

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

**FILED**  
MAY 21 2007

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

**Missouri Public  
Service Commission**

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

**ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENTS**  
**JEREMIAH NIXON AND KENNETH MCCLAIN**

COME NOW Jeremiah Nixon ("Nixon") and Kenneth McClain ("McClain"), by and through their counsel, and, pursuant to 4 CSR 240-2.070, and respectfully state the following to the Missouri Public Service Commission (Commission) as their answers and affirmative defenses to the Complaint:

1. Nixon and McClain deny the allegations contained in paragraph 1 of the Complaint.
2. Paragraph 2 concerns a legal conclusion and is not a matter which Nixon and McClain can admit or deny. Further answering, Nixon and McClain state that the regulation and statute referenced in paragraph 2 speak for themselves and, therefore, they deny the allegations contained in paragraph 2 to the extent they are inconsistent with the regulation and statute.
3. Nixon and McClain admit the allegations contained in the first sentence of paragraph 3. The second sentence of paragraph 3 is a legal conclusion and is not a matter which they are required to admit or deny. However, out of an abundance of caution, they deny the remaining allegations contained in paragraph 3.
4. Nixon and McClain admit the allegations contained in paragraph 4.

5. Nixon and McClain deny the allegations contained in paragraph 5. They further state that approximately one third of the issued shares of Raintree are owned by the Jeremiah Nixon Revocable Living Trust. They suggest that the Commission Staff consider amending its Complaint to substitute the Jeremiah Nixon Revocable Living Trust for Jeremiah Nixon.

6. Nixon and McClain deny the allegations contained in paragraph 6. They further state that approximately one third of the issued shares of Raintree are owned by the Norville Kenneth McClain Jr. Trust. They suggest that the Commission Staff consider amending its Complaint to substitute the Norville Kenneth McClain Jr. Trust for Kenneth McClain.

7. Nixon and McClain deny the allegations contained in paragraph 7.

8. Nixon and McClain deny the allegations contained in paragraph 8.

9. Nixon and McClain admit that Central Jefferson County Utilities, Inc. (Central Jefferson) is a water corporation, sewer corporation and public utility subject to the jurisdiction of the Commission, as provided by law. The second sentence of paragraph 9 is a legal conclusion and is not a matter which they are required to admit or deny. However, out of an abundance of caution, Nixon and McClain deny the remaining allegations contained in paragraph 9.

10. Nixon and McClain deny the allegations contained in paragraph 10.

11. Nixon and McClain deny the allegations contained in paragraph 11.

12. Nixon and McClain admit that Central Jefferson is in the business of providing water and sewer services to the public pursuant to certificates of convenience and necessity issued by the Commission. They further admit that Central Jefferson

provides water and sewer services to the residents of the Raintree Plantation Subdivision in Jefferson County, Missouri. The third sentence of paragraph 12 is a legal conclusion and is not a matter which they are required to admit or deny. They deny the remaining allegations contained in paragraph 12.

13. Nixon and McClain deny the allegations contained in paragraph 13. They further state that Raintree Plantation Subdivision consists of approximately 3152 lots, that all of these lots were initially sold and that there are approximately 681 homes constructed in the subdivision.

14. Nixon and McClain admit that Raintree developed the Raintree Plantation Subdivision. They deny the remaining allegations contained in paragraph 14.

15. Nixon and McClain admit that Raintree installed water and sewer mains in Raintree Plantation Subdivision. They deny the remaining allegations contained in paragraph 15.

16. Nixon and McClain admit that Raintree contributed utility plant to Central Jefferson. They deny the remaining allegations contained in paragraph 16.

17. Nixon and McClain admit that Raintree contributed approximately \$4 million of water and sewer plant to Central Jefferson. They deny the remaining allegations contained in paragraph 17.

18. Nixon and McClain admit the allegations contained in paragraph 18.

19. Nixon and McClain admit that Well No. 1 produces water that contains lead and that the water from Well No. 1 is only used when necessary and, then, is only used by mixing the water with water produced by Well No. 2. The remainder of the allegations contained in paragraph 19 are legal conclusions and are not matters which

they are required to admit or deny. However, out of an abundance of caution, they deny the remaining allegations contained in paragraph 19.

