

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

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

**RESPONSE OF RESPONDENTS JERIMIAH NIXON AND KENNETH McCLAIN TO  
STAFF'S REPLY AND SUGGESTIONS IN OPPOSITION TO RESPONDENTS'  
AFFIRMATIVE DEFENSES AND MOTIONS TO DISMISS**

COME NOW Respondents, Jeremiah Nixon and Kenneth McClain, and in response to the Staff's Reply and Suggestions in Opposition to Respondents' Affirmative Defenses and Motions to Dismiss state as follows:

**RESPONSE TO INTRODUCTION AND PROCESS OF DEVELOPMENT**

The Introduction and Process of Development sections of the Staff's reply are an attempt by the Staff to use a broad brush to paint these Respondents as villains by association with what the Staff believes is a corrupt system of land development. But, even the Staff admits that development of commercial and residential properties is "right and proper and are generally considered to confer many benefits upon the people of the State of Missouri." The motives of the Staff in presenting this completely irrelevant, and also substantially inaccurate, view of land development, and the land development process in the State of Missouri, must be questioned. These two sections, as does the Reply in general, contain many inaccuracies and blatantly false statements, and these Respondents deny all of the allegations of the Response not specifically admitted.

The statements of the Staff in these sections, as well as the Reply in general, demonstrate the Staff's lack of understanding of the processes of land development and the current situation of operation in the State of Missouri. For instance, the Staff states: "Any entrepreneur will tell you that you maximize profits by reducing expenses." Any good entrepreneur will tell you that you maximize profits by increasing sales and revenues, not by reducing expenses. There is no limit to increasing sales and revenues, but additional profit from the reduction of expenses is severely limited because expenses can only be reduced so much.

The Staff seems to assume that all of the relevant facts necessary for it to succeed have already been determined. The Staff ignores the fact that there has been no final determination, in any form, that the Respondents failed to provide safe and adequate water and sewer service. These issues were not part of the Transfer Case; **these Respondents were not parties to the Transfer Case**; even in the Transfer Case, the issues of safe and adequate service were not issues of which Central Jefferson County Utilities, Inc. had notice; Central Jefferson County Utilities, Inc. did not provide evidence to litigate those issues in the Transfer Case because of the lack of notice; there has been no determination by the Missouri Department of Natural Resources or the United States Environmental Protection Agency of any violations; and, the position by the Staff that there was a determination in the Transfer Case on the issues of safe and adequate water and sewer service is on appeal in the case of State of Missouri ex rel. Central Jefferson County Utilities v. Public Service Commission of The State of Missouri, Case No. 07AC-CC00444, in the Circuit Court of Cole County.

Central Jefferson County Utilities, Inc. provided safe and adequate water and sewer service to the residents of Raintree Plantation Subdivision for over 26 years. There were no violations of either the United States Environmental Protection Agency or the Missouri

Department of Natural Resources' rules and regulations affecting service to the residents.

Central Jefferson County Utilities, Inc.'s attempts to expand the water and sewer systems, or to sell the water and sewer systems, were substantially impaired by the processes of the Missouri Public Service Commission and its Staff, which would not permit Central Jefferson County Utilities, Inc. to obtain necessary financing for such expansions. Further, the Missouri Department of Natural Resources failed to act promptly and within a reasonable period of time to approve necessary plans for the expansion of the sewer system to permit Central Jefferson County Utilities, Inc. to obtain necessary financing and/or to sell the facilities to prospective purchasers.

These Respondents request the Commission to ignore the Staff's interjection of irrelevant and incorrect speculations, comments and opinions of the Staff. The use by the Staff of these deceptions points out the fallaciousness of the Staff's positions.

These Respondents will not respond to the Staff's argument relating to the Affirmative Defenses. These Respondents should never have to address the Affirmative Defenses because their Motion to Dismiss filed herein should be granted. Nonetheless, Affirmative Defenses will be addressed at the appropriate time, if necessary.

#### RESPONSE TO ARGUMENT

The Staff's true intentions are accurately reflected in its following statement: "Here, Staff seeks to impose liability upon all the shareholders of CJCUC, Respondents Kenneth McClain, Nixon and the Trust." The Staff is not a legislative body. It has no authority to "impose liability" upon anyone. The Legislature passes statutes, not the Staff. This Commission makes initial determinations on penalties, not the Staff. The Courts will have the final say. The Staff apparently has a greatly inflated view of its responsibilities and authority.

