

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 21st day
of August, 2008.

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, et al.

**ORDER DENYING MOTION FOR PARTIAL SUMMARY
DETERMINATION AGAINST CENTRAL JEFFERSON COUNTY
UTILITIES, INC.**

Issue Date: August 21, 2008

Effective Date: August 31, 2008

Background and Procedural History

On April 13, 2007, the Staff of the Missouri Public Service Commission (“Staff”) filed two complaints against Central Jefferson County Utilities, Inc. (“CJCU”), Raintree Plantation, Inc. (“Raintree”), Jeremiah Nixon, Kenneth McClain, Norville McClain, and the Norville McClain Trust (“McClain Trust”). The Complaints were assigned docket numbers WC-2007-0394 and SC-2007-0396. In general terms, the complaints alleged that the Respondents had provided unsafe and inadequate water and sewer services to the residents of the Raintree Plantation Subdivision in Jefferson County, Missouri.

The Respondents filed separate answers and pled affirmative defenses,¹ and on June 15, 2007 the Commission's Staff filed its reply to the answers and defenses and filed a motion for partial summary determination against CJCUC in both matters. The Commission heard oral argument on these motions on September 24, 2007, and ultimately denied Staff's motion on October 4, 2007. The Commission subsequently consolidated these two cases on October 10, 2007 pursuant to Commission Rule 4 CSR 240-2.110(3), and designated the lead case as WC-2007-0394.

The consolidated case remained idle pending the Circuit Court of Cole County's determination in the Writ of Review proceeding in Case Number SO-2007-0071, et al., *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*.² Case No. SO-2007-0071 is the underlying case wherein the Commission made certain findings of fact and conclusions of law in its Report and Order issued on February 8, 2007, that serve as the basis upon which Staff filed its complaints in this consolidated case.

The Circuit Court issued its ruling in the Writ of Review proceeding on June 30, 2008.³ The Circuit Court remanded the Commission's decision in SO-2007-0071 with

¹ See EFIS Docket Nos. 7-13 in WC-2007-0394, and EFIS Docket Nos. 7-13 in SC-2007-0396. "EFIS" is the Commission's Electronic Filing and Information System.

² The Writ of Review Action at the Cole County Circuit Court was assigned Case No. 07AC-CC00444.

³ All dates further referenced in this order refer to the year 2008 unless otherwise specified.

respect to certain “findings” and ordered the Commission to delete those “findings.”⁴

Specifically the Court stated:

The court therefore finds the Case No. SO-2007-0071 *findings* of statutory violation to be unlawful, having been achieved by procedure not authorized by law. The Report and Order is reversed in these respects and remanded to the Commission with the direction to delete such *findings*. (Emphasis added).

The Commission can only assume the Circuit Court was referencing the Commission’s *conclusions of law*, where the following specific conclusions regarding violations were delineated:⁵

Consequently, the Commission shall order its General Counsel to seek the maximum amount in penalties from Central Jefferson for the following violations:

a. Every violation of the Missouri Clean Water Act, Sections 644.051(1) and (2), and Section 644.076.1, as found by the DNR, is a violation of Commission Rule 4 CSR 240-60.020.1, in that Central Jefferson failed to maintain and operate a sewage treatment facility of adequate capacity and properly equipped to treat the sewage and discharge effluent of the quality required by the laws of the state of Missouri and in other respects failed to comply with the laws and regulations of the state and local health authority. Each violation is a separate and distinct offense, and each day forward from the date that DNR found the violation, and Central Jefferson failed to bring its system into compliance, is a separate and distinct offense.

b. Every violation of 10 CSR 20-6.010(1)(A) & 5(A), 10 CSR 20-7.015(9)(A)(1), 10 CSR 20-7.031(3)(A), (B), & (C), and 10 CSR 20-9.020(2), as found by the DNR, is a violation of Commission Rule 4 CSR 240-60.020.1, in that Central Jefferson failed to maintain and operate a sewage treatment facility of adequate capacity and properly equipped to treat the sewage and discharge effluent of the quality required by the laws of the state of Missouri and in other respects failed to comply with the laws and regulations of the state and local health authority. Each violation is a separate and distinct offense, and each day forward from the date that DNR found the violation,

⁴ *Findings of Fact, Conclusions of Law and Judgment*, Case No. 07AC-CC00444, In the Circuit Court of Cole County State of Missouri, June 30, 2008.

