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Witness: Martin Hummel
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MISSOURI PUBLIC SERVICE COMMISSION

UTILITY OPERATIONS DIVISION

DIRECT TESTIMONY

OF

MARTIN HUMMEL

GERALD AND JOANNE REIERSON V. KENNETH JAEGER, ET AL.

CASE NO. SC-2005-0083

**Jefferson City, Missouri
March 2007**

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

Gerald & Joanne Reiersen,

Complainants,

vs.

Kenneth Jaeger and Blue Lagoon Sewer
Corp.,

Respondents.

Case No. SC-2005-0083

AFFIDAVIT OF MARTIN HUMMEL

STATE OF MISSOURI)

) ss

COUNTY OF COLE)

Martin Hummel, of lawful age, on his oath states: that he has participated in the preparation of the following Direct Testimony in question and answer form, consisting of 5 pages of Direct Testimony to be presented in the above case, that the answers in the following Direct Testimony were given by him; that he has knowledge of the matters set forth in such answers; and that such matters are true to the best of his knowledge and belief.


Martin Hummel

Subscribed and sworn to before me this 9th day of March, 2007.



SUSAN L. SUNDERMEYER
My Commission Expires
September 21, 2010
Callaway County
Commission #06942086


Notary Public

My commission expires 9-21-10

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MARTIN HUMMEL
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CASE NO. SC-2005-0083

INTRODUCTION

Q. Please state your name and business mailing address.

A. Martin Hummel, P.O. Box 360, Jefferson City, MO 65102.

Q. By whom are you employed and in what capacity?

A. I am employed by the Missouri Public Service Commission (Commission) as an Engineer in the Water & Sewer Department (W/S Dept) of the Utility Operations Division

Q. How long have you been employed by the Commission?

A. I have been employed by the Commission since February 1989.

Q. What is your education background?

A. I received a Bachelor of Science degree in Education-Science and a Bachelor of Science degree in Engineering from the University of Missouri-Columbia.

Q. What is your employment experience?

A. Prior to my employment at the Commission, I worked with the Missouri Department of Natural Resources (DNR) in the Water Pollution Control Program. I have also worked as a Research Associate on water-related projects with Louisiana State University-Baton Rouge; and as a Project Engineer with a consulting engineering firm, primarily on wastewater treatment.

Q. Have you previously testified in cases before this Commission?

1 A. Yes, I have.

2 **EXECUTIVE SUMMARY**

3 **Q. What has been the nature of your involvement in this case?**

4 A. I have observed the service area and the physical sewer facilities that are
5 owned and operated by Mr. Ken Jaeger or a company he owns, which are referred to herein as
6 “Blue Lagoon” or as “the Utility.” I have spoken with and met with Respondent Kenneth
7 Jaeger, his agents, Complainants Gerald and Joanne Reiersen and Robert M. Hellebusch, and
8 various DNR personnel, to learn about the facts and issues in this case, and I have reviewed
9 the related documentation. I have also participated in the three prehearing conferences held in
10 this case, and participated in preparing the Staff Recommendation dated December 2, 2004,
11 which is attached hereto as Schedule 1.

12 **Q. Please summarize the Direct Testimony you are presenting.**

13 A. I am presenting testimony with regard to the regulatory status of the Utility,
14 and with regard to deficiencies in the Utility’s physical facilities.

15 **Q. What will your testimony on the above-noted matters show?**

16 A. That the Utility, as of the date of this testimony, is a sewer utility subject to the
17 jurisdiction of the Commission, but that it is operating without a Certificate of Convenience
18 and Necessity (CCN). It will also show that physical facility improvements are needed, in
19 order for either Blue Lagoon or another sewer utility to be able to provide safe and adequate
20 service to both existing and future customers.

21 **COMMISSION JURISDICTION**

22 **Q. Was this Utility subject to the jurisdiction of the Commission on**
23 **December 2, 2004, when the Staff filed its Recommendation in this case?**

1 A. Yes, because I believe that Blue Lagoon is a privately owned “for gain” utility
2 operation that is charging customers for sewer service.

3 **Q. Does this utility have a CCN?**

4 A. No, nor has it applied for a CCN.

5 **Q. Is the regulatory status of this utility the same now as it was in 2004?**

6 A. Yes.

7 **Q. Has Mr. Jaeger pursued other organizational structures for the Utility**
8 **that would take it out of Commission jurisdiction?**

9 A. Yes. Mr. Jaeger has attempted to persuade the local Public Water Supply
10 District to take over this sewer system, and, he has considered establishing a nonprofit sewer
11 corporation pursuant to the provisions of Chapter 393 of the Missouri Statutes. He was doing
12 this in order to establish a "continuing authority" that would be acceptable to the DNR.

