BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	**Case No. WC-2007-0394**
Central Jefferson County Utilities, Inc., et al.,	)	**Case No. SC-2007-0396**
Respondents.	)	

STAFF'S REPLY AND SUGGESTIONS IN OPPOSITION TO RESPONDENTS' AFFIRMATIVE DEFENSES AND MOTIONS TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel as authorized by §§ 386.071, 386.390.1, RSMo 2000, and Commission Rule 4 CSR 240-2.070(1), and for its Reply and Suggestions in Opposition to Respondents' Affirmative Defenses and Motions to Dismiss, states as follows:

INTRODUCTION

These cases concern the extent to which real estate developers can be held responsible for the inadequacies of the water and sewer utilities that they create and operate in order to support their profit-making activities. These cases are significant because, as the Commission is only too well-aware, developers often build minimally-acceptable water and sewer systems, often fail to maintain and operate them adequately, and often seek to avoid responsibility, leaving the

health and welfare of the public at risk. Staff seeks to establish the principle in these cases that developers can never get off the hook and evade personal financial responsibility for the harmful consequences of their activities.

The Process of Development:

Throughout Missouri, agricultural and other undeveloped real estate is being converted to residential and commercial use through the ongoing process of development. These developments are undertaken by private entrepreneurs who seek to realize personal profit by acquiring undeveloped land, greatly increasing its value by building homes, stores and office buildings upon it, and then selling it for a significant gain. These activities create jobs and result in significant revenues for real estate agents and brokers, banks, attorneys, title companies, and many others who have some share in the process. Government realizes revenues from these developments, as well, in the form of increased taxes and fees. It is true that the process of development is not without risk and there are developments that fail, resulting in losses to all concerned. Nonetheless, all of these activities are right and proper and are generally considered to confer many benefits upon the people of the State of Missouri.

Homes, stores and office buildings must be supported by utility services or they are unusable and worthless. Therefore, developers generally install utility infrastructure in the course of building their developments. The utility infrastructure, generally quite expensive, is then simply contributed by the developers to the utilities which will actually provide the services in question. The utility side of the development, therefore, represents a substantial cost of

doing business to the developers rather than a profit-making opportunity. The utility side of the development presents other difficulties and frustrations, as well, in the form of various regulatory agencies from whom permits and approvals must be obtained and whose specifications and regulations must be met.

Often, there is no established utility prepared to provide water or sewer services to a development. In that case, the developers install entire water and sewer systems, complete with wells and treatment plants. This practice has resulted in a significant and growing problem. Because the developers are not in the business of building water and sewer systems and providing water and sewer services, they often do not do these things very well. Because the developers do not expect to make any profits from building water and sewer systems and providing water and sewer services, they tend to invest as little time, effort and capital into these activities as possible. Any entrepreneur will tell you that you maximize profit by reducing expenses.

The Respondents:

Some developers operate the water and sewer systems that they build directly. Others create an entity of some sort to operate the water and sewer systems. In the present cases, the developers created a corporation, Central Jefferson County Utilities, Inc. ("CJCU"). CJCU is a certificated water and sewer utility; it is regulated by this Commission and also by the Missouri Department of Natural Resources ("DNR") and the United States Environmental Protection Agency ("EPA"). The developers also created a second corporation, Raintree Plantation, Inc. ("Raintree"), which actually carried on the development activities.

Both corporations are, or were at all times herein pertinent, owned by Respondents Norville McClain, his son Kenneth McClain, and Jeremiah Nixon, through the intermediary of trusts that they control. Both corporations are, or were at all times herein pertinent, managed, directed and operated by Respondents Norville McClain, his son Kenneth McClain, and Jeremiah Nixon directly.

This Commission, in its *Report & Order* issued on February 8, 2007, in Case No. SO-2007-0071, authorized CJCU to sell its assets to Jefferson County Public Sewer District ("JCPSD"). In granting this authority, the Commission stated:

> The Commission concludes that there is substantial and competent evidence on the record as a whole that Central Jefferson does not provide safe and adequate water service. The sworn testimony of Todd Thomas, civil engineer and vice president and general manager of EMC; Kenneth McClain, President and one of the owners of Central Jefferson; the witnesses at the local public hearing held in this matter, and the DNR Report of Compliance, all support this conclusion. Even though Lance Dorsey, environmental specialist for the DNR, testified that there were no outstanding compliance or enforcement actions against Central Jefferson with regard to its provision of drinking water, this is not the sole criteria for determining if safe and adequate service is being provided.

In the Matter of the Application of Central Jefferson County Utilities, Inc., Case No. SO-2007-0071 (*Report & Order,* issued February 8, 2007) at 34. The Commission additionally stated that "the residents of the Subdivision are situated in a precarious position" in view of the lead contamination of one of CJCU's two wells and its lack of adequate storage capacity. *Id.* The Commission concluded, "Central Jefferson has proved that it no longer has the technical and managerial ability to develop, operate and maintain a water system." *Id.,* at 35.

The Commission was equally critical of CJCU's sewer system, stating:

> Additionally, the Commission concludes that there is substantial and competent evidence on the record as a whole that Central Jefferson fails to provide safe and adequate sewer service. The sewer system is continually operating beyond its design capacity and sewage from this system is reported to be contaminating surrounding lakes, creeks, yards and basements. The EPA's findings of violation and moratorium on new connections to the sewer system, as well as the numerous DNR violations, speak for themselves. Additionally, it would appear that Central Jefferson is in violation of Commission Rule 4 CSR 240-60.020, not only for exceeding the system's design capacity and for failure to comply with environmental and health regulations, but also for its failure to control the surface and ground water that drains into its system.

