

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

Staff of the Missouri Public Service
Commission,

Complainant,

v.

Consolidated Public Water Supply District
C-1 of Jefferson County, Missouri,

and

City of Pevely, Missouri,

Respondents.

Case No. WC-2014-0018

STAFF’S INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its *Initial Brief*, states as follows:

Introduction

What is this case about?

Staff filed its *Complaint* on July 19, 2013, asserting that Respondents Consolidated Public Water Supply District C-1 of Jefferson County, Missouri (“CPWSD C-1”), and the City of Pevely (“Pevely” or “the City”), had violated § 247.172, RSMo.,¹ in several respects by (1) making a Territorial Agreement between them designating the boundaries of the water service area of each and the powers granted by each to the other to provide service within one another’s boundaries without seeking or obtaining

¹ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (“RSMo”), revision of 2000, as amended and cumulatively supplemented.

the approval of this Commission; (2) by filing a complaint regarding their Territorial Agreement in Circuit Court rather than before this Commission; (3) by seeking a modification or amendment of their Territorial Agreement in the Circuit Court rather than before this Commission; and (4) by seeking revocation or suspension of their Territorial Agreement in the Circuit Court rather than before this Commission on its determination that the Territorial Agreement is no longer in the public interest. For relief, Staff prays that the Commission will make the findings requested by Staff. Given the circumstances of this case, Staff no longer requests that the Commission authorize its General Counsel to seek penalties in Circuit Court pursuant to §§ 386.590 and 386.600.

An oral argument on Staff's *Motion for Summary Determination* and an evidentiary hearing on Staff's *Complaint* were scheduled on June 11, 2014. ^The argument was held, but no testimony was taken at the hearing; instead, the parties stipulated to the admission of certain items. Respondents thereafter objected to Ex. 6 as being incomplete and submitted their Ex. O to supplement the record. The evidence of record, therefore, consists of the following:

Ex. 1, Direct Testimony of James A. Busch.
Sch. JAB-1 – Witness' Case Participation Record.
Sch. JAB-2 – Respondents' Territorial Agreement.

Ex. 2, Direct Testimony of Terry Thomas.

Ex. 3, Affidavit of John Holborow.²
Ex. A – Respondents' Territorial Agreement.
Ex. B – Valle Creek Main Extension Agreement.
Ex. 2 – Petition, CPWSD C-1 v. City of Peveley, 12JC-CC01024.
Ex. A – Legal Description, Tiara at the Abbey Subdivision.
Ex. B – Legal Description, Hunters Glen Subdivision.
Ex. C – Legal Description, Valle Creek Condominiums.
Ex. D – Legal Description, Mason Woods.
Ex. E – Legal Description, Glenoma and Kenmon Valley

² Attached to Staff's *Motion for Summary Determination*.

Mobile Home Parks.
Ex. F – Legal Description, I-55 Business Park.
Ex. G – Respondents’ Territorial Agreement.
Ex. H – Letter, 08-28-12, Peveley City Attorney to CPWSD C-1 re Valle Creek Condominiums.
Ex. I – Letter, 09-11-12, Attorney for CPWSD C-1 to Peveley City Attorney.

Ex. 4, Rebuttal Testimony of James A. Busch.

Ex. 5, Respondents’ Responses to Staff’s Data Requests.

Ex. 6, Staff’s Responses to Respondents’ Data Requests.³

Ex. O, Respondents’ Ex. O, Documents provided by Staff to Respondents in response to their Data Requests.

Item 1 – Staff’s Responses to Respondents’ Data Requests.

Item 2 – “Facts around the issue of water service – PWSD C-1/City of Pevely,” provided to Staff by John Holborow.

Item 3 – Water Purchase Agreement, CPWSD C-1 and St. Louis County Water Co. (now MAWC).

Item 4 – Amendment to Water Purchase Agreement, CPWSD C-1 and St. Louis County Water Co.

Item 5 – Wholesale Water Agreement, CPWSD C-1 and MAWC.

Item 6 – Petition, Petition, CPWSD C-1 v. City of Peveley, 12JC-CC01024.

Ex. G – Respondents’ Territorial Agreement.

Ex. H – Letter, 08-28-12, Peveley City Attorney to CPWSD C-1 re Valle Creek Condominiums.

Ex. I – Letter, 09-11-12, Attorney for CPWSD C-1 to Peveley City Attorney.

Item 7 – List of Territorial Agreements.

Is this case moot?

