

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 4th day of
October, 2007.

The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Central Jefferson County Utilities, Inc.,
Raintree Plantation, Inc.,
Jeremiah Nixon, Kenneth McClain,
Norville McClain, and the
Norville McClain Trust,

Respondents.

Case No. WC-2007-0394

Case No. SC-2007-0396

**ORDER DENYING STAFF'S MOTION FOR PARTIAL SUMMARY
DETERMINATION**

Issue Date: October 4, 2007

Effective Date: October 14, 2007

Syllabus: This order denies Staff's motion for a partial summary determination against Central Jefferson County Utilities, Inc. ("CJCU") on the two formal complaints Staff has filed against the company and other respondents.

On April 13, 2007,¹ the Staff of the Missouri Public Service Commission ("Staff") filed the instant complaints against CJCU, Raintree Plantation, Inc., Jeremiah Nixon, Kenneth McClain, Norville McClain, and the Norville McClain Trust. In general terms, the complaints allege that one or more of the Respondents have provided unsafe and inadequate water and sewer services to the residents of approximately 681 homes in the Raintree Plantation

Subdivision in Jefferson County, Missouri. Staff seeks a Commission order finding that one or more of the Respondents have violated Section 393.130.1² and Commission Rule 4 CSR 240-60.020 by their conduct with respect to the Subdivision's water and sewer systems. Staff also seeks an order authorizing the Commission's General Counsel to seek monetary penalties in circuit court against one or more of the Respondents for the alleged violations pursuant to Sections 386.570 and 386.600.

Staff's Motion for Partial Summary Determination³ was filed on June 15, making CJCUC's response in opposition due on July 16.⁴ On July 12, by and through its counsel, CJCUC filed its unopposed Motion for Extension of Time to Respond, which the Commission granted by order dated July 18. On July 23, CJCUC timely filed its response to Staff's motion before the deadline established in the Commission's July 18 order. By order dated September 13, the Commission found that it would be helpful to hear oral argument on Staff's motion before deciding it, and scheduled argument on the motion pursuant to Commission Rule 4 CSR 240-2.117(1)(G), which expressly provides that the Commission "may hear oral argument on a motion for summary determination." The parties participated in an oral argument on Staff's motion on September 24, which substantially clarified the positions of all parties. As the motion has now been fully briefed and argued, it is ripe to be decided.

¹ All dates specified in this order refer to the year 2007.

² All statutory references are to RSMo 2000.

³ The reason Staff has denoted its motion as one for only "partial" summary determination is that it only applies to CJCUC, not the other respondents named in the complaints.

⁴ See Commission Rules 4 CSR 240-2.117(1)(C) and 4 CSR 240-2.050(1).

Summary Disposition

Commission Rule 4 CSR 240-2.117, which is titled “Summary Disposition,” authorizes the Commission to decide all or any part of “a contested case by disposition in the nature of summary judgment or judgment on the pleadings.”

One type of summary disposition permitted under this rule, which is called “summary determination” and is in the nature of summary judgment under the rules of civil procedure, is authorized by Commission Rule 4 CSR 240-2.117(1), which provides, in relevant part:

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period. . . .

(B) Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts. . . .

(C) Not more than thirty (30) days after a motion for summary determination is served, any party may file and serve on all parties a response in opposition to the motion for summary determination. . . . The response shall admit or deny each of movant’s factual statements in numbered paragraphs corresponding to the numbered paragraphs in the motion for summary determination, shall state the reason for each denial, shall set out each additional material fact that remains in dispute, and shall support each factual assertion with specific references to the pleadings, testimony, discovery, or affidavits. . . .