Id. The Commission observed that "Central Jefferson has allowed its water and sewer system to decay, and its owners have expressed a lack of willingness or lack of capacity to bring these systems into compliance with environmental regulations or to expand and improve the system to provide safe and adequate service to its current and future customers." *Id.* Based on these findings, the Commission approved the proposed transfer because placing the systems in the hands of another owner was not detrimental to the public interest, particularly where that new owner "has contracted with a competent company, EMC, to operate, maintain and expand the current facilities." *Id.* So outraged was this Commission by the abundant record of inadequate service, inadequate facilities and inadequate maintenance in Case SO-2007-0071, that it expressly directed the undersigned, its General Counsel, "to seek the maximum amount in penalties[.]" *Id.,* at 37.

Respondents' Pleadings:

A pleading, in Commission practice, is "any application, complaint,

petition, answer, motion**,** staff recommendation**,** or other similar written document, which is not a tariff or correspondence, and which is filed in a case. A brief is not a pleading under this definition." Rule 4 CSR 240-2.010(13). The complainant must make petition "in writing, setting forth any act or thing done or omitted to be done by any person, corporation or public utility[.]" Rule 4 CSR 240-2.070(3). The respondent, upon service of the complaint and the Commission's notice of complaint, "shall file an answer" setting out "[a]ll grounds of defense, both of law and of fact[.]" Rule 4 CSR 240-2.070(8).

CJCU filed an Answer and Affirmative Defenses. Respondents Raintree, Jeremiah Nixon, Norville and Kenneth McClain, and the Trust filed Answers and Affirmative Defenses, as well as Motions to Dismiss. The Affirmative Defenses and the Motions to Dismiss – which are incorporated by reference into the Affirmative defenses – are substantially identical and shall be discussed together herein.

ARGUMENT

I

Respondents' Motions to Dismiss

The Respondents, other than CJCU, filed Motions to Dismiss, in which they contend that Staff has failed to state a claim upon which relief may be granted in that the Movants cannot be held liable for the misconduct and violations of CJCU because it is a separate and distinct legal entity, that the Complaint lacks essential allegations, and, in the case of the Trust, is barred by

the Missouri Probate Code and is fatally flawed because necessary and indispensable parties are not joined, such as the personal representative of the deceased Norville McClain. The Trust further demands its fees and costs herein expended.

Failure to State a Claim:

A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint. J.R. Devine, *Missouri Civil Pleading and Practice,* § 20-3 (1986). While the determination of such motions was, at one time, limited to consideration of matters contained within the four corners of the complaint, the modern trend is to extend consideration to matters outside the complaint, as well. *Id.,* at 264 and § 24-2. All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint. *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. banc 1993). Complainant enjoys the benefit of all reasonable inferences. *Id.* The complaint should not be dismissed unless it shows no set of facts entitling it to relief. *Id.*

These rules must be applied in the context of the requirements applicable to administrative complaints generally and Public Service Commission complaints in particular. "[A] complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient." *St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,* 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925). The Court

made this statement in a case in which it was considering an assertion that the Commission had overstepped its authority and acted as a judicial body by construing and enforcing a contract. *Supra,* 308 Mo. at 371-72, 272 S.W. at 960. The Court noted that the allegations contained in the complaint in that case, as well as much of the evidence received, supported the charge. *Supra,* 308 Mo. at 372, 272 S.W. at 960. The Court made the statement in question as it dismissed the significance of these observations, noting that "we are not so much concerned with the form and substance of the complaint as with the nature and extent of the order made and the considerations upon which it was based."[1]

The rule of *Kansas City Terminal Railway* does not stand for the proposition that complaints filed with this Commission need not meet any pleading requirements nor that they are immune from dismissal for insufficiency. Rather, the case means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading. The Eastern District of the Missouri Court of Appeals has said the same thing:

> On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It

[1] *Id.* The Court went on to set aside the Commission's order because it concluded that the Commission had, in fact, exceeded its jurisdiction by construing and enforcing a contract.

> is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.

Sorbello v. City of Maplewood, 610 S.W.2d 375, 376 (Mo. App., E.D. 1980); *and see Schrewe v. Sanders,* 498 S.W.2d 775, 777 (Mo. 1973); *Giessow v. Litz,* 558 S.W.2d 742, 749 (Mo. App. 1977).

The principal theory relied upon by Respondents in both their Motions to Dismiss and in their Affirmative Defenses is that they cannot be liable for the misconduct and violations of CJCU in its capacity as a public utility. Respondents' theory has three prongs: first, that they are not entities subject to the Public Service Commission Law; second, that because CJCU is a corporation they cannot be held liable for its wrongdoing; third, that the Complaint is inartfully drafted and lacks necessary allegations.

Jurisdiction over Respondents:

This Commission certainly has jurisdiction to adjudicate Staff's complaints against these Respondents. Section 386.390.1, RSMo 2000, authorizes the Commission to determine complaints as to "any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]" Such a complaint "may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation[.]" By the plain language of the statute, a complaint under

the cited statute may be brought by anyone, against anyone.[2] The only requirement is that the complaint must, in the words of the Missouri Supreme Court, "fairly [present] for determination some matter which falls within the jurisdiction of the Commission[.]" *Kansas City Terminal Railway, supra.* That requirement is undeniably met in this case.

Staff's Theory of Liability:

There is absolutely no reason to suppose that the many failures of CJCU found as fact in Case SO-2007-0071 and charged herein are not, in fact, the direct and personal failures of Norville McClain, Kenneth McClain[3] and Jeremiah Nixon. They are the actual, natural persons who made the decisions that were manifested by CJCU's conduct. They are the actual, natural persons who subordinated the welfare of the residents of the Raintree Plantation Subdivision to the demands of their own greed and cupidity. Now, making every argument they can think of, they ask this Commission to dismiss them from this case and to thereby allow them to enjoy the fruits of their misconduct undisturbed in the future.[4] Staff urges the Commission to deny Respondents' motions and suggests that a thoughtful reading of Chapters 386 and 393 reveals that the legislature fully intended to impose continuing and unavoidable personal responsibility on the natural persons responsible for the conduct of a public utility, despite their efforts to shelter behind the corporate form.