20. Nixon and McClain admit the allegations contained in paragraph 20.

21. Nixon and McClain admit that its Well No. 2 has only a single pump.

They deny the remaining allegations contained in paragraph 21.

22. Nixon and McClain deny the allegations contained in paragraph 22.

23. Nixon and McClain admit that Central Jefferson has a water storage tank with a capacity of 50,000 gallons.

24. The allegations contained in paragraph 24 are legal conclusions and are not matters which Nixon and McClain are required to admit or deny. However, out of an abundance of caution, they deny the remaining allegations contained in paragraph 24.

25. Nixon and McClain admit that Central Jefferson's sewage treatment plant was originally constructed with a rated inflow capacity of 32,000 gallons per day, which was subsequently increased to 64,000 gallons per day. They deny the remaining allegations contained in paragraph 25.

26. Nixon and McClain deny the allegations contained in paragraph 26.

27. Nixon and McClain deny the allegations contained in paragraph 27.

28. Nixon and McClain deny the allegations contained in paragraph 28.

29. Nixon and McClain deny the allegations contained in paragraph 29.

30. Nixon and McClain deny the allegations contained in paragraph 30.

31. Nixon and McClain admit that the Department of Natural Resources issued a Notice of Violation to Central Jefferson on September 27, 2004. They further state that the Notice of Violation speaks for itself, and they deny the allegations contained

in paragraph 31 to the extent they are inconsistent with the Notice. They further deny that there has been any "finding" or final determination after litigation and specifically deny the allegations contained in the referenced Notice of Violation.

32. Nixon and McClain admit that the Department of Natural Resources issued a Notice of Violation to Central Jefferson on August 4, 2005. They further state that the Notice of Violation speaks for itself, and they deny the allegations contained in paragraph 32 to the extent they are inconsistent with the Notice. They further deny that there has been any "finding" or determination after litigation and specifically deny the allegations contained in the referenced Notice of Violation.

33. Nixon and McClain admit that the Department of Natural Resources issued a Notice of Violation to Central Jefferson on October 26, 2005. They further state that the Notice of Violation speaks for itself, and they deny the allegations contained in paragraph 33 to the extent they are inconsistent with the Notice. They further deny that there has been any "finding" or determination after litigation and specifically deny the allegations contained in the referenced Notice of Violation.

34. Nixon and McClain deny the allegations contained in paragraph 34. The Complaint alleges the existence of three Notices of Violation. However, no others are set forth in the Complaint.

35. Nixon and McClain admit that there was a hearing before the Commission in December of 2006, concerning Central Jefferson's proposed transfer of its water and sewer systems to Jefferson County Public Sewer District. They further state that the transcript of the hearing speaks for itself, and they deny the allegations contained in paragraph 35 to the extent they are inconsistent with the transcript.

36. Nixon and McClain deny the allegations contained in paragraph 36.

Further, the Department of Natural Resources agreed in December of 2006 that it did not have any enforcement or compliance actions against Central Jefferson pertaining to its water operations and did not consider Central Jefferson to be in significant non-compliance or a threat to public health or the environment in regard to drinking water.

37. Nixon and McClain admit that the United States Environmental Protection Agency issued a document titled Findings of Violation and Order for Compliance on November 30, 2005. They further state that the Findings of Violation and Order for Compliance speaks for itself, and they deny the allegations contained in paragraph 37 to the extent they are inconsistent with the Findings of Violation and Order for Compliance. They further deny that there has been any “finding” or final determination after litigation, and they specifically deny the allegations contained in the referenced Findings of Violation and Order for Compliance.

38. Nixon and McClain admit the allegations contained in paragraph 38.

39. Nixon and McClain state that the Findings of Violation and Order for Compliance speaks for itself, and they deny the allegations contained in paragraph 39 to the extent they are inconsistent with the Findings of Violation and Order for Compliance.

40. Nixon and McClain admit that the United States Environmental Protection Agency issued a document titled Findings of Violation and Order for Compliance on March 2, 2006. They further state that the Findings of Violation and Order for Compliance speaks for itself, and they deny the allegations contained in paragraph 40 to the extent they are inconsistent with the Findings of Violation and Order for Compliance. They further deny that there has been any “finding” or final determination after litigation

and specifically deny the allegations contained in the referenced Findings of Violation and Order for Compliance.

