

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

FILED<sup>2</sup>

JUN 04 2007

The Staff of the Missouri Public Service  
Commission, )  
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)  
v. )  
)  
)  
Central Jefferson County Utilities, Inc., )  
et al. )

Missouri Public  
Service Commission

Case No. SC-2007-0396  
WC-2007-0394

**MOTION TO DISMISS COMPLAINTS AGAINST RESPONDENTS  
NORVILLE McCLAIN (DECEASED) AND THE NORVILLE McCLAIN TRUST**

COME NOW Respondents Norville McClain (Deceased) and the Norville McClain Trust ("Decedent" and "Trust"), by and through their undersigned counsel, and pursuant to 4 CSR 240-2.070(6), move the Missouri Public Service Commission ("Commission") to dismiss the above-referenced Complaints as to these Respondents because said Complaints fail to state a claim upon which the relief requested may be granted, has failed to properly name and join indispensable parties and purports to be a proceeding against a deceased party. In support of said Motion, Decedent and Trust state as follows:

1. The Complaints allege generally in paragraph 1 that the Respondents in the Complaints provided unsafe and inadequate water and sewer services to the public. The Complaints seek penalties and other relief as provided in the Complaints.
2. The Complaints allege in paragraph 2 that Central Jefferson County Utilities, Inc. ("Central Jefferson") is a Missouri corporation in good standing.
3. The Complaints allege in paragraph 12 that Central Jefferson is in the business of providing water and sewer services to the public for gain pursuant to

certificates of convenience and necessity issued by the Commission. These water and sewer services are provided to residents of the Raintree Plantation subdivision.

4. The Complaints allege in paragraph 4 that Respondent Raintree Plantation, Inc. ("Raintree") is a Missouri corporation in good standing.

5. The Complaints allege in paragraphs 14 through 17 that Raintree, along with Respondents Jeremiah Nixon ("Nixon") and Kenneth McClain, as well as Decedent and Trust, acted as Developers of Raintree Plantation subdivision.

6. The Complaints allege in paragraph 7 that Respondent Trust owned a one-third share of both Central Jefferson and Raintree. The Complaints do not allege what owning a "one-third share" means. They do not explain whether it is as a stock holder or in some other form of ownership.

7. The Complaints allege in paragraph 8 that Decedent controlled the Trust and the Trust controlled the shares of both Central Jefferson and Raintree. The Complaints do not allege how the Decedent controlled the shares and purports to allege control after his death on May 11, 2003.

8. The Complaints allege in paragraph 9 that Respondent Central Jefferson is a water corporation, sewer corporation and a public entity and is subject to the jurisdiction of the Commission.

9. The Complaints allege in paragraph 10 as follows:

Respondents Jeremiah Nixon, Kenneth McClain, Norville McClain, and the Trust own, operate, control, or manage Respondent CJCUC and are therefore each a water corporation, a sewer corporation and a public utility subject to the jurisdiction of this Commission pursuant to § 386.020(2), (48) and (58), RSMo 2006.

10. The Complaints allege in paragraph 11 as follows:

Respondent Raintree is an affiliate of Respondent CJCUC in a business carried on by Respondents Jeremiah Nixon, Kenneth McClain, Norville McClain, and the Trust in addition to the regulated business that those Respondents conduct by and through Respondents CJCUC and Respondent Raintree is thus subject to the jurisdiction of this Commission pursuant to §§ 386.250(7) and 393.140(12).

11. Complainant's allegations in paragraph 10 against Decedent and Trust rely upon subsections § 386.020 as cited above. Those subsections provide as follows:

(42) **"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 provisions of this chapter;

(48) **"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;

(52) **"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.

12. The definition of "Public Utility" in subsection 42 relies upon the definitions of sewer corporation and water corporation defined in subsections 48 and 58. Both subsections 48, relating to sewer corporations, and 58, relating to water corporations, require that any "person," as Decedent and Trust, actually own, operate, control or manage "any plant or property, dam or water supply," or as to the sewer system, it requires that the "person" own, operate, control, or manage "any sewer system,

plant or property for the collection, carriage, treatment, or disposal of sewage.” In other words, to be a water corporation, the “person” must actually own, operate, or manage the water system, **not an entity which owns, operates, controls or manages the water system.** The same is true for a sewer corporation: the “person” must actually own, operate, control or manage the sewer system and plant, **not another entity that owns, operates, controls or manages the sewer plant and system.**

There are no allegations that Decedent and Trust own, operate control or manage any water or sewer plant or property. Rather the allegation is that the Decedent controlled the Trust that controlled the shares of Central Jefferson, which owns, operates, controls and manages the water and sewer system. Therefore, neither Decedent nor Trust is a water and sew corporation or public utility as alleged, and consequently, the Commission has no jurisdiction over Decedent and Trust. To allege that an owner of shares in a water or sewer corporation is, by the fact of the ownership or control of the owner, itself a sewer or water corporation is patently absurd.