For the first time, Staff raises in this Reply the legal theories of piercing the corporate veil and liability for personal acts of an agent or officer of the corporation. While the Staff argues that it is only required in its pleadings to provide notice to the Respondents, rather than factual allegations, the Staff fails to meet even the pleading requirement for which it argues in its Reply. Nowhere in the initial complaints are there any allegations providing notice to Respondents that the Staff is seeking to pierce the corporate veil or to hold these Respondents liable for their personal actions. Rather, the allegations, particularly in Paragraph No. 10 of the Complaints, are that these Respondents each constitute a water and sewer corporation and a public utility. The Staff has failed to provide any notice of its intention to seek to pierce the corporate veil of Central Jefferson County Utilities, Inc. or to hold these Respondents liable for any personal actions. These arguments and legal theories must be ignored by the Commission in ruling on these Respondents' Motion to Dismiss.

The Staff's interpretation and strained construction of the definitions of "sewer corporation" and "water corporation," are intentionally misleading and grammatically incorrect. The Staff argues that the phrase "owning, operating, controlling or managing" modifies the phrase "any sewer system, plant or property." Similarly, the Staff argues that the same phrase "owning, operating, controlling or managing" modifies "any plant or property, dam or water supply, canal, or power station." But in fact, the phrase "owning, operating, controlling or managing" qualifies the first phrase of the relevant definition: "every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court." **In other words, it is the entity or person "owning, operating, controlling or managing" the water or sewer system that is a water or sewer**

**corporation, not the owners, operators, controlling persons or managers of the entity owning, operating, controlling or managing the water or sewer system.**

The Staff's hypothetical is inapplicable to this situation. The Staff argues that a contractor employed by a water or sewer corporation to operate the water or sewer plant would be a water or sewer corporation because of its operation of the utility systems. It is important to note that in stating this hypothetical, the Staff only hypothesizes that the contractor is "operating" the utility system. This is not just a random selection of one of four words in the definition; it is required in order for the Staff to hypothesize these facts and arrive at its misleading conclusion.

While a contractor "operating" the utility system could arguably be a water or sewer corporation, it is only because that operator is directly "operating" the system. In our situation, it is not the Respondents who are "operating" the water or sewer systems. Rather, it is Central Jefferson County Utilities, Inc. which is operating the system. Therefore, the Respondents cannot be deemed water or sewer corporations because they do not "operate" the system as does this hypothetical contractor.

These Respondents do not "own" the water or sewer system. These systems are "owned" by Central Jefferson County Utilities, Inc. These Respondents cannot be deemed water or sewer corporations by reason of their ownership of the corporation which owns the water or sewer systems.

These Respondents do not "control" the water or sewer systems. The water and sewer systems are "controlled" by Central Jefferson County Utilities, Inc. These Respondents cannot be deemed a water and sewer corporation by reason of their control of the corporation, rather than their control of the systems.

These Respondents do not “manage” the water and sewer systems. Individually, these Respondents act as officers and directors of Central Jefferson County Utilities, Inc. But they, individually, do not manage the systems. Rather, they execute the authority of their offices within the corporation to have the corporation manage the systems. These Respondents are not, therefore, water or sewer corporations by reason of their positions with Central Jefferson County Utilities, Inc.

To accept the Staff’s argument that these Respondents are, as individuals, water and sewer corporations, would be a novel expansion of the definitions of water and sewer corporations by this Commission. These definitions have never been so interpreted before, and such an interpretation would have many unanticipated consequences, both good and bad, which would extend far beyond the application of this case.

For instance, under such an interpretation, each of these individuals, and each contract operator as proposed in the Staff’s hypothetical, would need to apply for Certificates of Convenience and Necessity. That, of course, has never been required. If as the Staff is contending, their definitions are shown by the “plain language” of the statutes, why has the Staff not come to this Commission on many prior occasions and requested that the Commission require Certificates of Convenience and Necessity of each of these water and sewer corporations? Something so plain as these interpretations, according to the Staff, should have been readily enforced by the Staff!

Over 26 years ago, this Commission granted a Certificate of Convenience and Necessity to Central Jefferson County Utilities, Inc., not these Respondents. It has been Central Jefferson County Utilities, Inc., not these Respondents, that has had the authority to provide safe and adequate service to its customers. It has been Central Jefferson County Utilities, Inc. that has

provided safe and adequate service to its customers. These Respondents can not be penalized for allegedly failing to provide a service they were not authorized to provide.

The past interpretation given by everyone in the State of Missouri, including the Commission's Staff, to these definitions is controlling. Respondents have had no notice of any attempt by the Commission or the Staff to impose a broader interpretation. These Respondents cannot be responsible for any penalties by retroactive change in definition. It is the Legislature which must change these definitions, not the Staff or the Commission.

WHEREFORE, these Respondents respectfully request the Commission to grant their Motions to Dismiss the complaints filed herein.

Respectfully submitted,

HOCKENSMITH TATLOW MCKINNIS, P.C.



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#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent, either electronically or by hand delivery or by first class, United States mail, postage prepaid, on this 22nd 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.