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[2] Unless the complaint questions whether established rates are just and reasonable, in which case there is a limitation as to who may bring the complaint.

[3] The McClain Respondents, in fact, are Norville Kenneth McClain, Sr., herein referred to as "Norville," and Norville Kenneth McClain, Jr., herein referred to as "Kenneth."

[4] In fact, a higher tribunal has already dismissed Norville Kenneth McClain, Sr., who died on May 11, 2003, according to Respondents. Staff does not dispute this assertion.

CJCU is a "water corporation," a "sewer corporation" and a "public utility" within the intendments of § 386.020, RSMo Supp. 2006. CJCU provides water and sewer service to the public for gain, within its assigned service area, pursuant to a certificate of convenience and necessity ("CCN") granted by this Commission. CJCU operates both a "water system" and a "sewer system," as those phrases are defined in § 386.020, RSMo Supp. 2006, each consisting of various pipes, mains, tanks, other equipment, appliances and fixtures, as well as certain tracts of real estate. CJCU admits as much in its Answer, filed herein on May 18, 2007, as do the other Respondents in their Answers.[5]

Staff has alleged that the two McClains, Jeremiah Nixon and the Norville McClain Trust are also each a water corporation, a sewer corporation and a public utility within the intendments of § 386.020, RSMo Supp. 2006.[6] All of the Respondents have denied these allegations,[7] and have characterized Staff's underlying theory as "patently absurd."[8] Staff's theory, however, is founded squarely upon the plain language of the statute.

"Fundamentally, [the courts] seek to ascertain the intent of the lawmakers . . . by attributing to the words used in the statute their plain and ordinary meaning." *Fisher v. Waste Management of Missouri,* 58 S.W.3d 523, 526 (Mo. banc 2001). "Sewer corporation" and "water corporation" are defined in § 386.020, (49) and (58), RSMo Supp. 2006, as follows:

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[5] CJCU's Answers, ¶ 9.

[6] Complaints, ¶ 10.

[7] At ¶ 10 of each of the Answers.

[8] At ¶ 12 of Kenneth McClain and Jeremiah Nixon's Motion to Dismiss and Norville Mclain

> "Sewer corporation" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets;
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> "Water corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water;

Each definition has four parts, which describe the relationship of an entity to a water or sewer system used for certain activities:

(1) An expansive list of eligible entities – "every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court";[9] and

(2) A series of verbs describing the relationship of the entity to the utility system – "owning, operating, controlling or managing";[10] and

(3) The water or sewer system – "any sewer system, plant or property" or "any plant or property, dam or water supply, canal, or power station";[11] and

(4) The activity in which the entity is engaged, using the water or sewer system – "the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain" or "distributing or selling for distribution,

[9] Section 386.020(49), RSMo Supp. 2006; § 386.020(58) is virtually similar.

[10] *Id.*

[11] Section 386.020, (49) and (58), RSMo Supp. 2006.

or selling or supplying for gain any water[.]"[12]

The first two factors are both written in very expansive terms, thereby revealing the legislative intent to impose liability very broadly. What is the effect of this broad liability? Subjection to the jurisdiction of this Commission and the provisions of Chapter 386 as a public utility:

> "Public utility" includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter[.]"[13]

Consider this hypothetical situation: A water or sewer system, used to serve the public for gain, is owned by a Missouri general business corporation. The corporation is certainly a "water corporation" or a "sewer corporation"; a "corporation" is an eligible entity under the cited statute and "owning" is one of the relationships expressly mentioned in the statute.

Our hypothetical corporation contracts with a licensed, professional operator. The contractor is also a "water corporation" or "sewer corporation" because he is a natural person, which is an eligible entity under the statute, and he is "operating" the utility system, which is also one of the relationships expressly mentioned in the statute. Nothing in the language of the statute excludes the operator; in fact, the language, read in its plain and ordinary meaning, certainly includes him. This reading not only is required by the plain

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[12] *Id.* Note that (49), applicable to sewer corporations, also contains an exclusion for very small systems that is not paralleled in (58): "except that the term shall not include sewer systems with fewer than twenty-five outlets[.]"

[13] Section 386.020(52), RSMo Supp. 2006.

language of the statute, but it accords with this police-power statute's remedial purpose of safeguarding the public health and welfare: not only the certificated corporation, a mere fictitious person, can be held responsible, but also the natural person doing the operating. After all, any operational failures of the system are the operator's personal failures.

Like all corporations, our hypothetical corporation has officers and directors. The officers and directors manage the corporation's affairs. Like "operating," the statute expressly refers to "managing" as a relationship conferring responsibility. Again, nothing in the statutory language excludes the managers from liability; rather, the language, read in its plain and ordinary meaning, certainly includes them.

Finally, our hypothetical corporation is itself owned by several shareholders; together, they hold all of the issued and outstanding shares and control the corporation and the utility systems that it owns and operates. The shareholders are among the enumerated entities and "controlling" is also one of the specifically enumerated activities. The plain and ordinary meaning of the statutory language is that the shareholders, too, are personally liable. Nothing in the language of the statute or its purpose excludes them; rather, both of these points indicate that they, like the operator and the manager, are personally responsible. The broad scope of the Commission's complaint authority at § 386.390.1, RSMo 2000, supports this reading of § 386.020, RSMo Supp. 2006.