Subsections 48 and 58 to § 386.020 also require that the operation of the water and sewer systems be “for gain.” There are absolutely no allegations in the Complaints that Decedent and Trust are operating any water or sewer systems for gain. Again, therefore, Respondents Decedent and Trust are not subject to the jurisdiction of the Commission.

13. The lack of jurisdiction is supported by the Commission’s decision in the matter of *Staff v. Hurricane Deck Holding Company, et al.*, Case Number WC-2006-0303 (August 31, 2006). The Commission may take cognizance of the entirety of its determination in that case. In relevant part, however, the Commission determined on a

motion for summary determination that there were insufficient “facts to establish that any of [the owners], **as individuals**, rather than as corporate officers on behalf of Hurricane Deck Holding Company, are offering water or sewer service to the public.” (emphasis added). The clear implication of this statement is that facts must be pled and offered, showing that the individuals were offering water and sewer service to the public, for gain. In these Complaints, there are no allegations that Decedent or Trust offered any water or sewer service to the public for gain. The only allegation is that the Trust was a one-third owner of Central Jefferson and Raintree Plantation.

14. Further, Missouri clearly recognizes that corporations are separate and distinct legal entities from their shareholders, officers and directors. Ownership alone does not make the shareholders as individuals responsible for the acts of the corporation. *Thomas Berkeley Consulting Engineers, Inc. v. Zerman*, 911 S.W.2d 692, 695 (Mo. App. ED 1995).

15. There is no allegation that Decedent and Trust have ever sought or been granted certificates of convenience and necessity to operate water and sewer systems, nor that, up until now, they are water and sewer corporations subject to Commission jurisdictions. If Decedent and Trust are water and sewer corporations, why did the staff not require their individual applications for transfer of the water and sewer system to the Jefferson County Public Sewer District? Because they are not water or sewer corporations!

16. There are no allegations that Defendant and Trust have been granted permits by the Missouri Department of Natural Resources to operate water and sewer systems in the State of Missouri.

17. There are no allegations in the Complaints that Decedent and Trust undertook any acts resulting in any violations alleged in the Complaints for which penalties are now sought. The Complaints do allege in paragraphs 14 through 17 that Decedent and Trust were part of "the Developers" of Raintree subdivision. They allege in paragraph 17 that there was a "connection fee of \$1,100.00" which is being collected by "the Developers" to recover their costs incurred to construct the water and sewer mains in the subdivision. The allegations of paragraph 17 have previously been resolved by the Commission in the matter of *Charles A. Harter, Complainant v. Raintree Plantation, Inc. and Central Jefferson County Utilities, Inc.*, Case Number WC-82-230. In that case, Mr. Harter alleged that the fee being charged by Raintree Plantation, Inc. was a connection fee subject to the jurisdiction of this Commission. The Commission found against the Complainant, ruling:

The Complaint directly concerns charges levied for a building permit in Raintree Plantation. This Commission has no jurisdiction over charges made by a developer for a building permit, whether those charges are admittedly for the construction of a water or sewer system or plant, unless the entity so charging is a water and sewer corporation as defined in § 386.020, RSMo 1978. Since Raintree Plantation, Inc. is not engaged in owning or operating a water or sewer system or plant for gain, the Commission has no jurisdiction over Raintree's actions. Consequently, the Commission is of the opinion that the Complaint filed herein should be dismissed as against both Respondents.

Decedent and Trust cannot be deemed water and sewer corporations for owning a one-third interest in Raintree Plantation, Inc., which has been found by this Commission not to be engaged in owning or operating a water or sewer system or plant for gain. The allegations of paragraphs 14 through 17 form no basis for jurisdiction of this Commission over Decedent and Trust..

18. No claim has been made against Decedent's estate. This Commission has no basis to assert jurisdiction against the Decedent. Any such claim is subject only to the probate jurisdiction of the probate court of Jefferson County, Missouri. The Commission has failed to timely file a claim in the probate court and is barred by Missouri statute.

19. The Complaints fail to join necessary and indispensable parties. The Commission has failed to join a properly designated personal representative on behalf of the Decedent.


20. The Complaints against Decedent and Trust are frivolous and are not brought by the Complainant in good faith or with reasonable cause.

21. For the above reasons, Decedent and Trust request the Commission to dismiss the Complaints against them because the Complaints fail to state a claim upon which the relief requested may be granted, and that the Trust be awarded its attorneys' fees and costs incurred herein.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

By:

  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via first class U.S. mail or hand delivered on the 18<sup>th</sup> day of May, 2007, to:

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