

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

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. SC-2007-

COMPLAINT

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through the Commission's General Counsel, pursuant to §§ 386.071 and 386.390.1, RSMo 2000,¹ and Commission Rule 4 CSR 240-2.070(1), and for its Complaint states as follows:

Introduction

1. This Complaint concerns Respondents' unsafe and inadequate provision of water and sewer services to the public.

Complainant

2. Complainant is the Staff of the Missouri Public Service Commission, acting through the Commission's General Counsel as authorized by Commission Rule 4 CSR 240-2.070(1). Section 386.390.1 provides that "Complaint may be made . . . in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, in

violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the Commission . . ."

Respondents

3. Respondent Central Jefferson County Utilities, Inc. ("CJCU"), is Missouri general business corporation in good standing, with its principal place of business located at 1519 McNutt Road, Herculaneum, Missouri 63048. Respondent CJCU has admitted all of the allegations set out in this paragraph in the verified application that it filed with the Commission on August 15, 2006, Case No. SO-2007-0071, and Staff hereby requests that the Commission take notice thereof.

4. Respondent Raintree Plantation, Inc. ("Raintree"), is a Missouri general business corporation in good standing with its principal place of business located at 1519 McNutt Road, Herculaneum, Missouri 63048.

5. At all times herein pertinent, Respondent Jeremiah Nixon owned a one-third share of both CJCU and Raintree.

6. At all times herein pertinent, Respondent Kenneth McClain owned a one-third share of both CJCU and Raintree.

7. At all times herein pertinent, Respondent the Norville McClain Trust ("the Trust") owned a one-third share of both CJCU and Raintree.

8. At all times herein pertinent, Respondent Norville McClain controlled the Norville McClain Trust as its settlor and trustee, and thus controlled the Trust's share of both CJCU and Raintree.

¹ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri ("RSMo"), revision of 2000.

Jurisdiction

9. Respondent CJCUC is a water corporation, a sewer corporation, and a public utility within the intendments of Chapters 386 and 393, RSMo, and is thus subject to the jurisdiction, regulation and control of this Commission. Respondent CJCUC has admitted all of the allegations set out in this paragraph in the verified application that it filed with the Commission on August 15, 2006, Case No. SO-2007-0071, and Staff hereby requests that the Commission take notice thereof.

10. 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, (42), (48) and (58), RSMo 2006.

11. Respondent Raintree is an affiliate of Respondent CJCUC and 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 Respondent CJCUC and Respondent Raintree is thus subject to the jurisdiction of this Commission pursuant to §§ 386.250(7) and 393.140(12).

Allegations Common to All Counts

12. Respondent CJCUC is, or formerly was, in the business of providing water and sewer services to the public for gain pursuant to Certificates of Convenience and Necessity issued by this Commission. In particular, Respondent CJCUC provides, or formerly provided, water and sewer services to approximately 681 residents of the Raintree Plantation Subdivision (“the Subdivision”) in Jefferson County, Missouri. Respondent CJCUC has admitted all of the allegations set out in this paragraph in the verified application that it filed with the Commission

on August 15, 2006, Case No. SO-2007-0071, and Staff hereby requests that the Commission take notice thereof.

13. The Subdivision is a planned development consisting of approximately 3,400 lots. All but approximately 30 lots had been sold as of February 8, 2007; however, only 681 homes have been constructed in the Subdivision.

14. Respondents Jeremiah Nixon, Kenneth McClain and Norville McClain, acting together with and through Respondents Raintree and the Trust (collectively “the Developers”), are the developers of the Subdivision.

15. The Developers installed water mains to serve all 3,400 lots in the Subdivision and sewer mains to serve approximately 3,000 lots in the Subdivision.

16. The Developers contributed the water and sewer mains to CJCUC.

17. The Developers are recovering their costs of approximately \$4 million incurred in constructing water and sewer mains in the Subdivision through a connection fee paid to them by the purchaser upon the purchase of a lot in the Subdivision pursuant to an agreement styled the Intrastate Exemption Statement. This connection fee of \$1,100 includes \$700 for sewer service connection, \$300 for water service connection, and a \$100 fire hydrant fee.

18. Respondent CJCUC obtains, or formerly obtained, water from two wells that it uses in serving its customers in the Subdivision.