41. Nixon and McClain admit that the Commission convened a local public hearing on November 6, 2006, in Commission Case No. SO-2007-0071, concerning Central Jefferson's proposed transfer of the water and sewer systems to the Jefferson County Public Sewer District. They deny the complaints referenced in paragraph 41 and its subparts. They further state that the transcript of this proceeding speaks for itself, and they deny the allegations contained in paragraph 41 to the extent they are inconsistent with the transcript.

42. Nixon and McClain admit that Central Jefferson generally denied the allegations that were raised at the local public hearing held in Case No. SO-2007-0071. They further state that the record of this case speaks for itself, and they deny the allegations contained in paragraph 42 to the extent they are inconsistent with such record. They deny the truth of the allegations.

43. Nixon and McClain admit that Central Jefferson has in the past attempted to sell its water and sewer service assets.

44. Nixon and McClain deny the allegations contained in paragraph 44.

45. Nixon and McClain admit that on July 13, 2006, Central Jefferson entered into a Tri-Party Purchase and Sale Agreement with the Jefferson County Public Sewer District and Environmental Management Company (EMC). They further state that the Agreement will speak for itself, and they deny the allegations contained in paragraph 45 to the extent they are inconsistent with the terms of the Agreement. They admit that Central Jefferson entered into an Agreement for Operation and Maintenance of Water and

Wastewater Treatment Facilities with EMC whereby EMC agreed to operate Central Jefferson's water and sewer systems beginning September 1, 2006. They further state that this agreement was later terminated by EMC.

46. Nixon and McClain admit that on August 15, 2006, Central Jefferson filed an Application with the Commission seeking approval of the transaction contemplated by the Tri-Party Purchase and Sale Agreement and that this Application was assigned Cases Nos. SO-2007-0071 and WO-2007-0072. They deny the remaining allegations contained in paragraph 46.

47. Nixon and McClain admit that the Commission approved the transaction contemplated by the Tri-Party Purchase and Sale Agreement in its Report and Order issued on February 8, 2007 in Case No. SO-2007-0071, as consolidated. They deny the Report and Order directed the General Counsel to bring the Complaints that are the subject of these proceedings. Nixon and McClain further state that the Report and Order in the referenced case speaks for itself, and they deny the allegations contained in paragraph 47 to the extent they are inconsistent with such Report and Order.

#### **Count I**

48. Nixon and McClain hereby adopt by reference their responses to paragraphs 1 through 47 found above.

49. Nixon and McClain state that Section 393.130.1, RSMo speaks for itself, and, therefore, they deny the allegations contained in paragraph 49 to the extent they are inconsistent with this statute.

50. Nixon and McClain deny the allegations contained in paragraph 50 and each subpart thereof.



## **Count II**

51. Nixon and McClain hereby adopts by reference their responses to paragraphs 1 through 50 found above.

52. Nixon and McClain state that Commission Rule 4 CSR 240-60-020 speaks for itself, and, therefore, they deny the allegations contained in paragraph 52 to the extent they are inconsistent with this regulation.

53. Nixon and McClain deny the allegations contained in paragraph 53.

## **Count III**

54. Nixon and McClain hereby adopt by reference their responses to paragraphs 1 through 53 found above.

55. Nixon and McClain state that Section 386.570, RSMo speaks for itself and, therefore, they deny the allegations contained in paragraph 55 to the extent they are inconsistent with this statute.

56. Nixon and McClain state that Section 386.600, RSMo speaks for itself and, therefore, they deny the allegations contained in paragraph 56 to the extent they are inconsistent with this statute.

57. Except as expressly admitted in this answer, Nixon and McClain deny each and every other allegation contained in the Complaints.

58. Nixon and McClain further deny that Complainant is entitled to the relief prayed for in the WHEREFORE clauses of the Complaints or is entitled to any relief whatsoever in the premises.

## AFFIRMATIVE DEFENSES

59. For further answer and defense, pursuant to Commission Rule 4 CSR 240-2.070(8), Nixon and McClain provide the following additional grounds of defense, both of law and fact, in further answer and response to the Complaint:

A. The Commission and its General Counsel lack subject matter jurisdiction to adjudicate any violations alleged by the Missouri Department of Natural Resources and the United States Environmental Protection Agency.

