

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED²

JUN 04 2007

The Staff of the Missouri Public Service
Commission,)

Missouri Public
Service Commission

v.)

Case No. SC-2007-0396

Central Jefferson County Utilities, Inc., et al.)

WC-2007-0394

ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENTS
NORVILLE McCLAIN (DECEASED) AND THE NORVILLE McCLAIN TRUST

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

ANSWER ON BEHALF OF DECEDENT NORVILLE McCLAIN

Without waving any defenses or objection, Decedent, Norville McClain, who died on May 11, 2003, cannot admit or deny any of the allegations set forth in the Complaint, and therefore all are denied. On behalf of Decedent this response incorporates by reference the Motion to Dismiss filed on Decedent's behalf and all defenses set forth herein.

ANSWER ON BEHALF OF THE NORVILLE McCLAIN TRUST

1. Trust denies the allegations contained in paragraph 1 of the Complaint.
2. Paragraph 2 concerns a legal conclusion and is not a matter which the Trust can admit or deny. Further answering, the Trust states that the regulation and statute referenced in paragraph 2 speak for themselves and, therefore, denies the allegations contained in paragraph 2 to the extent they are inconsistent with the regulation and statute.

3. Trust admits 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 it is required to admit or deny. However, out of an abundance of caution, the Trust denies the remaining allegations contained in paragraph 3.

4. Trust admits the allegations contained in paragraph 4.

5. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 5 and therefore denies the same.

6. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 6 and therefore denies the same.

7. Trust admits that it presently holds title to one-third of the shares of Central Jefferson County Utilities, Inc. and Raintree Plantation, Inc. Trust denies the remaining allegations contained in paragraph 7.

8. Trust denies the allegations contained in paragraph 8.

9. Trust admits 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, Trust denies the remaining allegations contained in paragraph 9.

10. Trust denies the allegations contained in paragraph 10.

11. Trust denies the allegations contained in paragraph 11.

12. Trust admits 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. Trust further admits 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 Trust is required to admit or deny. Trust denies the remaining allegations contained in paragraph 12.

13. Trust denies the allegations contained in paragraph 13. Trust further states 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. Trust admits that Raintree developed the Raintree Plantation Subdivision. Trust denies the remaining allegations contained in paragraph 14.

15. Trust admits that Raintree installed water and sewer mains in Raintree Plantation Subdivision. Trust denies the remaining allegations contained in paragraph 15.

16. Trust admits that Raintree contributed utility plant to Central Jefferson. Trust denies the remaining allegations contained in paragraph 16.

17. Trust admits that Raintree contributed approximately \$4 million of water and sewer plant to Central Jefferson. Trust denies the remaining allegations contained in paragraph 17.

18. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 18 and therefore denies the same.

19. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 19 and therefore deny the same. Trust further states

that 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, Trust denies the remaining allegations contained in paragraph 19.

20. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 20 and therefore denies the same.

21. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 21 and therefore denies the same.

22. Trust denies the allegations contained in paragraph 22.

23. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 23 and therefore denies the same.

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

25. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 25 and therefore denies the same.

26. Trust denies the allegations contained in paragraph 26.

27. Trust denies the allegations contained in paragraph 27.

28. Trust denies the allegations contained in paragraph 28.

29. Trust denies the allegations contained in paragraph 29.

30. Trust denies the allegations contained in paragraph 30.

31. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 31 and therefore denies the same.

32. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 32 and therefore denies the same.

33. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 33 and therefore denies the same.

34. Trust denies the allegations contained in paragraph 34.

35. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 35 and therefore denies the same.

36. Trust denies 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. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 37 and therefore denies the same.

38. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 38 and therefore denies the same.

39. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 39 and therefore denies the same.

40. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 40 and therefore denies the same.

41. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 41 and therefore denies the same.

42. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 42 and therefore denies the same.

43. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 43 and therefore denies the same.

44. Trust denies the allegations contained in paragraph 44.

45. Trust admits 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). Trust further states that the Agreement will speak for itself, and Trust denies the allegations contained in paragraph 45 to the extent they are inconsistent with the terms of the Agreement. Trust admits 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. Trust further states that this agreement was later terminated by EMC.

46. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 46 and therefore denies the same.

47. Trust is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 47 and therefore denies the same.

Count I

48. Trust hereby adopts by reference its responses to paragraphs 1 through 47 found above.

49. Trust states that Section 393.130.1, RSMo speaks for itself, and, therefore, Trust denies the allegations contained in paragraph 49 to the extent they are inconsistent with this statute.

50. Trust denies the allegations contained in paragraph 50 and each subpart thereof.

Count II

51. Trust hereby adopts by reference its responses to paragraphs 1 through 50 found above.

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

53. Trust denies the allegations contained in paragraph 53.

Count III

54. Trust hereby adopts by reference its responses to paragraphs 1 through 53 found above.

55. Trust states that Section 386.570, RSMo speaks for itself and, therefore, Trust denies the allegations contained in paragraph 55 to the extent they are inconsistent with this statute.

56. Trust states that Section 386.600, RSMo speaks for itself and, therefore, Trust denies the allegations contained in paragraph 56 to the extent they are inconsistent with this statute.

57. Except as expressly admitted in this answer, Trust denies each and every other allegation contained in the Complaints.

58. Trust further denies 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), on behalf of Decedent and Trust the following additional grounds of defense, both of law and fact, are hereby set forth 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. Decedent and Trust 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. Decedent and Trust 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. Decedent and Trust 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. Decedent and Trust 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. Decedent and Trust state affirmatively that Central Jefferson has provided to its customers at all times a sufficient water supply for use by its customers.

H. Decedent and Trust 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. Decedent and Trust 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. Decedent and Trust 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) Decedent and Trust 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. Decedent and Trust incorporate herein by reference all affirmative defenses raised by the other respondents in their answers.

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

R. The Commission is barred by the probate statutes and laws of Missouri from pursuing claims against the Decedent and the Trust.

S. The Complaint fails to join necessary and indispensable parties.

WHEREFORE, having fully answered and set forth its affirmative defenses, Respondents Norville McClain (Deceased) and The Norville McClain Trust pray the Commission dismiss the Complaints, award The Norville McClain Trust its attorneys' fees, and grant such other relief as the Commission deems reasonable and just.

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 18th day of May, 2007, to:

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