19. The water from Well No. 1 contains lead in excess of the limit of 15 parts per billion allowed by the Missouri Department of Natural Resources (“DNR”) and this water must therefore be mixed with water from Well No. 2 in order to produce water for human consumption with an acceptable lead content.

20. Respondent CJCUC uses, or formerly used, water from Well No. 2 exclusively except on days of high demand when water from Well No. 1 also had to be used.

21. Well No. 2 only has a single pump; consequently, if that pump were to fail, only water from Well No. 1 would be available to serve the Subdivision.

22. Average daily demand for water in the Subdivision in 2005 was 202,560 gallons, peaking to 300,000 gallons per day in the summer months.

23. Respondent CJCUC has, or formerly had, a storage tank with a capacity of only 50,000 gallons.

24. DNR requires that Respondent CJCUC have storage capacity equal to a minimum of one day's water supply, which is 200,000 gallons.

25. Respondent CJCUC's sewage treatment plant was originally constructed with an inflow capacity of 32,000 gallons per day, which was subsequently increased to 64,000 gallons per day, a capacity sufficient to serve 636 people.

26. As of December 2006, the sewage inflow to Respondent CJCUC's treatment plant averaged 100,019 gallons per day, which is 156% of daily design flow. Based on this inflow, the Subdivision currently has a population equivalent of 2,320 people, which is 265% of its design population.

27. Respondent CJCUC's wastewater treatment facility has exceeded its average design flow every day since July 2000, and this is dry weather flow.

28. Respondent CJCUC failed to submit its Discharge Monitoring Reports in a timely manner 85% of the time between 2000 and 2004.

29. Respondent CJCUC did not make reasonable efforts to eliminate or prevent the entry of surface or ground water into its sanitary sewer system, and has been unable to eliminate or

prevent the entry of surface or ground water into its sanitary sewer system and has abandoned efforts to resolve this defect in its system.

30. Respondents refuse to invest money in necessary improvements and expansions to the water and sewer systems for the Subdivision.

31. On September 27, 2004, DNR issued a Notice of Violation to Respondent CJCUC finding it had violated the Missouri Clean Water Law, §§ 644.051(1) and (2) and 644.076.1, RSMo 2000, and Regulation 10 CSR 20-7.031(3)(A),(B), and (C), by causing pollution of Galligher Creek.

32. On August 4, 2005, DNR issued a Notice of Violation to Respondent CJCUC finding it had violated the Missouri Clean Water Law, § 644.076.1, RSMo 2000, and Regulations 10 CSR 20-7.015(9)(A)(1) and 10 CSR 20-9.020(2) for failing to retain a certified operator to supervise the operation and maintenance of its wastewater treatment facility and for failing to submit complete or timely Discharge Monitoring Reports for May and June 2005.

33. On October 26, 2005, DNR issued a Notice of Violation to Respondent CJCUC finding it had violated the Missouri Clean Water Law, §§ 644.051, (1) and (2), and 644.076.1, RSMo 2000, and Regulation 10 CSR 20-6.010(1)(A) and (5)(A) for having discharged wastewater into an unnamed tributary of Galligher Creek without a Missouri State Operating Permit, and for having caused pollution to the same tributary.

34. In total, DNR had by December 2006 issued a dozen Notices of Violation to Respondent CJCUC in connection with its operations in the Subdivision.

35. In a hearing before this Commission in December 2006, Respondent CJCUC admitted that it had been operating its sewer system above its design capacity and that it has failed to control ground and surface water entry into its system.

36. As of December 2006, Respondent CJCUC was not in compliance with either DNR's safe drinking water standards or sewage discharge standards.

37. On November 30, 2005, the United States Environmental Protection Agency ("EPA") issued a Finding of Violation and Order of Compliance, Docket No. CWA-07-2006-0060, finding that Respondent CJCUC discharged pollutants into the waters of the United States in violation of § 301 of the Clean Water Act, codified at 33 U.S.C. § 1311, and in violation of § 402 of the Clean Water Act, codified at 33 U.S.C. § 1342.

38. As part of the November 30, 2005, Order of Compliance, the EPA imposed a moratorium on connections to the sewage treatment facilities at the Subdivision until the facilities were expanded and improved.