* * *

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

(F) If the commission grants a motion for summary determination, but does not dispose thereby of the entire case, it shall hold an evidentiary hearing to

resolve the remaining issues. Those facts found in the order granting partial summary determination shall be established for purposes of the hearing.⁵

As the subject cases do not seek a rate increase and are not subject to an operation of law date, Staff's motion is authorized by Commission Rule 4 CSR 240-2.117(1)(A). Moreover, under the terms of Rule 4 CSR 240-2.117(1)(E), the Commission may grant Staff's motion only if: (1) the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact and that Staff is entitled to the relief it has requested as a matter of law; and (2) the Commission determines that it is in the public interest to do so. In other words, Staff not only "bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment,"⁶ but must *also* prove to the Commission's satisfaction that it is in the public interest to determine the merits of the complaints as to CJCUC by way of summary determination without an evidentiary hearing.⁷

Staff has undertaken to prove these two things by citing to the record in Case No. SO-2007-0071, in which CJCUC sought (and ultimately received) the Commission's authorization to transfer its sewer and water system assets to the Central Jefferson County

⁵ The other type of summary disposition available to parties in a case before the Commission, which is called "determination on the pleadings" and is akin to judgment on the pleadings under the rules of civil procedure, is authorized by Commission Rule 4 CSR 240-2.117(2), which states, in its entirety:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

⁶ *Bannum, Inc. v. City of St. Louis*, 195 S.W.3d 541, 544 (Mo. App. E.D. 2006).

⁷ The Commission notes that in this important respect, its rule on summary determination is quite different from the Missouri Rules of Civil Procedure governing summary judgment and the related case law interpreting them, because unlike the circuit court, the Commission is required to make a determination that granting summary determination is in the public interest before doing so.

Public Sewer District.⁸ Staff has expressly requested two distinct forms of relief: (1) an order finding that CJCUC has violated Section 393.130.1 and Commission Rule 4 CSR 240-60.020 by its conduct with respect to the Subdivision's water and sewer systems; and (2) an order authorizing the Commission's General Counsel to seek monetary penalties against CJCUC for those violations in circuit court pursuant to Sections 386.570 and 386.600. For the following reasons, the Commission finds that under the circumstances present here, it would *not* be in the public interest to grant the relief requested by Staff in the instant complaint cases by summary determination based solely on the record developed in Case No. SO-2007-0071. Accordingly, Staff's Motion for Partial Summary Determination will be denied.

As correctly observed by CJCUC, the existence of statutory or regulatory violations by CJCUC and whether those violations justified granting Staff the authority to seek monetary penalties against CJCUC in circuit court: (1) were not expressly identified in the extensive but nonexclusive list of issues prepared by the parties and adopted by the Commission in Case No. SO-2007-0071;⁹ (2) were not mentioned in any of the parties' opening statements;¹⁰ (3) were not discussed in any of the parties' post-hearing briefs;¹¹ and (4) were not addressed in any of the parties' proposed post-hearing findings of fact and conclusions of law.¹² Clearly, both before *and* after the evidentiary hearing in Case No. SO-2007-0071, *none of the parties* believed that deciding those particular issues was essential to resolving the

⁸ Staff's Motion for Partial Summary Determination ("Motion") at 1-2. The case was consolidated with Case No. WO-2007-0072.

⁹ CJCUC's Response in Opposition to Motion for Partial Summary Determination ("Response") at 4.

¹⁰ *Id.* at 4-5.

¹¹ Response at 5.

¹² *Id.*

critical question before the Commission in that case. Staff framed that question as follows in its opening statement: “The question for the Commission is whether the public interest would be served by transferring these assets to the new provider, the sewer district, even though the customers would have to pay more for their utility service.”¹³ Indeed, the instant cases represent Staff’s first request of any kind for a Commission order finding that CJCUC committed multiple statutory and regulatory violations and authorizing Staff to file an action against CJCUC in circuit court seeking the imposition of what could conceivably amount to financial penalties well in excess of six figures.¹⁴