Staff's Theory is Not Contrary to Settled Missouri Law:

As noted, the Respondents' dismiss Staff's theory as "patently absurd." It

is not. Corporations, as fictitious persons, are creatures of statute and what the legislature has given with one hand it may take away with the other. "[A]s a general rule, *and in the absence of . . . statutory provisions to the contrary,* stockholders are not liable as such for any of the obligations of a corporation . . . ." 18A Am.Jur.2d, Corporations § 850 (emphasis supplied). Staff contends that the language of § 386.020, RSMo Supp. 2006, herein considered, is just such a statutory provision to the contrary.

The rule for corporate torts is a little different: "It is generally held that stockholders are not liable for the tortuous acts of the corporation *unless they participate in or aid the commission of such acts*." *Id.,* at § 851 (emphasis added). "[S]hareholders [will not] ordinarily be liable for violations of state or local statutes, ordinances, or regulations in the absence of proof of active participation in the management of the corporation or the wrongdoings." *Id.* Staff contends that Respondents participated in and aided CJCU's misconduct and are thus equally liable for its violations.

> The general rule of nonliability of shareholders for corporate obligations or conduct is subject to numerous exceptions. The statements of these exceptions have taken many forms, with courts stating that shareholders may be held individually liable to prevent fraud or injustice, to enforce or achieve a paramount equity, to protect the rights of innocent parties where recognition of corporate separateness would result in "a manifest absurdity," or to prevent the avoidance of a legal obligation or duty.

Id., at § 852.

Except for the Norville McClain, Sr., Trust, this is not a case in which the complainant seeks to impose liability upon persons whose only involvement has been to own shares in the subject enterprise. Nixon and the McClains were, and

are, not only the shareholders of Raintree and CJCU, but also the directors and the officers of those corporations. Each of them was, and with the exception of Norville McClain, Sr., still is, actively engaged in the management of both CJCU and Raintree. As Staff stated above, the many failures of CJCU found as fact in Case SO-2007-0071 are the direct and personal failures of Norville McClain, Kenneth McClain and Jeremiah Nixon. They are not shielded from liability for these personal acts and omissions by the corporate form.

Section 386.580, RSMo 2000, imposes criminal liability upon officers, agents and employees of public utilities:

> Every officer, agent or employee of any corporation or public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any corporation, person or public utility of any provision of the constitution of this state or of this or any other law, or who fails to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, or who procures, aids or abets any corporation, person or public utility in their or its failure to obey, observe and comply with any such order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, in a case in which a penalty has not herein been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

This provision, like § 386.390.1, RSMo 2000, illustrates and supports Staff's interpretation of the effect of the broad language of § 386.020, RSMo Supp. 2006.

Respondents assert that the Commission has already considered and rejected Staff's theory of liability based on § 386.020, RSMo Supp. 2006, in *Staff v. Hurricane Deck Holding Co. et al.,* Case No. WC-2006-0303 (*Order Granting*

in Part and Denying in Part Staff's Motion for Summary Judgment, issued August 31, 2006). Respondents misrepresent the Commission's holding in *Hurricane Deck.* The Commission did not reject Staff's legal theory, rather, it concluded that the undisputed facts did not support summary determination against the respondents other than Hurricane Deck Holding Co. itself. Rather than pursue a hearing against the remaining Respondents, Staff dismissed them on September 7, 2006.

Staff's Alternate Theory of Liability:

Even if the Commission does not accept Staff's theory of liability founded upon the plain language of § 386.020, RSMo Supp. 2006, Respondents Kenneth McClain, Jeremiah Nixon and the Trust are liable for CJCU's misconduct and violations, and thus subject to the Commission's jurisdiction, upon well-established doctrines of Missouri law. Shareholders, directors and officers can all be called to account for corporate misconduct under certain circumstances. Staff believes that those circumstances exist here. To the extent that the necessary factual basis is not already established in the record of Case No. SO-2007-0071, Staff prays that the Commission will afford it an adequate opportunity to conduct discovery in order to find and establish those facts.

Shareholder Liability

Missouri law recognizes circumstances in which the "corporate veil" can be "pierced" in order to hold the corporation's owners liable for its debt. *66, Inc. v. Crestwood Commons Redevelopment Corp.,* 998 S.W.2d 32, 40 (Mo. banc 1999); s*ee also, May Department Stores v. Union Electric,* 341 Mo. 299, 107

S.W.2d 41 (1937), *Mobius Management Systems, Inc. v. West Physician Search, L.L.C.,* 175 S.W.3d 186, 188 -189 (Mo. App., E.D. 2005), *Walls by Walls v. Allen Cab Co.,* 903 S.W.2d 937, 943 (Mo. App. 1995), *K.C. Roofing Center v. On Top Roofing, Inc.,* 807 S.W.2d 545, 549 (Mo. App. 1991), and *Collet v. American National Stores, Inc.,* 708 S.W.2d 273, 284-287 (Mo. App. 1986). A Missouri court will disregard the corporate entity and hold the corporate owners liable if the following can be shown:

> 1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
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> 2) Such control must have been used by the corporation to commit fraud *or* wrong, to perpetrate the violation of statutory or *other positive legal duty,* or dishonest and *unjust* act in contravention of plaintiff's legal rights; and
>
> 3) The control and breach of duty must proximately cause the injury or unjust loss complained of.

66, Inc.,supra, 998 S.W.2d at 40, *Mobius Mgt. Systems, supra,* 175 S.W.3d at 188 -189 (Mo. App., E.D. 2005), *Collet, supra,* 708 S.W.2d at 284. (Emphasis added.)

Here, Staff seeks to impose liability upon *all* of the shareholders of CJCU, Respondents Kenneth McClain, Nixon and the Trust. The element of control is

necessarily met – Respondents own or control 100% of the shares. The shareholders used their control of CJCU to breach its affirmative legal duties to its ratepayers, this Commission and the public in general, as this Commission has already determined in Case No. SO-2007-0071. There can be no question but that it was the shareholders' control of CJCU and their callous disregard for its obligations as a public utility that proximately caused CJCU's misconduct as found by this Commission in Case No. SO-2007-0071 and as herein complained of by Staff. As the court said in *Mobius Mgt. Systems, supra,* 175 S.W.3d at 189, "all three elements required to pierce the corporate veil -- control, breach of duty, and proximate cause -- are present."