B. Nixon and McClain state affirmatively that Respondents did not discharge pollutants into the waters of the United States in violation of Section 301 of the Clean Water Act, 33 U.S.C. §1311 and Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

C. Nixon and McClain state affirmatively that Respondents did not discharge pollutants into the waters of the State of Missouri as defined by Missouri statutes and regulations of the Missouri Department of Natural Resources.

D. Nixon and McClain state affirmatively that Central Jefferson's wastewater treatment facility has not discharged pollutants into a "navigable water" as defined by the Clean Water Act, Section 502(7), 33 U.S.C. § 1362(7) because Gallagher Creek is not a "navigable water" of the United States or of the State of Missouri.

E. Nixon and McClain state affirmatively that any discharge from Central Jefferson's wastewater treatment plant was permitted by the terms of Central Jefferson's discharge permit or was permitted under 10 CSR 20-7.015(9)(E) which provides as follows:

(E) Bypassing,

1. Any bypass or shutdown of a waste-water treatment facility and tributary sewer system or any part of a facility and sewer system that results in a violation of permit limits or conditions is prohibited except –

A. Where unavoidable to prevent loss of life, personal injury or property damages;

B. Where unavoidable excessive storm drainage or runoff would damage any facilities or processes necessary for compliance with the effluent limitations and conditions of this permit; and

C. Where maintenance is necessary to ensure efficient operation and alternative measures have been taken to maintain effluent quality during the period of maintenance.

F. The Commission's and the Commission's General Counsel's attempts to adjudicate violations alleged by the Missouri Department of Natural Resources and the United States Environmental Protection Agency deprive Respondents of equal protection under the law pursuant to Article I, Section 2 of the Constitution of the State of Missouri and under the Fourteenth Amendment to the Constitution of the United States, and further deprive Respondents of due process of law under Article I, Section 10 of the Constitution of the State of Missouri and the Fifth Amendment to the Constitution of the United States because the Missouri statutes and regulations, and the statutes and regulations of the United States, provide for methods of adjudication and appeal of such adjudication. Adjudication by the Commission and the Commission's General Counsel other than as provided under such statutes and regulations could possibly be used as res judicata or collateral estoppel in any enforcement action by the Missouri Department of Natural Resources or the United States Environmental Protection Agency thereby depriving Respondents of their rights to due process and equal protection for adjudication of such violations alleged by the Missouri Department of Natural Resources and the United States Environmental Protection Agency.

G. Nixon and McClain state affirmatively that Central Jefferson has provided to its customers at all times a sufficient water supply for use by its customers.

H. Nixon and McClain state affirmatively that the water provided to Central Jefferson's customers at the point of use by the customers does not violate any state or federal standard for lead content and complies with all state and federal regulations. That the water supplied by Central Jefferson and used by its customers complies with all state and federal regulations regarding lead content has been recognized and admitted by representatives of the Missouri Department of Natural Resources in public meetings.

I. Nixon and McClain state affirmatively that the inability of Central Jefferson to expand and improve its water system and wastewater treatment and delivery system was directly caused by the failure of the Missouri Public Service Commission and its staff to approve rates sufficient to finance construction of such expansion and improvements or to obtain financing from commercial funding entities sufficient for construction of such improvements and expansions. The existing rates approved by the Missouri Public Service Commission are insufficient to support expansions and improvements to the existing wastewater treatment system and water system.

J. Nixon and McClain state affirmatively that Central Jefferson undertook numerous negotiations and efforts to sell its assets or the company to prospective buyers who had the ability and resources to fund or obtain funding for improvement and expansion of Central Jefferson's wastewater treatment system and water system. Central Jefferson's efforts to sell the company or its assets were thwarted by the refusal of the Missouri Department of Natural Resources to timely approve necessary plans and specifications for expansion of the wastewater treatment plant and by the Missouri Department of Natural Resources refusal to agree to relieve any purchaser of liability for violations while improvements were constructed by the prospective purchaser to the

wastewater treatment plant. Further, Central Jefferson's efforts to sell the company or its water systems and wastewater treatment plant were prevented by the refusal of the Missouri Public Service Commission to grant or commit to prospective rate increases sufficient to allow any purchaser to finance construction of the necessary improvements and expansion or to assure any purchaser of recovery of its investment and a reasonable rate of return on its investment. In fact, the Missouri Public Service Commission's practice of not approving rate increases prospective to construction of sewer and water improvements makes it extremely difficult for small water and sewer companies to make such improvements.