⁵ *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, Report and Order, issued February 8, 2008, effective February 28, 2008.

and Central Jefferson failed to bring its system into compliance, is a separate and distinct offense.

c. Each day that the capacity of Central Jefferson wastewater treatment facility was exceeded was a failure of Central Jefferson to maintain and operate its sewage treatment facility with adequate capacity and is a violation of Commission Rule 4 CSR 240-60.020.1 and Section 393.130.1. Central Jefferson's sewer treatment facility capacity has been exceeded every day since on or about July 1, 2000, each day thereafter being a separate and distinct offense.

d. Each day that Central Jefferson failed to make reasonable efforts to eliminate or prevent the entry of surface or ground water, and each day that Central Jefferson did in fact fail to eliminate or prevent the entry of surface or ground water, into its sanitary sewer system is a violation of Commission Rule 4 CSR 240-60.020.3 and Section 393.130.1. This problem was identified as arising on or about December 1, 2003, each day forward being a separate and distinct offense.

e. Each day that Central Jefferson has been unable to provide adequate storage of uncontaminated drinking water, to ensure the safe and adequate provision of water services is a violation of Section 393.130.1. DNR documented annual water consumption figures exceeding the demand of Central Jefferson's storage capacity in 2005. Consequently, each day forward from on or about January 1, 2005 when adequate reserves were unavailable is a separate and distinct offense.

The conclusions of law section, above, is the section where the Commission describes the statutory violations found in Case No. SO-2007-0071. The underlying findings of fact in the Commission's February 8 Report and Order were not disturbed by the Circuit Court's June 30 ruling. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.⁶

⁶ *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

Staff's Renewed Motion for Summary Determination and Responses, and Outstanding Motions Regarding the Commission's Jurisdiction

On August 6, 2008, Staff renewed its June 15, 2007 motion for partial summary determination. The Commission notes that Staff has again limited its renewed motion to Respondent CJCUC and the motion does not involve any of the other Respondents in this matter.

On August 8, 2008, CJCUC filed with the Commission, on its behalf and on behalf of the Office of the Public Counsel (Public Counsel), Raintree, Jeremiah Nixon, Kenneth McClain, Norville McClain (Deceased) and the McClain Trust, a joint status report stating, *inter alia*:⁷

Raintree Plantation, Inc., Jeremiah Nixon, and Kenneth McClain filed motions to dismiss with the Commission on May 21, 2007. Norville McClain (Deceased) and the Norville McClain Trust filed a motion to dismiss on June 4, 2007. The Staff filed its response to these motions to dismiss on June 15, 2007. Jeremiah Nixon, Kenneth McClain and Raintree Plantation filed their reply to the Staff pleading on June 22, 2007. The motions to dismiss raise basic questions of jurisdiction. Accordingly, a ruling on those motions is necessary before the case can progress in a meaningful manner.⁸

The motions to dismiss based upon the alleged lack of jurisdiction, however, involve only Raintree, Jeremiah Nixon, Kenneth McClain, Norville McClain (Deceased) and the Norville McClain Trust (collectively the "Jurisdictional Movants"). The motions to dismiss do not involve CJCUC. Consequently, the Commission need not rule on the jurisdictional issues regarding the Jurisdictional Movants to reach a determination on the motion for partial

⁷ This joint status report was filed in response to the Commission's *Order Directing the Filing of a Joint Status Report*, issued on July 29, 2008.

