiding by their Agreement and there is no displacement of competition, the purpose of which § 247.172 is concerned.[8] As previously argued, Respondents' conduct is not a violation of § 247.172 and, from a practical standpoint, Respondents have already reached the result desired by § 247.172.

Nor does an exception to the mootness doctrine apply because the issue is not one of general public interest and importance that is recurring in nature.[9] Staff has admitted that this case is unlike any other territorial agreement ever before the Commission, and it has not presented any evidence that any other cases like it exist throughout the State or are likely to

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Commission's authority...must come from the statutes, and the Commission merely carries out the public policy declared by the Missouri Legislature." Id. at 230. It found no statute that "grants the Commission the authority to limit a public utility's negligence liability involving personal injury or property damage." Id. It went on to conclude:

> Common law in Missouri favors a system where its citizens may file an action for negligence when a company's negligence causes injury or harm...
>
> Where the legislature intends to preempt common law, it must do so clearly. It is axiomatic that what the legislature must itself do explicitly it cannot impliedly empower the Commission to do. Because we find no statute empowering the Commission to abrogate a customer's right to sue a public utility company for negligence involving personal injury or property damage, we conclude that the Commission does not have the statutory authority to approve a public utility's attempt to abrogate these common law rights in a tariff sheet. The legislature is the appropriate entity to abrogate negligence claims against public utilities involving personal injury or property damage or it is the entity to expressly delegate that power to the Commission. Until the legislature does so and does so explicitly, however, the Commission has no authority to abrogate an action for common law negligence involving personal injury or property damage.

Id. at 230-31.

[8] Precision Inv., L.L.C. v. Conerstone Propane, L.P., 220 S.W.3d 301, 304 (Mo. banc 2007) (emphasis added).

[9] State ex rel. Praxair, Inc. v. Public Service Commission of the State of Missouri, 328 S.W.3d 239, 334-35 (Mo. Ct. App. 2010).

come into existence. Unlike the matter in Praxair, the issues here are not duplicative and recurring in nature.[10] Thus, the exception to the mootness doctrine does not apply.

As mentioned above, Staff's interpretation and application of the statute in this case leads to an absurd result. Staff has presented no evidence that the Agreement was ever followed (only evidence that not following it resulted in litigation), but nevertheless seeks that the Commission assert jurisdiction over an Agreement that does not exist. Under Staff's logic, an ineffective and non-existent agreement would be required to be submitted to the Commission so that the Commission may determine that the Agreement should not be followed. Neither the purpose nor language of the statute supports this position.

C. Enforcement of § 247.172 as Staff requests violates due process.

Staff has recommended against seeking penalties in this case. Although its offer is appreciated, it does not resolve the due process issues here or the requirement that the statute be strictly construed, as set forth in Pevely's *Initial Brief*. The fact remains that Staff seeks from the Commission a finding that Respondents violated a vague statute that did not provide constitutional notice that Respondents' conduct would violate the law nor standards to guide Staff and the Commission so as to avoid arbitrary application. Pevely received no prior notice – either by the language of § 247.172 or by Staff – that its conduct may be considered to violate the law; the first notice it received was the issuance of the *Complaint* in the present case. Section 247.172 is vague and it violates due process to apply it as Staff requests.

D. Conclusion.

In sum, the only way for the Commission to find, as set forth by Staff, that the Agreement falls under § 247.172 and that Respondents' actions violated § 247.172 is to either ignore the

[10] 328 S.W.3d at 335.

plain language of that statute or to read non-existent language into that statute. This is in clear violation of Missouri law and of the powers of the Commission as a creature of statute. This case is moot and given its admittedly unique nature, does not involve an issue of great public importance that is recurring in nature. Staff is estopped from enforcing § 247.172 against the Agreement, and even if it were not, enforcement of § 247.172 as requested by Staff violates due process. Finally, Pevely incorporates by reference the arguments made by the District, if any, in its post-hearing reply brief.

The Commission should deny the relief requested by Staff and find in favor of Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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