13 **Q. Is the Staff aware of any substantive progress toward changing the**
14 **organizational structure of this Utility?**

15 A. No.

16 **Q. Has the Staff done any cost-of-service analysis on this utility?**

17 A. No. The Staff has focused its efforts to date on determining who owns the
18 Utility, and who will be the “continuing authority” in the future.

19 **Q. Should the Commission issue a CCN to the Utility?**

20 A. As stated above, I believe that the Utility is subject to the Commission’s
21 jurisdiction. However, Mr. Jaeger has not applied for a certificate. Furthermore, the Staff
22 believes that Mr. Jaeger does not want to operate this utility in any form, and he may not be
23 qualified to provide sewer service to customers who are served by this facility.

FACILITY IMPROVEMENTS NEEDED

Q. Does the physical plant of this utility need improvements?

A. Yes. While Mr. Jaeger has undertaken some needed improvements to the sewer collection system, the lagoon treatment facility is loaded beyond its capacity, to the point that it can overflow; in fact, it has done so. Instead of an ordinary discharge to a creek, the proposed system would pump wastewater from the lagoon to a land irrigation site. However, after approximately two (2) years, Mr. Jaeger has failed to complete the design of a permanent irrigation system that is capable of disposing of the lagoon effluent in a frequent and timely fashion and at a controlled rate that meets DNR's approval, nor has one been constructed..

Q. Is DNR pursuing this matter in the context of their water pollution regulations?

A. Yes. In addition to reviewing Mr. Jaeger's proposals for improvements, the DNR, through the Attorney General, has filed suit against Mr. Jaeger in the circuit court of Ralls County (Case No. CV805-12CC) in an attempt to compel him to comply with the DNR's regulations.

Q. Are there unanswered questions about the capabilities of the physical plant?

A. Yes. While the Staff has not yet seen a final Engineering Report, the Staff understands that the integrity of the lagoon seal (meaning its ability to hold water without leaking) has not been verified. Similarly, with regard to the proposed irrigation system, the Staff does not have information to support the assumption that the proposed application rate of approximately 40 inches of wastewater per year on the 4.95 acre is sustainable for anything but the short term.

1 **Q. Why are conditions of the physical plant critical?**

2 A. Because original facilities adequate to provide safe and adequate utility service
3 should have been paid for out of the "gains" the developer realized from the sale of lots. This
4 is particularly true if the utility is to be transferred to a nonprofit sewer corporation, to the
5 homeowners, or to a public district. The homeowners and customers should not end up with
6 an inadequate treatment facility because their developer simply did not construct what is
7 necessary to provide adequate treatment.

8 **CONCLUSIONS AND RECOMMENDATIONS**

9 **Q. What are your recommendations for this case at this time?**

10 A. Mr. Jaeger, as the developer, needs to obtain DNR approval and construct a
11 sewage treatment facility that is capable of providing safe and adequate service to existing
12 and future customers. The DNR is attempting to get this done through the law suit in Ralls
13 County Circuit Court. I don't recommend that the Commission consider issuing a CCN to
14 Mr. Jaeger at this time, because the existing sewage treatment facility is not yet capable of
15 providing safe and adequate service. The Commission may wish to consider requiring Mr.
16 Jaeger or Blue Lagoon to cease charging for sewer service until the issues are resolved, or to
17 seek penalties against Mr. Jaeger or Blue Lagoon for operating a for-gain utility and charging
18 customers without proper authorization to do so.

19 **Q. Does this conclude your testimony at this time?**

20 A. Yes.

Schedule 1 to the Direct Testimony
of Martin Hummel

Report of Staff Investigation

December 2, 2004

Case Nos. SC-2005-0083 and SC-2005-0099

REPORT OF STAFF INVESTIGATION
Case Nos. SC-2005-0083 and SC-2005-0099
Blue Lagoon Sewer System, Inc.

Prepared By:
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Water & Sewer Department

Reviewed/Approved By:
Dale Johansen – Manager
Water & Sewer Department

Overview of the Formal Complaints

Two customers of a sewer utility that provides service generally in an area that includes a subdivision known as Lost Valley Subdivision, near Monroe City, Ralls County, Missouri, have filed formal complaints before the Commission. The sewer utility is not regulated by the Public Service Commission (Commission) at present. The formal complaints pertain to both quality of service, and jurisdictional oversight. More specifically, with regard to quality of service, the Complainants allege service matters including sewage backup events, and inferior construction of the sewer system. Indeed, the Missouri Department of Natural Resources (DNR) is addressing issues of construction and permitting with the owner of the system.