Officer & Director Liability

Under Missouri law, an agent or officer of a corporation may be held personally liable for acts done by the corporation if "he had actual or constructive knowledge of the actionable wrong and participated therein." *Wolfersberger v. Miller,* 327 Mo. 1150, ___, 39 S.W.2d 758, 764 (1931); s*ee also Patzman v. Howey,* 340 Mo. 11, ___, 100 S.W.2d 851, 856 (1936); *McKeehan v. Wittels,* 508 S.W.2d 277, 282 (Mo. App. 1974); *City of St. Louis v. Boos,* 503 S.W.2d 133, 135 (Mo. App. 1973); H. Henn & J. Alexander, *Laws of Corporations and Other Business Enterprises* § 218 (3d ed. 1983).[14] The McClain Respondents and Respondent Nixon controlled CJCU and actively managed it. There is no

[14] The authority cited by Respondents, *Thomas Berkeley Consulting Engineers, Inc. v. Zerman,* 911 S.W.2d 692 (Mo. App., E.D. 1995), does not contradict this line of cases.

question but that they knew of the problems at CJCU and refused to remedy them.[15]

Inartful Drafting:

The Movants also contend that the Complaint is inartfully drafted and thus fails to state a claim. Thus, Raintree asserts that the allegation that it is an "affiliate" of CJCU, without more, is insufficient to establish jurisdiction under § 386.250(7), RSMo 2000; and that the Complaint fails to establish jurisdiction under § 393.140(12), RSMo 2000, because it does not include an allegation that Raintree is a non-regulated business enterprise of CJCU not kept substantially separate and apart from the regulated business; and that the PSC has already held that the connection fee does not create jurisdiction. *Harter v. Raintree Plantation, Inc., and CJCU,* Case No. WC-82-230. Respondents Nixon and Kenneth McClain assert that they do not directly own shares in CJCU or Raintree, but that they are beneficiaries of certain trusts that actually hold the shares. The Movants assert that the Complaint is defective because there is no allegation that they participated in any of CJCU's wrongdoing or that they have or ever sought certificates from this Commission or permits from DNR.

Staff responds that the Complaint is sufficient under the rule announced in *Kansas City Terminal Railway,* because "it fairly presents for determination [a] matter which falls within the jurisdiction of the Commission," *supra,* 308 Mo. at 372, 272 S.W. at 960, and It fairly apprises the Respondents of the offenses for

[15] *See, e.g.,* Ex. 17HC from the record of Case No. SO-2007-0071, a letter dated September 7, 2005, from Roger Phibbs to Jeremiah "Jerry" Nixon and Kenneth McClain – Norvillle McClain was already dead by this date. An opportunity for discovery will permit Staff to establish the extent and scope of Respondents' knowledge in greater detail.

which penalties are sought. *Sorbello v. City of Maplewood, supra,* 610 S.W.2d at 376. Further, *Harter, supra,* is inapposite because Staff does not rely upon the connection fee to establish jurisdiction.

The Trust's Motion to Dismiss:

Respondent the Norville McClain Trust raises certain theories not raised by the other Movants. First, based on its allegation that Respondent Norville McClain died on May 11, 2003, the Trust asserts that the Complaint is barred as to Norville McClain's estate by the Missouri Probate Code. Second, the Trust contends that the Complaint is fatally flawed because Staff failed to join a necessary and indispensable party in the form of Mr. McClain's personal representative.

Staff agrees that the Complaint should be dismissed as to Respondent Norville K. McClain, Sr., now deceased. However, Staff vehemently denies that the Complaint should be dismissed as to the Respondent Trust. Neither of these two theories is relevant in any respect to the Complaint against the Trust.

WHEREFORE, by reason of all of the foregoing, Staff urges the Commission to deny Respondents' Motions to Dismiss and to resolve Staff's Complaints by contested case proceedings including, after due notice, an evidentiary hearing; and to grant such other and further relief as is just in the premises.

II

Respondents' Affirmative Defenses

The Commission's pleading rule for complaints states that respondent "shall file an answer" setting out "[a]ll grounds of defense, both of law and of fact[.]" Rule 4 CSR 240-2.070(8). Respondents assert Affirmative Defenses both of fact and law. "An affirmative defense seeks to defeat or avoid the plaintiff's cause of action, and avers that even if the allegations of the petition are taken as true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid the legal responsibility alleged." *Smith v. Thomas,* 210 S.W.3d 241, 244 (Mo. App., W.D. 2006), quoting *Mobley v. Baker,* 72 S.W.3d 251, 257 (Mo. App., W.D. 2002; *see also Rice v. James,* 844 S.W.2d 64, 66 (Mo. App., E.D. 1992), quoting *Parker v. Pine,* 617 S.W.2d 536, 542 (Mo. App., W.D. 1981): "'An affirmative defense contemplates additional facts not included in the allegations necessary to support plaintiff's case and avers that plaintiff's theory of liability, even though sustained by the evidence, does not lead to recovery because the affirmative defense allows the defendant to avoid legal responsibility.'"

By way of factual affirmative defenses, Respondents deny discharging pollutants, deny that the receiving stream is a "navigable water," assert that all discharges were authorized, that CJCU has always provided an adequate water supply to its customers, that that water was compliant with all applicable state and federal requirements at the point of delivery, that the PSC has never allowed adequate rates to CJCU and is thus responsible in some degree for the

inadequate nature of its systems, and that the PSC and the DNR have thwarted Respondents' attempts to sell the systems. Foremost among Respondents' factual defenses is their assertion -- which Staff does not contest -- that Norville Kenneth McClain, Sr., is now deceased.