Moreover, during oral argument of its motion for partial summary determination, Staff conceded that there was no need for expediency to protect the Subdivision’s residents since the asset transfer was going forward as authorized by the Commission and no customers would be affected by anything the Commission did with regard to the instant complaints.¹⁵ Finally, during the same oral argument, opposing counsel both referred to certain material that was never offered into evidence at the evidentiary hearing in Case No. SO-2007-0071 but might well have been introduced had they recognized that violations and

¹³ Transcript of Evidentiary Hearing in Case No. SO-2007-0071 (“EH Tr.”) at 31. In fact, in response to questions from Commissioners Murray and Clayton during oral argument on the motion, the Commission’s General Counsel acknowledged that “it was not necessary for the Commission to find violations in order to . . . determine that the [transfer of assets] was in the public interest and then to authorize the transfer,” and that the violations “didn’t have to be particularly found by the Commission to approve the transfer.” Transcript of Oral Argument on Staff’s Motion for Partial Summary Determination (“OA Tr.”) at 19, 25.

¹⁴ See Motion at 17-18. For this reason, during oral argument on the motion, counsel for CJCUC referred to the proceedings in Case No. SO-2007-0071 as “very much a stealth hearing” when it came to violations and penalties. OA Tr. at 51. Later, CJCUC’s attorney maintained that “the way you try a case, a transfer case, is certainly different than the way you try a complaint case. . . . [I]f you do not know that there is a complaint case being tried, your strategy, your evidence, presentation, any number of things are going to be different.” *Id.* at 59. Furthermore, at the outset of his argument, the Commission’s General Counsel explained that one reason he filed the instant complaints was that he was “[c]oncerned with the due process aspect of the case.” *Id.* at 7.

¹⁵ OA Tr. at 19-20.

the propriety of a penalty action were actually being tried in that proceeding,¹⁶ not to mention the affirmative defenses in CJCUC's answer in the present cases that might necessitate a hearing.¹⁷

Decision

The Commission has already found that CJCUC was not denied procedural due process as to its findings regarding regulatory or statutory violations in Case No. SO-2007-0071 since evidence of the claimed violations was admitted without objection and the issue was tried by implied consent.¹⁸ Nevertheless, the Commission finds that, under the circumstances here, including those discussed above and the fact that the Circuit Court of Cole County is currently in the midst of undertaking judicial review of the record and the Commission's findings and conclusions in Case No. SO-2007-0071,¹⁹ it would not be in the public interest to grant the relief requested by Staff in the instant complaint cases by summary determination based solely on the record developed in Case No. SO-2007-0071.

¹⁶ OA Tr. at 65, 74. To further illustrate, counsel for Jeremiah Nixon, Kenneth McClain, and Raintree Plantation, Inc. (who were all non-parties to the transfer case) stated that he intended to present "other evidence that will give this Commission a completely different picture than what was presented at the transfer hearing." *Id.* at 75. With regard to such additional evidence, the Commission's General Counsel stated: "I will be only too thrilled if, in fact, he can bring you evidence and adduce evidence that shows that the situation at this water and sewage facility is not as dismal as the Commission found in the companion case because that would mean that life for those ratepayers is much superior to what the Commission has found. I think you should give Mr. Hockensmith that opportunity. I would think you would want to hear that evidence." *Id.* at 77. Staff also made it clear that it would be "more than happy to go through another hearing" should the Commission choose to require one. *Id.* at 8-9.

¹⁷ OA Tr. at 69, 71.

¹⁸ Order Denying Application for Rehearing, *In the Matter of the Application of Central Jefferson County Utilities, Inc. for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2007-0071 (Apr. 24, 2007) at 5. Nothing in this order denying Staff's motion for partial summary determination should be construed to indicate otherwise.

¹⁹ A Writ of Review was issued in Cole County Circuit Court Case No. 07AC-CC00444 on May 24, 2007. See Response at Appendix B.

IT IS ORDERED THAT:

1. Staff's Motion for Partial Summary Determination, which was filed on June 15, 2007, is denied.
2. This order shall become effective on October 14, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written in a cursive style.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Lane, Regulatory Law Judge