39. The EPA's ordered moratorium prohibits all new sewer connections to the Subdivision wastewater treatment plant "unless and until a professional engineer registered and in good standing in the State of Missouri certifies in advance that the new connection to the sewage collection system will not result in the wastewater treatment plant exceeding its existing design average daily hydraulic capacity limit of 64,000 gallons per day."

40. On March 2, 2006, the EPA issued a second Finding of Violation and Order of Compliance, Docket No. CWA-07-2006-0060, finding that Respondent CJCUC discharged pollutants into the waters of the United States in violation of § 301 of the Clean Water Act, codified at 33 U.S.C. § 1311, and in violation of § 402 of the Clean Water Act, codified at 33 U.S.C. § 1342.

41. This Commission convened a Local Public Hearing on November 6, 2006, in Case No. SO-2007-0071, at which hearing certain residents of the Subdivision provided sworn testimony expressing numerous complaints involving the quality and safety of the water and

sewer service provided to them by Respondent CJCUC, to-wit:

- a. infrastructure deterioration and lack of maintenance of that infrastructure;
- b. inadequate trunk lines;
- c. ineffective straining system for non-organic waste;
- d. micro-bacterial and inorganic contamination of the drinking water;
- e. unsafe lead level in Well 1;
- f. inadequate water storage capacity;
- g. inadequate sewer capacity resulting in the need to haul sludge out of the Subdivision;
- h. homeowners having to clean manhole covers and collection boxes by hand to prevent the backup of sewage into their homes, three or four times a year since 1998;
- i. pump grinders that burn up;
- j. backflow of sewage into basements;
- k. raw sewage contaminating lawns, creeks and lakes;
- l. failure to flush out fire hydrants; and,
- m. failure to provide safe and adequate water and sewer service.

42. While Respondent CJCUC generally denied all of the allegations raised at the Local Public Hearing referred to in Paragraph 38, above, Respondent CJCUC did not deny that its sewer treatment facility was operating beyond its daily inflow capacity, that it had less than one day's storage capacity for drinking water, that it was unable to control ground and surface water entry into its sewer system, and that the homeowners in the Subdivision had to personally maintain the collection boxes to prevent sewage from backing up into their homes.

43. The Respondents have attempted to sell, or have sold, Respondent CJCUC's water and sewer service assets.

44. Pursuant to an attempted sale of Respondent CJCUC's water and sewer system assets to Aquasource Utility, Inc. ("Aquasource"), and its affiliate Aqua Missouri, Inc., the Respondents have assigned to Aquasource their right to receive connection fees on the sale of the remaining lots in the Subdivision and Aquasource has assumed responsibility for constructing sewer mains to serve the 400 lots in the Subdivision that are not yet served by sewer mains.

45. On July 13, 2006, Respondent CJCUC entered into a contract styled "Tri-Party Purchase and Sale Agreement," whereby Respondent CJCUC agreed to transfer certain assets of its sewer and water operations to the Jefferson County Public Sewer District ("District") and the District agreed to pay a liability of approximately \$102,000 owed by Respondent CJCUC on the water tower serving the Subdivision water system. The Tri-Party Purchase and Sale Agreement further provided that Environmental Management Corporation ("EMC") would operate the Subdivision water and sewer systems for a 20-year period upon transfer of title to the District and that the District would provide funds to EMC in order to permit necessary improvements and expansions of the water and sewer facilities. Pursuant to an interim agreement, EMC took over the operation of the Subdivision water and sewer systems on September 1, 2006.

46. On August 15, 2006, Respondent CJCUC and the District jointly applied for Commission approval of the transaction contemplated in the Tri-Party Purchase and Sale Agreement described in Paragraph 48, above, Cases SO-2007-0071 and WO-2007-0072.

47. This Commission approved the transaction by its Report and Order issued on February 8, 2007, in consolidated Case No. SO-2007-0071. Therein, the Commission directed the undersigned to bring this Complaint against the Respondents.

Count I

Failure to Provide Safe and Adequate Service

48. Complainant hereby adopts by reference and re-alleges the allegations set out in Paragraphs 1 through 47, above.

49. Section 393.130.1 provides in pertinent part as follows:

Every gas corporation, every electrical corporation, every water corporation, and every sewer corporations shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.