As to Respondents' affirmative defenses of law, they state that this Commission lacks subject matter jurisdiction to adjudicate violations charged by DNR or the EPA, that for the Commission to do so would deprive them of due process and of the equal protection of the laws in violation of the Constitutions of Missouri and of the United States,[16] that any discharges were not pollutants within the meaning of applicable state and federal requirements, that they are immune under § 386.470, RSMo 2000, that the General Counsel is not authorized to bring this Complaint, that the Complaint fails to states a claim upon which relief may be granted because § 386.570 is unconstitutionally vague and overbroad, that § 386.570 does not apply to violations outside of this Commission's limited jurisdiction, and that § 386.570 does not apply here because, by its terms, § 386.570 does not apply where other laws provide penalties as allegedly is the case with some of the violations, that the Complaint contains interpretations and constructions of Chapters 386 and 393, RSMo, that are unreasonable, arbitrary and capricious, *ultra vires,* and prohibited by the Constitutions of Missouri and of the United States,[17] barred by the applicable limitations statute or by *laches,* and, in the case of the Trust, barred by the Missouri Probate Code and fatally flawed because necessary and indispensable

[16] Mo. Const., Art. I, §§ 2 and 10; U.S. Const., Amd's 5 and 14.

[17] Mo. Const., Art. III, §§ 1 and 49; U.S. Const., Amd's 5 and 14.

parties are not joined.

Violations Charged by the EPA and DNR:

Respondents assert several so-called affirmative defenses of law and fact with respect to the violations charged against CJCU by the EPA and DNR, referred to in ¶¶ 32-40 of the Complaint (*See* the various Answers, ¶¶ 59.A-59.H). These do not require extended discussion. Staff points out that these allegations are modeled upon the Commission's own findings of fact (¶¶ 27-35) in its *Report & Order* in Case No. SO-2007-0071 and are used for the same purpose that the Commission used them, namely, as facts that support the conclusion that Respondents have violated § 393.130.1, RSMo 2000, and Rule 4 CSR 240-60.020. This use of the violations charged admittedly by DNR and EPA does not implicate any of the legal or constitutional defenses raised by Respondents. As to the Respondents' factual assertions, the Commission has already concluded, in Case No. SO-2007-0071, that CJCU has violated § 386.390.1, RSMo 2000, and Rule 4 CSR 240-60.020.

The Inadequacies of CJCU's Systems:

Respondents assert two affirmative defenses to the charged inadequacies of CJCU's water and sewer systems, namely, that this Commission has never allowed CJCU adequate rates and that this Commission and DNR have "thwarted" efforts by Respondents to sell the systems to buyers better able to maintain and expand them (Answers ¶¶ 59.I and 59.J). These purported defenses are not affirmative defenses at all because, even if true, they do not negate Respondent's liability. *Smith v. Thomas, supra,* 210 S.W.3d at 244.

Immunity under § 386.470, RSMo 2000:

Respondents assert immunity under § 386.470, RSMo 2000, to the extent that the Complaint is based upon either documentary evidence that they provided in the course of Case No. SO-2007-0071 or on the testimony of Kenneth McClain in that case (Answers ¶ 59.K). This asserted defense is without merit.

Section 386.470, RSMo 2000, provides:

> No person shall be excused from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before the commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind.

The Missouri Supreme Court has commented that this statute "require[s] witnesses to testify with respect to particular topics in return for immunity from prosecution[.]" *State ex rel. Munn v. McKelvey,* 733 S.W.2d 765, 768 (Mo. banc 1987). There are no reported decisions construing, interpreting or applying it. However, it is nonetheless clear from the language of the statute itself that it is of no assistance to Respondents.

First, two of the Respondents are corporations – CJCU and Raintree. The statute plainly states that it is not intended to confer immunity on any corporation. Section 386.470, RSMo 2000. Second, the immunity offered by the statute is available only where a witness is compelled to testify or produce documents

despite his or her assertion of the privilege against self-incrimination. *See Munn v. McKelvey, supra; State ex rel. North v. Kirtley,* 327 S.W.2d 166 (Mo. banc 1959). Thus, the statute has no application here.

Only Respondent Kenneth McClain is in a position to claim the benefit of § 386.470, RSMo 2000, because he is the only non-corporate Respondent that testified in Case No. SO-2007-0071 – there is no indication that he produced any documents. However, McClain was not compelled to testify. Rather, he testified voluntarily as one of CJCU's witnesses. Consequently, the Commission should disregard this purported defense.

The Authority of the General Counsel to Bring these Complaints:

Respondents contend that the Commission's General Counsel is not authorized to bring these Complaints because the authority expressly granted in the *Report & Order* issued in Case No. SO-2007-0071 was time-limited and they were not brought before the stated period expired (Answers ¶ 59.L). This purported affirmative defense is also without merit.

Section 386.390.1, RSMo 2000, discussed above, authorizes any "person" to bring a complaint before the Commission. The General Counsel is certainly a "person" and is thus so authorized. Some might respond that that section specifies certain officials who may file complaints and, by the exclusion of the General Counsel from that list, he must be understood to be prohibited under the rule of statutory construction that the express mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius. Wolff Shoe Co. v. Dir. of Rev.,* 762 S.W.2d 29, 32 (Mo. banc 1988). This is not a view shared by Staff.

Section 386.071, RSMo 2000, creates the office of the Commission's General Counsel and describes his powers and duties:

> The public service commission may appoint and fix the compensation of a general counsel to serve at the pleasure of the commission. He shall be an attorney at law and shall have resided in this state prior to his appointment. It shall be the duty of the general counsel for the commission to represent and appear for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission, and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.