No, this case is not moot. At the oral argument, the City suggested that this matter is moot because the City no longer desires to be bound by the Territorial Agreement. According to counsel for Pevely, it “makes no sense” for Respondents either to submit their Territorial Agreement for approval or for cancellation by the Commission. Counsel for Peveley cited ***State ex rel. Public Counsel v. Public***

³ Identical to Item 1 attached to Respondents’ Ex. O.

Service Commission,⁴ a case that turned on the mootness of superseded tariffs. As Staff Counsel explained at the Oral Argument, this is complaint case that is retrospective in nature. The violations occurred in the past and the fact that the Respondents have now abandoned their unlawful Territorial Agreement does not “unring the bell.” The most important issue still remains for decision, namely, the Commission’s jurisdiction over these parties to the extent that they make or unmake any territorial agreement between them. Also remaining for decision is whether the Commission will seek penalties.

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.”⁵ In the present case, as stated above, important issues remain for decision. In any event, “an exception to the mootness doctrine . . . exists [w]here the issue raised is one of general public interest and importance, recurring in nature[.]”⁶ Courts have invoked an exception to the mootness doctrine if “there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance.”⁷ The circumstances presented by this case demonstrate that some municipalities and public water supply districts do require

⁴ 328 S.W.3d 347 (Mo. App., W.D. 2010).

⁵ ***Precision Invs., L.L.C. v. Cornerstone Propane, L.P.***, 220 S.W.3d 301, 304 (Mo. banc 2007); ***State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm’n***, 848 S.W.2d 593, 596 (Mo. App., W.D. 1993).

⁶ ***State ex rel. Praxair, Inc. v. Public Service Commission***, 328 S.W.3d 329, 334 (Mo. App., W.D. 2010) (citation omitted and internal quotation marks omitted).

⁷ ***Public Service Com’n of State v. Missouri Gas Energy***, 388 S.W.3d 221, 229 (Mo. App., W.D. 2012).

guidance as to the application of § 247.172, RSMo.

Argument

ISSUE 1. Respondents have violated § 247.172, RSMo., by (1) making a Territorial Agreement between them designating the boundaries of the water service area of each and the powers granted by each to the other to provide service within one another's boundaries without seeking or obtaining the approval of this Commission; (2) by filing a complaint regarding their Territorial Agreement in Circuit Court rather than before this Commission; (3) by seeking a modification or amendment of their Territorial Agreement in the Circuit Court rather than before this Commission; and (4) by seeking revocation or suspension of their Territorial Agreement in the Circuit Court rather than before this Commission on its determination that the Territorial Agreement is no longer in the public interest.

Section 247.172, RSMo.:

Section 247.172 grants exclusive authority to this Commission to approve territorial agreements "between and among" public water supply districts, water corporations subject to Public Service Commission jurisdiction, and municipally-owned utilities, and 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 for in 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 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.

3. Where the parties cannot agree upon the boundaries of the water service areas that are to be set forth in the agreement, they may, by

mutual consent of all parties involved, petition the public service commission to designate the boundaries of the water service areas to be served by each party and such designations by the commission shall be binding on all such parties. Petitions shall be made pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity and the commission shall hold evidentiary hearings on all petitions so received as required in subsection 5 of this section. The commission shall base its final determination regarding such petitions upon a finding that the commission's designation of water service areas is in the public interest.

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 otherwise 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 properly 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, 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. The commission may approve the application if it determines that approval of the territorial agreement in total is not detrimental to the public interest. Review of commission decisions under this section shall be governed by the provisions of sections 386.500 to 386.550.

6. Commission approval of any territorial agreement entered into under the provisions of this section shall in no way affect or diminish the rights and duties of any water supplier not a party to the agreement to provide service within the boundaries designated in such territorial agreement. In the event any water corporation which is not a party to the territorial agreement and which is subject to the jurisdiction, control and regulation of the commission under chapters 386 and 393 has sought or hereafter seeks authorization from the commission to sell and distribute water or construct, operate and maintain water supply facilities within the boundaries designated in any such territorial agreement, the commission, in making its determination regarding such requested authority, shall give no consideration or weight to the existence of any such territorial

agreement and any actual rendition of retail water supply services by any of the parties to such territorial agreement will not preclude the commission from granting the requested authority.

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 service, 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.

8. Notwithstanding the provisions of section 386.410, the commission shall by rule set a schedule of fees based upon its costs in reviewing proposed territorial agreements for approval or disapproval. Responsibility for payment of the fees shall be that of the parties to the proceeding as ordered by the commission in each case. The fees shall be paid to the director of revenue who shall remit such payments to the state treasurer. The state treasurer shall credit such payments to the public service commission fund, or its successor fund, as established in section 33.571. Nothing in this section shall be construed as otherwise conferring upon the commission jurisdiction over the service, rates, financing, accounting or management of any public water supply district or municipally owned utility and except as provided in this section, nothing shall affect the rights, privileges or duties of public water supply districts, water corporations subject to public service commission jurisdiction or municipally owned utilities.