Background of the Sewer Utility

As stated above, part of the sewer utility's service area includes Lost Valley Subdivision, which has approximately 37 lots, 35 of which have been sold, and 31 on which homes have been constructed. A person involved with the subdivision development, Mr. Ken Jaeger perhaps through one or more corporations and perhaps with other partners, is also an owner of the sewer system, or a corporation that owns it. The Complainants in the instant cases have property in Lost Valley. The sewer system also serves commercial developments that include a recreational vehicle (RV) campground called Salt River Campground with 72 sites, five cabins, a theater, a motel with 21 rooms, and a convenience store with a restaurant. The Staff estimates that there may be approximately 36 customers, though there could be up to 139 identifiable users if campground lots and motel rooms are separately counted. The area is largely recreational, being near the Mark Twain Lake.

The Missouri Department of Natural Resources (DNR) had issued a Letter of Approval for the construction of a "no-discharge" system in August of 1990, meaning the treatment facility was constructed so as not to discharge treated sewage to a creek, and therefore did not need a discharge permit. The original owners, according to DNR's information, were Robert Vanderbeck and Ken Jaeger. Sometime in approximately 1999 the owners filed bankruptcy. It appears that Mr. Jaeger either bought back, or retained ownership of the lagoon real estate, since information indicates that in June of 2001 Mr. Jaeger made an agreement with Ralls County State Bank, part of which addresses charging the RV campground lots for sewer service. Although Mr. Jaeger apparently acquired ownership of the lagoon, the lagoon and sewer system

appears to have been constructed to provide sewer utility service to properties that Mr. Jaeger did not acquire, namely the theater, the motel, and the RV campground. Since the system was constructed in proximity to them, and the properties are apparently actually connected, the Staff presumes that the owners of these properties have a claim to treatment capacity in the lagoon.

Much of this information as presented herein was collected in pieces by the Staff by field observation, by DNR correspondence, and by word of mouth from DNR and customers. Thus, the Staff is not absolutely certain about ownership history and details of involved properties. Regardless of some of the background facts, the real question is whether or not the sewer utility today is subject to regulation, and also how to address the technical issues, which is also DNR's concern.

Some of the technical issues include sewer pipeline size, treatment facility effluent discharge in spite of being constructed as a no-discharge facility, and sewage overflows from a lift station.

Background of Staff Involvement – Informal Complaints

The Staff first became aware of this system through an informal complaint from Mr. Mike Knepper, the owner of the RV campground and the store, in approximately May 2003. Martin Hummel took and handled this matter. There were fewer than ten homes constructed in Lost Valley Subdivision at that time. The primary concern of the complainant was the amount charged for sewer service and the availability of the service.

Later, in March 2004, a person who purchased one of the RV campground lots initiated an informal complaint, which was taken and handled by Jim Merciel, although the complaint was actually made against Mr. Knepper. In addition to being a customer of the sewer utility, Mr. Knepper, or specifically the RV campground, is a customer of a water district and an electric cooperative. He, or perhaps a corporation he controls, was arguably acting as a water, sewer and electric utility by re-distributing those services to campground lots, some of which have been sold to individuals. Within the context of this complaint, Mr. Knepper inquired of the Staff the need to regulate Mr. Jaeger's sewer utility. At the time of this complaint, the Staff contacted Mr. Jaeger, who stated he was consulting with his attorney regarding how to properly set up the sewer utility. There was limited discussion with him regarding types of sewer utilities, but Mr. Jaeger indicated he was relying on his attorney for advice on what to do, but also indicated that they were seriously considering a non-profit sewer corporation. Additionally, during the time this complaint was being addressed, Mr. Jaeger caused the campground to be disconnected from the sewer system, and in response Mr. Knepper was able to get a restraining order and resume sewer service for the store and campground.

In September 2004, the Staff received three informal complaints regarding the sewer system, quality of service, its operation, and the jurisdiction question, two of them from the people who filed the instant formal complaints. It was during the handling of these informal complaints that the Staff learned that Mr. Jaeger had formed, and was operating the sewer system, as a corporation called Blue Lagoon Sewer System, Inc., set up as a non-profit corporation. Another event of the time was a meeting that customers had requested with DNR for the purpose of discussing technical issues regarding construction and operation of the sewer system, and

regulations. This meeting was held on September 17, 2004 at DNR's Northeast Regional Office in Macon. Having discussed the issues with DNR, the PSC Staff was invited to attend. Martin Hummel of the PSC Staff attended the meeting, answered questions regarding PSC regulation, and provided the customers information about filing formal complaints with the PSC.