There are no reported decisions construing, interpreting or applying this section. It is Staff's view that this section does not require that the General Counsel obtain specific Commission authorization prior to bringing a Complaint before the Commission. The two references to authorization by the Commission are best understood as referring to actions before tribunals *other* than the Commission itself. The first refers to intervention and the second to actions brought by the General Counsel in the name of the state. *Id.* Complaints such as the present are not brought in the name of the state, but in the name of the Commission's Staff. In any event, to the extent that specific authorization is required under either §§ 386.390.1 or 386.071, RSMo 2000, the Commission has granted it in Rule 4 CSR 240-2.070(1), which provides:

> The commission on its own motion, the commission staff through the general counsel, the office of the public counsel, or any person or public utility who feels aggrieved by a violation of any statute, rule, order or decision within the commission's jurisdiction may file a complaint. The aggrieved party, or complainant, has the option to file either an informal or a formal complaint.

For these reasons, the Commission should disregard this purported defense.

Section 386.570, RSMo 2000:

Respondents raise three affirmative defenses directed at § 386.570, RSMo 2000, the Commission's penalty statute (Answers ¶ 59.M, (1)-(3)). First, Respondents contend that § 386.570, RSMo 2000, is unconstitutionally vague and overbroad because the phrase "any other law" in subsection 1 is unlimited in scope. Second, Respondents argue that § 386.570, RSMo 2000, does not apply to some or all of the alleged violations because they are outside of the intendments of the phrase "any other law" in subsection 1 in view of the Commission's limited jurisdiction. Third, they assert that § 386.570, RSMo 2000, does not apply to some or all of the alleged violations because it applies by its terms only "in a case in which a penalty has not herein been provided" and state law provides other penalties for some or all of the alleged violations. None of these asserted defenses are meritorious.

As for the contention that § 386.570.1, RSMo 2000, is unconstitutionally vague and overbroad, this Commission is an administrative tribunal with no power to hold a statute unconstitutional. "Deciding constitutional issues is beyond the authority of an administrative agency, and the courts must review agency actions that present constitutional questions." *Westwood Partnership v.*

Gogarty, 103 S.W.3d 152, 162 (Mo. App., E.D. 2003); *Fayne v. Department of Social Services,* 802 S.W.2d 565, 567 (Mo. App.1991); *Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors,* 744 S.W.2d 524, 530-31 (Mo. App.1988). Staff notes that, in the various reported cases applying § 386.570, RSMo 2000, no court has yet found the statute defective for this reason.

As for the contention that some of the charged violations are outside of the intendments of § 386.570.1, RSMo 2000, Staff responds that it seeks authority herein to sue for penalties for violations of Chapter 393 and Commission Rule 4 CSR 240-60.020. The argument that the Commission's penalty statutes, including § 386.570, RSMo 2000, do not apply to such violations is fatuous.

Finally, with respect to the contention that § 386.570, RSMo 2000, does not apply to some or all of the alleged violations because it applies by its terms only "in a case in which a penalty has not herein been provided" and state law provides other penalties for some or all of the alleged violations, Staff points out that the burden is on Respondents to specifically plead those state laws. Respondents have not done so. In any event, the penalty provisions in Chapter 386 are the only state laws that provides penalties for violations of § 393.130.1, RSMo 2000, and Commission Rule 4 CSR 240-60.020.

The Commission should disregard these purported defenses.

Unreasonable Interpretations of Chapters 386 and 393, RSMo:

Respondents argue that the Complaint contains "constructions and interpretations," as well as applications, of Chapters 386 and 393, RSMo, that

are unreasonable, arbitrary and capricious, inconsistent, *ultra vires,* and unconstitutional, first, because they are *ultra vires,* in violation of Article III, §§ 1 and 49, of the Missouri Constitution, and second, "because it would subject Respondents to multiple punishments for the same offense," in violation of the 5th and 14th Amendments to the Constitution of the United States (Answers ¶ 59.N, (1)-(5)).

As noted previously, administrative tribunals such as this Commission are not authorized to determine constitutional questions. *Westwood Partnership v. Gogarty, supra.* Thus, Respondents constitutional contentions must be ignored.

As for Respondents' other assertions, to the extent that this writer is able to discern Respondents' intent, they are absurd and should be discarded. Lawyers often speak, informally, of a preliminary test that must be applied to every legal argument – the "straight face" test. Respondents' contention that Staff's charges of violations of § 393.130.1, RSMo 2000, and Rule 4 CSR 240-60.020 against CJCU are unreasonable, arbitrary and capricious, inconsistent, and *ultra vires* does not pass the "straight face" test. Respondents' contention that Staff's quest to extract penalties for these violations from CJCU is unreasonable, arbitrary and capricious, inconsistent, and *ultra vires* also does not pass the "straight face" test.

Perhaps it is Staff's attempt to extend liability to the other Respondents that so disturbs Respondents. However, as Staff has demonstrated, that effort is well within the ambit of settled Missouri law. The utility business is subject to pervasive police power regulation because the public interest, health and welfare

require it. *See e.g. May Department Stores v. Union Electric Light & Power Co.,* 341 Mo. 299, 330, 107 S.W.2d 41, 56-57 (1937). That is a well-settled point. Utilities that operate in defiance of the law expose themselves by their behavior to police power penalties. "[The Commission's] orders are to be obeyed under pains and penalties." *State ex rel. Missouri Southern R. Co. v. Public Service Commission,* 259 Mo. 704, ___, 168 S.W. 1156, 1161 (banc 1914). "[T]he commission [has] plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise bound it*." Id.,* 259 Mo. at ___, 168 S.W. at 1163. That is a well-settled point of law as well.