⁸ *Status Report*, filed by Central Jefferson County Utilities, Inc. on August 8, 2008, paragraphs 2, 3 and 5.

summary determination Staff renewed on August 6 involving only CJCUC. The Commission has jurisdiction over CJCUC – a fact, and legal conclusion, that no party is contesting.⁹

On August 14, CJCUC filed its response to Staff's renewed motion. CJCUC analogizes Staff's renewed motion to that of being a motion for reconsideration of the determination made regarding its June 15, 2007 motion. CJCUC claims that Staff has not identified any change in facts that would justify reconsideration or a finding that the Commission's earlier decision was unlawful, unjust or unreasonable pursuant to Commission Rule 4 CSR 240-2.160(2) governing motions for reconsideration.¹⁰ CJCUC further contends that granting Staff's renewed motion would be unhelpful in that such a grant could only be applicable to CJCUC and that consideration of CJCUC's prior raised affirmative defenses might require a hearing.

The Commission does not regard Staff's renewed motion as a motion for reconsideration of the Commission's October 4, 2007 determination on its prior motion. To "renew" is "to make new again,"¹¹ and there is no error to be found with the Commission considering and ruling upon a renewed or new motion, especially in instances where the facts and circumstances surrounding the issues in question have substantially changed.¹² The Commission's rule on summary determination, Rule 4 CSR 240-2.117, is analogous to Missouri Supreme Court Rule 74.04, and the Commission's Rule, just like Supreme Court

⁹ See Central Jefferson's Response in Opposition to Motion for Partial Summary Determination, filed on July 23, 2007, page 7, paragraph 10. See also *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, Application filed on August 15, 2007, paragraph 2; and Report and Order, issued February 8, 2008, effective February 28, 2008, Conclusions of Law, pp. 27-28.

¹⁰ Commission Rule 4 CSR 240-2.160(2) requires all motions for reconsideration to be filed within ten days of the date the order was issued.

¹¹ *Black's Law Dictionary*, Sixth Edition, West Publishing Co., 1990, p. 1296; *The American Heritage College Dictionary*, Third Edition, Houghton Mifflin Company, 1997, p. 1155

Rule 74.04, does not prevent renewed motions for summary judgment after an initial denial.¹³

The facts and circumstances surrounding this matter have changed substantially in the interim between October 4, 2007, when the Commission denied Staff's former motion, and June 30, 2008, when the Circuit Court issued its judgment on the writ of review in Case No. SO-2007-0071. Most importantly, the reviewing court has now issued a judgment identifying which conclusions of law delineated in the Commission's February 8, Report and Order in Case No. SO-2007-0071 it believes are lawful.

The Commission's October 2, 2007 Order Denying Staff's Motion for Partial Summary Determination

Before the Commission delves into its full analysis of Staff's new motion, the Commission must first revisit its prior order denying the original motion. That order is interlocutory, not final, and the Commission still retains jurisdiction over this matter having not yet rendered a final decision.¹⁴

The Commission improvidently made several apparently conflicting statements in the October 4, 2007 order denying Staff's prior motion – both internally conflicting within the order and also conflicting with prior orders of the Commission. In the October 4, 2007 Order, the Commission, on pages 5 and 6, stated:

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; (2) were not mentioned in any of the parties' opening statements;

¹² *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 162 (Mo. banc 1997).

¹³ *Id.*

¹⁴ An order denying a motion for summary judgment is interlocutory in nature and trial courts have discretion to reconsider such an order at any point before final judgment is entered. *Midwest Crane and Rigging, Inc. v. Custom Relocation's Inc.* 250 S.W.3d 757, 761 (Mo. App. 2008).

(3) were not discussed in any of the parties' post-hearing briefs; and (4) were not addressed in any of the parties' proposed post-hearing findings of fact and conclusions of law. 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 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." 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.

In the very same Order, on page 7, the Commission stated:

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. 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, 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. (Emphasis added).

The statement above, emphasized in bold, was qualified by a footnote that read:

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.**

In the Commission's April 24, 2007 Order Denying Application for Rehearing in SO-2007-0071, the Commission stated:¹⁵

¹⁵ Order Denying Application for Rehearing, Case No. SO-2007-0071, issued April 24, 2007, p. 4.