The Staff believed that, given the events and informal complaints of the past year and a half, and considering the apparent need for some negotiation and dialogue among the involved parties, a satisfactory resolution would more likely be reached through the formal complaint process, and the result is the two subject Formal Complaints.

Jurisdiction including not-for-profits, and non-profit issues

The Public Service Commission regulates sewer utilities that are operated "for gain" as per Missouri statutes. From a layman's point of view, "for gain" and "for profit" as used to describe types of corporations sound similar, but that is not necessarily the case. Clearly, a for-profit corporation that is able to meet expenses and provide a return to the stockholders is a "for gain" operation. On the other hand, any corporation, whether for-profit or non-profit, with insufficient revenue to meet more than the most basic expenses, arguably is not a for-gain operation. Although non-profit corporations are contemplated such that the owners/incorporators do not realize any profit, they could still be for-gain operations if someone benefits by the proceeds from revenue. As an example, the Staff and the Commission once dealt with a water utility owned by a man named Bill Beeney, Case No. WC-92-77, along with an associated case in Warren County Circuit Court. Mr. Beeney owned a non-profit corporation that provided water service to the public, but proceeds from the water service revenue not only paid expenses but were also sent to the owner's religious mission in Mexico. While the corporation and its owners may not have realized a profit as such, there was a gain realized by persons other than the bill-paying water customers.

Thus, Blue Lagoon Sewer System, Inc. may or may not realize revenue that meets more than its basic operating expenses, but the Staff believes that as an entity solely under the control of the incorporators, there is potential for it to be a for-gain operation.

A series of Missouri Statutes, specifically 393.825 through 393.861 and 393.175 contemplate what are called "nonprofit sewer corporations" as defined in 393.825. The statutes specify for such corporations, among other things, that there be five (5) incorporators, that the entities be set up as nonprofit membership corporations, and that they are not subject to PSC regulation. The statutes also provide for election of a board of directors among the corporation members, and how to deal with excess revenue. From a practical standpoint, the Staff regularly advises developers and others contemplating water and sewer utilities that in order to eliminate any question about the need for regulation, the utility should be controlled equally by and only by the customers. The nonprofit sewer corporations as defined in 393.825 clearly are not subject to regulation; however since Blue Lagoon Sewer System, Inc. does not meet the requirements of the statutes that define nonprofit sewer corporations, even though it is incorporated as a non-profit entity, the Staff does not believe that it is exempt from regulation.

Conclusions and Recommendations

The Staff believes that, regarding regulation, the following options are available:

- Blue Lagoon Sewer System, Inc. could file an application for a Certificate of Convenience and Necessity and become a regulated sewer utility. Although it might be able to do so as it exists as a non-profit corporation, an option would be for the owners to form a for-profit corporation to own and operate the system and become the regulated sewer utility, so that they have an opportunity to earn a return on their investment if there is any.
- Blue Lagoon Sewer System, Inc. could be reorganized as another entity that meets the definition of nonprofit sewer company in 393.825.
- A property owners association could be formed, although this alternative may not be practical since some customers are not a part of a subdivision under which most such associations commonly exist.

Since the Staff believes that there is no firm determination regarding the type of utility that will ultimately legitimately exist, the Staff is not able to study rates or charges that would be necessary to properly operate and manage the sewer utility. The Staff does not anticipate studying rates unless and until a proposal for a regulated utility is presented. Such a proposal, most likely in the form of an application for a Certificate of Convenience and Necessity, would need to include financial information including documentation of how capital funding has been provided in the past, how capital funding for needed improvements will be handled, and operating expense information, so that justifiable rates may be set. Such an application would need to also include a plan to address the technical concerns, address service problems that may exist, and properly operate the system in compliance with state regulations. Among the possible issues, there could be differences in funding for capital improvements within Lost Valley Subdivision, which could legitimately be made by the developer, versus funding improvements for customers outside the subdivision.

Whether or not this utility becomes regulated, it is desirable to determine how to correct the technical issues. The Staff believes that it is difficult or perhaps impossible for the Commission to issue any order that would resolve this. Even disregarding the issue of regulation, a conference within this formal context may be beneficial to determine the direction of this utility by negotiation between the interested parties. One obvious issue is that of whether or not the owner of the sewer system will agree to fund corrections. It is also possible that the owner may be forced by DNR enforcement action to do so.

In summary, the Staff recommends that a prehearing conference be set in order to address the two fundamental issues; the first of which is that of regulation, and the second of which is the technical issues, which should be addressed in this context regardless of the regulation issue.