K. Respondents are immune under Section 386.470, RSMo in that the Complaint purports to impose a penalty for alleged transactions or conduct with respect to which Central Jefferson has provided documentary evidence or with respect to which the Complainant claims that Central Jefferson has testified under oath through Kenneth McClain.

L. The Commission's General Counsel is not authorized to bring this Complaint in that the Commission's Report and Order in Case No. SO-2007-0071 directed that any such Complaint be filed prior to February 28, 2007. This Complaint was filed on April 13, 2007.

M. The Complaints fail to set forth facts showing that Complainant is entitled to relief prayed for or any relief whatsoever in the premises, and fails to state a claim upon which relief can be granted against Central Jefferson in the following respects:

(1) Section 386.570, RSMo is unconstitutionally vague and overbroad in that the phrase "any other law" as used in subsection 1 thereof is unlimited in scope. It

does not reasonably identify the nature of the conduct proscribed by the statute such that a corporation, person or public utility is reasonably put on notice as to what actions are punishable thereunder. The practical scope of this clause absent some meaningful boundaries is limitless. In this case, Complainant points to alleged violations of federal law and matters falling within the jurisdiction of another state agency to justify the claim of a violation of state law.

(2) The penalty provided in Section 386.570, RSMo is not available for some or all of the violations of law alleged against Respondents in the Complaint because the laws purportedly violated by Respondents are not within the scope of the statute's phrase "any other law" as properly construed based on the statutory and constitutional limitations on the Commission's jurisdiction and powers.

(3) The penalty provided in Section 386.570, RSMo is not applicable to the conduct alleged against Respondents to the extent that a penalty is provided for that alleged conduct under other state law, because the relief under Section 386.560, RSMo is only available "in a case in which a penalty has not herein been provided for such corporation, person or utility." The State cannot recover penalties under Section 386.570, RSMo where another remedy exists.

(4) Nixon and McClain incorporate herein by reference their Motion to Dismiss filed in these Complaints.

N. The construction and interpretation of Chapters 386 and 393, RSMo the Complainant seeks to apply in this action:

(1) constitutes an unreasonable, inconsistent and arbitrary construction and interpretation of the statute;

(2) constitutes an unreasonable, inconsistent and arbitrary application of the statute;

(3) exceeds the statutory authority, powers, and jurisdiction of the Commission;

(4) constitutes the making of law or an adjudication in violation of the authority, powers and jurisdiction of the Commission as limited by the Constitution of Missouri, Article III Sections 1 and 49, and by Chapters 386 and 393, RSMo; and,

(5) violates the Fifth Amendment of the United States Constitution as it is applied to the states through the Fourteenth Amendment as it would purport to subject Respondents to multiple punishment for the same alleged offenses.

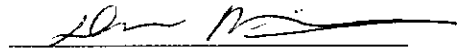
O. The Complaint is in whole, or in part, barred by limitations on actions provided by law and equitable principles of laches.

P. Nixon and McClain incorporate herein by reference all affirmative defenses raised by the other respondents in their answers.

Q. Nixon and McClain reserve the right to raise any additional affirmative defenses which may become apparent through the course of discovery.

WHEREFORE, having fully answered and set forth its affirmative defenses, Respondents Jeremiah Nixon and Kenneth McClain, pray the Commission dismiss the Complaints and grant such other relief as the Commission deems reasonable and just.

HOCKENSMITH TATLOW MCKINNIS, P.C.



Dana Hockensmith #24925  
12801 Flushing Meadows Dr.  
St. Louis, MO 63131  
(314) 965-2255  
Fax: (314) 965-6653  
Attorneys for Respondents Jeremiah Nixon  
and Kenneth McClain

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via mail or hand delivery on this 21<sup>st</sup> day of May, 2007, to:

Kevin Thompson  
General Counsel  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

Christina Baker  
Office of the Public Counsel  
P.O. Box 2230  
Jefferson City, MO 65102

Dean L. Cooper  
Brydon, Swearengen & England, P.C.  
312 East Capitol Avenue  
Jefferson City, MO 65101