At hearing, Central Jefferson did not object to the taking of evidence regarding operating its water system without adequate storage capacity, operating its sewer system above its design capacity and failing to control ground and surface water entry into its system. In fact, Central Jefferson conceded these failures. **These issues were integrally related to determining the issue if the transfer of assets was detrimental to the public interest, and given the procedural history of this case, Central Jefferson was clearly on notice that these issues were interrelated.** As such, it is difficult to comprehend Central Jefferson's belated objections with regard to the Commission's determination on these issues.

The Commission unintentionally contradicted itself within its October 4, 2007 order denying General Counsel's motion for partial summary judgment, and contradicted itself in terms of what was determined when deciding the transfer of assets case and when the Commission denied CJCUC's motion for rehearing in that case; i.e. Case No. SO-2007-0071.

The Commission acknowledges its error and makes clear that its prior determinations were: (1) CJCUC had adequate notice that the issue of safe and adequate service was an issue in the transfer of assets case; (2) CJCUC had adequate opportunity to defend on that issue; (3) CJCUC tried those issues by consent; and, (4) based upon CJCUC's own admissions at hearing, the Commission properly authorized its General Counsel to seek penalties based upon the violations it concluded were committed by CJCUC – violations stemming from findings of fact that the Cole County Circuit Court have appropriately left undisturbed in the writ of review proceeding in SO-2007-0071.

Having had the opportunity to review its October 4, 2007, Order Denying Staff's Motion for Partial Summary Determination, the Commission, on its own motion, corrects said order by striking the language it has identified appearing on pages 5 and 6 of the order. The Commission also corrects the sentence on page six of the order that

immediately followed the stricken language so that sentence will begin with the word “During” as opposed to the word “Moreover.”¹⁶

While CJCUC did not renew its July 23, 2007 point-by-point response to Staff’s prior motion for summary determination when Staff filed its new motion, it did reference its prior defenses in its current response to Staff’s new motion. However, a full review of CJCUC’s defenses is not required to rule on the General Counsel’s renewed motion.

As previously noted, the Circuit Court, upon review, remanded SO-2007-0071 on the basis of the Commission’s conclusions of law regarding “statutory violations” having been achieved by a procedure not authorized by law. The Commission did not choose to appeal that judgment, and the Commission has in place the method to correct that deficient process; namely the current complaint case. To grant summary judgment; however, on the basis of the findings of fact in the underlying transfer of assets case, would, under the circumstances of this case, cut that corrective process off prematurely.

The Commission wishes to emphasize that its findings of fact in SO-2007-0071 were not disturbed by the Circuit Court’s June 30 judgment. By moving forward with the hearing process in this matter, General Counsel will have sufficient opportunity to fully develop any facts establishing any alleged violations by CJCUC, and CJCUC will have the opportunity to fully defend against any such allegations. Consequently, the Commission will deny Staff’s Renewed Motion for Partial Summary Determination and direct the parties to submit a procedural schedule culminating in an evidentiary hearing.

¹⁶ The full sentence originally read: “Moreover, during oral argument of its motion for partial summary determination, Staff conceded that there was no need to expediency to protect the Subdivision’s residents since the assets 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.” The Staff of the Missouri Public Service Commission, Complainant, vs. Central Jefferson County Utilities, Inc. Raintree Plantation, Inc., Jeremiah Nixon, Kenneth McClain, Norville McClain, and the Norville McClain Trust, Case No. WC-2007-

IT IS ORDERED THAT:

1. The language identified in the body of this order, appearing on pages 5 and 6 in the Commission's October 4, 2007 interlocutory "Order Denying Staff's Motion for Partial Summary Determination," is hereby stricken from that order. The Commission further orders the additional editorial corrections to the Commission's October 4, 2007 interlocutory "Order Denying Staff's Motion for Partial Summary Determination," as delineated in the body of this order.
2. The Staff of the Missouri Public Service Commission's Renewed Motion for Partial Summary Determination against Central Jefferson County Utilities, Inc. is hereby denied.
3. No later than September 8, 2008, the parties shall file a proposed procedural schedule culminating in an evidentiary hearing.
4. This order shall become effective on August 31, 2008.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Stearley, Senior Regulatory Law Judge