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.

Respondents' Violations of § 247.172, RSMo.:

This case presents a legal controversy; in Staff's opinion, there are no material

facts in dispute. Respondent CPWSD C-1 is a consolidated public water supply district and Respondent Pevely is a Fourth Class City and municipality that owns and operates a water supply utility.⁸ They are thus within the scope of § 247.172.1, RSMo.

Pevely and CPWSD C-1 are adjacent and parts of Pevely are within the corporate boundaries of CPWSD C-1.⁹ Disputes arose between the two Respondents as to which of them would provide water service to certain areas and these disputes resulted in litigation.¹⁰ To resolve these disputes and litigation, on or about November 12, 2007, the Respondents entered into an agreement that they captioned “Territorial Agreement between the Consolidated Public Water Supply District No. C-1 of Jefferson County, Missouri, and the City of Pevely, Missouri” (“the Territorial Agreement”).¹¹ The Respondents have never sought or obtained approval by this Commission of their Territorial Agreement.¹² By making this Territorial Agreement and not seeking Commission approval, the Respondents violated the plain language of § 247.172.4, RSMo.

The Respondents’ Territorial Agreement did not end the disputes between them. Among the parcels that are located within both Pevely and CPWSD C-1 is one known as the Valle Creek Condominiums (“the Development”).¹³ The Development was built by H and H Development Group, Inc. (“H&H”), which eventually became insolvent,

⁸ Ex. 5, DRs 1-3, 36 and 37.

⁹ *Id.*

¹⁰ *Id.*, DRs 4 and 38.

¹¹ The Territorial Agreement appears in the record multiple times: Sch. JAB-2 attached to Ex. 1; Ex. A attached to Ex. 3; Ex. G attached to Ex. 2, which is attached to Ex. 3; and Ex. G attached to Item 6, attached to Respondents’ Ex. O.

¹² Ex. 5, DRs 6 and 40.

¹³ See Ex. 3 and attached to it, Ex. 2, esp. Ex. C; and see Item 2 and Item 6 attached to Ex. O, esp. Exs. G, H and I; Ex. 5, DRs 7 and 41.

leading to the appointment of a receiver (“the Receiver”).¹⁴ Although the Development is located within CPWSD C-1, none of CPWSD C-1’s water mains extend to it.¹⁵ However, Pevely’s mains do extend to the Development and Pevely provided water service to the Development via its mains, evidently in violation of the Territorial Agreement.¹⁶

On June 30, 2008, H&H entered into an agreement (“the Main Extension Agreement”) with Respondent CPWSD C-1, which required H&H to install, at its expense, a water main extension connecting the Development to CPWSD C-1’s water mains.¹⁷ The Main Extension Agreement provided that this work was to be completed by February 1, 2009, and, if still incomplete by March 1, 2009, “then the water service line from Pevely’s water main will be terminated on that date” and “[CPWSD] C-1 water meters will be removed, and the Developer [i.e., H&H] will make other provisions to legally serve Valle Creek Condominiums customers at that time.”¹⁸ The Main Extension Agreement was an amendment of the parties’ Territorial Agreement and by making this amendment to their Territorial Agreement and not seeking Commission approval, the Respondents again violated the plain language of § 247.172.4, RSMo.

A verbal side agreement (“the Temporary Service Agreement”) permitted Pevely to provide water service to the Development on an interim basis, pending completion of

¹⁴ Ex. 5, DRs 11, 21, 45, and 55.

¹⁵ Ex. 3, ¶ 4; Ex. 5, DRs 12 and 46.

¹⁶ The Territorial Agreement allows service by Pevely to several named developments, not including the Valle Creek Condominiums. The Valle Creek Condominiums are not mentioned in the Territorial Agreement. See Ex. 3, ¶¶ 9 and 10; Ex. O, Item 2.

¹⁷ Ex. 3, ¶¶ 6-8; Ex. 5, DRs 12 and 46; Ex. O, Item 2, ¶ 3.