50. By their conduct set out in Paragraphs 10 through 47, above, Respondents failed to provide safe and adequate service in violation of § 393.130.1; more particularly,

- a. Respondents lacked the technical, financial and managerial resources and ability to develop, operate and maintain a water and sewer system;
- b. Respondents' drinking water facility was not appropriately engineered, designed and constructed, and is not properly licensed to provide sufficient capacity to meet the demands of the service area;
- c. Respondents' water supply and storage facilities lacked sufficient capacity to meet the demands of the service area;
- d. Respondents' drinking water quality is not in compliance with DNR, EPA and all state and local Department of Health regulations with regard to inorganic, organic and bacterial contaminants, and with all public health standards;
- e. Respondents' sewer treatment facilities were not appropriately engineered, designed and constructed, and are not properly licensed to provide sufficient capacity to meet the demands of the service area;

f. Respondents' sewer treatment facilities do not have sufficient capacity to meet the demands of the service area, nor adequate capacity to accommodate and appropriately treat the daily influent and effluent of the service area;

g. Respondents' sewer treatment facility is not in compliance with DNR, EPA and all state and local Department of Health regulations with regard to contaminants, inflow and discharge capacity, safe discharge of effluent, and with all public health standards;

h. Respondents' infrastructure is not of sufficient quality, is not compliant with all relevant statutes and regulations, and is not sufficiently maintained to ensure the continuous delivery of water and/or sewer service to its service area.

WHEREFORE, Staff prays that the Commission will give notice to Respondents as required by law and, after hearing, find that Respondents, or some of them, have violated Section 393.130.1 by their conduct with respect to the Subdivision water and sewer systems and, further, find that each day of operation in violation of Section 393.130.1 constitutes a separate violation.

Count II

Provision of Unsafe Sewer Services to the Public

51. Complainant hereby adopts by reference and re-alleges the allegations set out in Paragraphs 1 through 50, above.

52. Commission Rule 4 CSR 240-60.020 provides, in pertinent part:

(1) Each sewer utility shall 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 shall comply with the laws and regulations of the state and local health authority.

(2) The design and construction of a utility's system of sewers, treatment facility and all additions and modifications shall conform to the requirements

prescribed by law except that any rule contained in this chapter shall apply which is more stringent than those prescribed by the Clean Water Commission.

(3) The sewer utility shall make reasonable efforts to eliminate or prevent the entry of surface or ground water into its sanitary sewer system. It may request assistance from the appropriate state, county or municipal authorities, but such a request does not relieve the sewer utility of its responsibility to prevent the entry of such surface or ground water.

53. By their conduct set out in Paragraphs 10 through 47, above, Respondents violated Commission Rule 4 CSR 240-60.020.

WHEREFORE, Staff prays that the Commission will give notice to Respondents as required by law and, after hearing, find that Respondents, or some of them, have violated Commission Rule 4 CSR 240-60.020 by their conduct with respect to the Subdivision sewer system and, further, find that each day of operation in violation of Commission Rule 4 CSR 240-60.020 constitutes a separate violation.

Count III

Authority to Seek Penalties

54. Complainant hereby adopts by reference and re-alleges the allegations set out in Paragraphs 1 through 53, above.

55. Section 386.570 provides:

1. Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

2. Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a

separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.

56. Section 386.600 provides:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission. No filing or docket fee shall be required of the general counsel. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this chapter, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

WHEREFORE, Staff prays that the Commission will give such notice to the Respondents as is required by law and, after hearing, in the event that any of the conduct herein described is determined to be a violation of any law of the State of Missouri or of any order, decision, or rule of the Commission, deem each day that such violation existed to be a separate offense and authorize its General Counsel to proceed in Circuit Court to seek such penalties as are authorized by law.

Respectfully Submitted,

/s/ KEVIN A. THOMPSON

Kevin A. Thompson

General Counsel

Missouri Bar No. 36288

P.O. Box 360

Jefferson City, MO 65102

573-751-6514 (telephone)

573-526-6969 (facsimile)

kevin.thompson@psc.mo.gov (e-mail)

Attorney for the Staff of the

Missouri Public Service Commission