Staff herein contends that those who own, control, manage, and operate a utility in defiance of the law also expose themselves by their behavior to police power penalties. It has been held, for example, that utility employees owe a duty to the public: "The employees' duties are owed to the public though rendered through the utility." *State v. Local No. 8-6, Oil, Chemical and Atomic Workers International Union,* AFL-CIO, 317 S.W.2d 309, 319 (Mo. banc 1958), *rev'd on other grounds,* 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960). It is not unreasonable to suppose that utility shareholders, directors and officers also owe a duty to the public.

Respondents' purported defenses should be disregarded.

The Complaints are Not Untimely:

Respondents assert that these Complaints are barred, in whole or in part, by statutes of limitations or by *laches* (Answers ¶ 59.O). This defense is also

without merit.

Taking up *laches* first, Staff notes that *laches* is "an equitable doctrine barring a claim if an unreasonable delay prejudices an opposing party." *O'Connell v. School Dist. of Springfield R-12*, 830 S.W.2d 410, 417 (Mo. banc 1992). Respondents have not identified any unreasonable delay by Staff nor explained how they are thereby prejudiced. In any event, this Commission is an administrative tribunal and so cannot do equity. *American Petroleum Exchange v. Public Service Commission,* 172 S.W.2d 952, 955 (Mo. 1943). "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise." *State Tax Commission v. Administrative Hearing Commission,* 641 S.W.2d 69, 75 (Mo. 1982). Like Respondents' constitutional defenses, *laches* must be set aside for another day and another venue.

The Respondents also refer to statutes of limitations; however, they do not specify *which* statutes of limitations nor how they apply to the Complaints. Certainly, this defense is not well-pleaded even under the relaxed pleading standard of *Kansas City Terminal Railway, supra.* Where an affirmative defense is not properly pleaded, that defense is deemed to have been waived. *Smith v. Thomas,* 210 S.W.3d 241, 243 (Mo. App., W.D. 2006); *Mobley v. Baker,* 72 S.W.3d 251, 257-58 (Mo. App., W.D. 2002). Neither Staff nor the Commission can be expected to search through the Revised Statutes of Missouri in an effort to find a limitation statute that might apply. That is Respondents' burden and they have not met it.

Perhaps Respondents mean § 516.390, RSMo 2000, which many consider to be applicable to § 386.600, RSMo 2000, the Commission's penalty provision.[18] Section 516.390, RSMo 2000, provides:

> If the penalty is given in whole or in part to the state, or to any county or city, or to the treasury thereof, a suit therefor may be commenced, by or in behalf of the state, county or city, at any time within two years after the commission of the offense, and not after.

This provision, in conjunction with § 516.103, RSMo 2000, which provides that "[t]he time for commencement of any suit provided for in sections 516.380, 516.390 and 516.400, shall not be tolled by the filing or pendency of any administrative complaint or action and no such suit may be brought or maintained unless commenced within the time prescribed by said sections," appears to leave only a narrow window within which penalties may be sought under § 386.600, RSMo 2000. However, Staff suggests that Respondents have overlooked § 516.420, RSMo 2000, which provides:

> None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created.

"[I]n Missouri, a moneyed corporation is a corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance." *Division of Labor Standards, Dept. of Labor and Indus. Relations, State of Mo. v. Walton Const. Management Co.,*

[18] No reported Missouri case expressly so holds.

Inc., 984 S.W.2d 152, 156 (Mo. App., W.D. 1998) *and see Schwartz v. Bann-Cor Mortgage et al.,* 197 S.W.3d 168, 177 *et passim* (Mo. App., W.D. 2006) ("We also believe the statutory purposes are best fulfilled by holding that all banks, insurers, and finance companies are "moneyed corporations" within the meaning of section 516.420."). Staff contends that utilities are "moneyed corporations" within the intendments of § 516.420, RSMo 2000, because they are in the business of extending credit to the public – i.e., making loans – upon the security of deposits. Commission Rule 4 CSR 240-13.030 authorizes utilities to require a deposit as a condition of service where the customer has an unsatisfactory credit rating or payment history. The rule defines a "deposit" as "a money advance to a utility for the purpose of securing payment of delinquent charges which might accrue to the customer who made the advance[.]" Rule 4 CSR 240-13.015(J).

CJCU's water service tariff, P.S.C.Mo. No. 1, at Original Sheet 10, Rule 10.C, provides:

> The Company may require from any customer a security deposit or other guaranty as a condition of new or continued service in accordance with Commission Rule 4 CSR 240-13.030.

CJCU's sewer service tariff, P.S.C.Mo. No. 1, at Original Sheet 3, Rule 3.C, is identical. CJCU, which bills for service monthly in arrears, *id.,* at Rule 3.I, on the security of a deposit, is thus a moneyed corporation within the intendments of § 516.420, RSMo 2000, because it "make[s] loans upon pledges or deposits[.]" *Walton, supra.*

For these reasons, the Respondents' affirmative defenses of *laches* and the statute or statutes of limitations must fail.

Probate Defenses Asserted by the Trust:

With respect to the Complaints against Norville McClain, now deceased, the Trust asserts that the Complaints are time-barred under the Missouri Probate Code and fatally defective because Staff has not joined Norville McClain's personal representative (Answer of Norville McClain and the Norville McClain Trust ¶ 59, R & S). These defenses require no discussion because Staff agrees that Norville McClain, now deceased, should be dismissed as a respondent. Staff notes that neither of these points apply to the Trust itself which is a proper respondent herein as a shareholder in CJCU and Raintree.

WHEREFORE, on account of all the foregoing, Staff urges the Commission to strike and disregard Respondents' insufficient, inapplicable and mispleaded Affirmative Defenses and to resolve Staff's Complaints by contested case proceedings including, after due notice, an evidentiary hearing; and to grant such other and further relief as is just in the premises.

Respectfully Submitted,

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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 **15th day of June, 2007,** 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.

s/ Kevin A. Thompson