¹⁸ Ex. 3, Ex. B.

the main extension.¹⁹ Pevely provided water to the Development from June 30, 2008, until October 1, 2012, under the Temporary Service Agreement.²⁰ During that period, the meters on the lines by which Pevely served the Development belonged to CPWSD C-1.²¹ CPWSD C-1 billed H&H monthly for the water provided to the Development and reimbursed Pevely semi-annually for the cost of the water.²² The Respondents did not then, nor at any time thereafter, seek or obtain approval by this Commission of the Temporary Service Agreement.²³ The Temporary Service Agreement was also an amendment of the parties' Territorial Agreement and by making this additional amendment to their Territorial Agreement and not seeking Commission approval, the Respondents yet again violated the plain language of § 247.172.4, RSMo.

However, the main extension was never built, H&H ran out of money, and the Receiver was appointed in 2012.²⁴ In September of 2012, yet another territorial dispute arose between CPWSD C-1 and Pevely, pursuant to which, on October 1, 2012, Pevely removed CPWSD C-1's meters from the Development and replaced them with its own.²⁵ Thereafter, Pevely billed H&H directly for the water service provided to the Development.²⁶ CPWSD C-1 responded by filing a new lawsuit against Pevely on November 1, 2012, Case No. 12JE-CC01024, in the Circuit Court of Jefferson County, Missouri, seeking several varieties of relief, some of which, pursuant to § 247.172, are

¹⁹ Ex. 3, ¶ 9; Ex. 5, DRs 15 and 49.

²⁰ Ex. 3, ¶ 10; Ex. 5, DR 52.

²¹ Ex. 3, ¶ 10; Ex. 5, DRs 15 and 49; Ex. O, Item 2, ¶ 5.

²² Ex. 3, ¶ 10; Ex. 5, DRs 16 and 50; Ex. O, Item 2, ¶ 5.

²³ Ex. 5, DR 17.

²⁴ Ex. 3, ¶ 8; Ex. 5, DRs 21 and 55; Ex. O, Item 2, ¶ 4.

²⁵ Ex. 3, ¶ 11; Ex. 5, DR 60; Ex. O, Item 2, ¶ 6.

²⁶ *Id.*

within the exclusive authority of this Commission.²⁷ CPWSD C-1 thereby violated § 247.172.7, RSMo.

While the lawsuit was pending, in April 2013, CPWSD C-1 removed Pevely's meters from the Development and replaced them with its own and started billing H&H directly for the water service provided to the Development.²⁸ The water was still coming from Pevely over Pevely's mains as CPWSD C-1's mains still do not extend to the Development.²⁹ At about the same time, CPWSD C-1, by letter to the Receiver, demanded that H&H complete within 180 days the main extension contemplated by the Main Extension Agreement, or face service termination. H&H lacks the necessary funds to complete the main extension and the possibility exists that the Development will lose its water service.³⁰ Because of the unlawful and irresponsible behavior of the Respondents, and the continuing threat of service disconnection to the Condominium, the public interest requires that the Commission determine this *Complaint* in Staff's favor.

At the hearing, counsel for Peveley repeatedly asserted that the City wants out of the unlawful Territorial Agreement it made with CPWSD C-1. That, too, is relief that only this Commission can grant pursuant to § 247.172.7, RSMo.

ISSUE 2. Although the Respondents have violated § 247.172, RSMo., it is Staff's recommendation that the Commission not pursue penalties from these two public entities.

Section 386.570, RSMo., provides for penalties for violating statutes

²⁷ Ex. 3, ¶ 12 and Ex. 2; Ex. 5, DRs 27 and 61; Ex. O, Item 6.

²⁸ Ex. 3, ¶ 13; Ex. 5, DRs 29, 30, 63, and 64; Ex. O, Item 2, ¶ 7.

²⁹ Ex. 3, ¶ 14.

³⁰ Ex. 3, ¶ 15.

Administered by the Commission:

1. Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

2. Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.

Although Staff believes that penalties would lie against Respondents for their several violations of § 247.172, RSMo., as enumerated above, Staff recommends that the Commission not pursue penalties in this case because each Respondent is a public governmental body.

Conclusion

The evidence adduced herein establishes that Respondents have repeatedly violated § 247.172, RSMo. The Commission should, therefore, sustain Staff's *Complaint*. The public welfare is not served by the ongoing competition and disputes of these parties and they are manifestly unable to resolve them by themselves. Staff does not recommend penalties in this case.

WHEREFORE, Staff prays that the Commission will sustain its *Complaint*, and grant such other and further relief as the Commission deems just.

Respectfully submitted,

s/ Kevin A. Thompson
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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 **23rd day of July, 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, which date is not later than the date on which this pleading is filed with the Commission as required by Rule 4 CSR 240-2.117(1)(B), relating to Summary Determination.

s/ Kevin A. Thompson