

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

Gerald and Joanne Reiersen)	
)	
Complainants,)	
)	
v.)	<u>Case No. SC-2005-0083</u>
)	
Kenneth Jaeger and Blue Lagoon Sewer)	
Corp.,)	
)	
Respondents.)	

POSITION STATEMENT OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel (Public Counsel) and states its position on the issues in this case as follows:

1. Is the Blue Lagoon sewer system, which is owned by the Respondents and serves the Lost Valley Subdivision, subject to regulation by the Missouri Public Service Commission?

Missouri's statutes define what entities are subject to the regulation of the Missouri Public Service Commission. Section 393.020, RSMo states:

(42) "Public Utility" includes every ... sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter; RSMo 2000.

In defining whether an entity is a sewer corporation, Section 393.020 (48), RSMo states:

(48) "Sewer Corporation" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere

within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets; RSMo 2000.

Basically, the Missouri statutes state that any privately owned sewer system with twenty-five or more outlets which collects, carries, treats or disposes of sewage for gain is a public utility subject to the jurisdiction, control and regulation of the Missouri Public Service Commission.

The direct testimony filed in this case offers evidence that Blue Lagoon sewer system is a privately owned “for gain” utility operation due to the fact that is charging customers for sewer service. The direct testimony also offers evidence that Blue Lagoon sewer system consists of twenty-five or more outlets which collects, carries, treats or disposes of sewage. No rebuttal testimony was filed which offers evidence to the contrary.

Therefore, it is Public Counsel’s position that Blue Lagoon sewer system is a public utility subject to regulation by the Missouri Public Service Commission because it is a privately owned “for gain” sewer corporation with twenty-five or more outlets.

2. If the Blue Lagoon sewer system is subject to regulation by the Commission, have the Respondents failed to provide safe and adequate service to their customers?

Missouri’s statutes require public utilities to provide safe and adequate service to their customers. Section 393.130 states:

1. Every ... sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. ... RSMo 2000.

The direct testimony filed in this case offers evidence that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed. The

direct testimony also offers evidence that the Missouri Department of Natural Resources (DNR), through the Attorney General, has filed suit against Mr. Jaeger in the circuit court of Ralls County (Case No. CV805-12CC) to compel him to comply with DNR's regulations. No rebuttal testimony was filed which offers evidence to the contrary.

It is Public Counsel's position that Respondents' actions plainly show that Respondents are not financially, managerially, and technically capable of operating Blue Lagoon sewer system in compliance with applicable statutory and regulatory standards for a public sewer utility. Therefore, if the Blue Lagoon sewer system is subject to regulation by the Commission, it is Public Counsel's position that Respondents have failed to provide safe and adequate service to their customers.

3. If the Blue Lagoon sewer system is subject to regulation by the Commission, should the Commission order the Respondents to make improvements to their system pursuant to the provisions of Section 393.140 (2), RSMo or Section 393.270.2, RSMo?

Missouri's statutes give the Commission the power to order improvements to sewer systems. Section 393.140 (2) states the Commission shall:

Investigate and ascertain, from time to time, the quality of ... sewer service furnished by persons and corporations, examine or investigate the methods employed by such persons and corporations in ... furnishing a sewer system, and have power to order such responsible improvements as will best promote the public interest, preserve the public health and protect those using such ... sewer system, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable apparatus and property of ... sewer corporations. RSMo 2000.

In a similar Missouri statute, Section 393.270.2 also states:

After a hearing and after such investigation as shall have been made by the commission, or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of ... sewer service not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; and may order such improvement in the ... collection, carriage, treatment and disposal of sewage, or in the methods employed by such persons or corporation as will in its judgment be adequate, just and reasonable. RSMo 2000.

If the Blue Lagoon sewer system is subject to regulation by the Commission, the Commission has the power to order improvements to Blue Lagoon sewer system as will promote the public interest, preserve the public health and protect those using the sewer system.

The direct testimony filed in this case offers evidence that Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. The direct testimony also offers evidence that the Missouri Department of Natural Resources (DNR), through the Attorney General, has filed suit against Mr. Jaeger in the circuit court of Ralls County (Case No. CV805-12CC) to compel him to comply with DNR's regulations. The direct testimony offers evidence that Respondents currently do not comply with DNR's regulations with no indication of when Respondents will comply. No rebuttal testimony was filed which offers evidence to the contrary.

Therefore, if the Blue Lagoon sewer system is subject to regulation by the Commission, it is Public Counsel's position that the Commission should order improvements to Blue Lagoon sewer system as will promote the public interest, preserve the public health and protect those using the sewer system. However, it is Public Counsel's position that Respondents' actions plainly show that Respondents are not financially, managerially, and technically capable of operating Blue Lagoon sewer

system in compliance with applicable statutory and regulatory standards for a public sewer utility. So, Public Counsel is dubious as to whether Respondents will comply with the Commission's order.

4. Have the Respondents been collecting or accepting fees for their services and, if so, have those fees been authorized by the Commission and found to be just and reasonable?

Missouri's statutes require that fees of a public utility must be authorized by the Commission and found just and reasonable. Section 393.130 states

1. ... All charges made or demanded by any such ... sewer corporation for ... sewer or any service rendered or to be rendered shall be just and reasonable and nor more than allowed by law or by order or decision of the commission. ... RSMo 2000.

The direct testimony filed in this case offers evidence that Blue Lagoon sewer system, which is owned by the Respondents, is charging customers for sewer service. The direct testimony also offers evidence that Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. No rebuttal testimony was filed which offers evidence to the contrary.

Therefore, it is Public Counsel's position that Respondents have been collecting or accepting fees for their services, and since Respondents do not possess the required Certificate of Convenience and Necessity, these fees have not been authorized by the Commission or found to be just and reasonable.

5. If the Blue Lagoon sewer system is subject to regulation by the Commission, should the Commission order Respondents to transfer their assets to Cannon Water District No. 1, pursuant to the provisions of Section 393.146 RSMo, or to transfer their assets to another third party?

Missouri's statutes give the Commission the power to order a public utility to transfer their assets to a third party. Section 393.146, RSMo states:

2. The commission may order a capable public utility to acquire a small ... sewer corporation if, after providing notice and an opportunity to be heard, the commission determines:

(1) That the small ... sewer corporation is in violation of statutory or regulatory standards that affect the safety and adequacy of the service provided by the small ... sewer corporation, including but not limited to the public service commission law, the federal clean water law, the federal Safe Drinking Water Act, as amended, and the regulations adopted under these laws, or

...

(3) That it is not reasonable to expect that the small ... sewer corporation will furnish and maintain safe and adequate service and facilities in the future; and

(4) That the commission has considered alternatives to acquisition in accordance with subsection 3 of this section and has determine that they are impractical or not economically feasible; and

(5) That the acquiring capable public utility is financially, managerially, and technically capable of acquiring and operating the small ... sewer corporation in compliance with applicable statutory and regulatory standards. RSMo 2006 Cum. Supp.

In addition, any such transfer would also be subject to the determination that the transfer is not detrimental to the public interest as required by Commission Rules 4 CSR 240-3.310(D) and 4 CSR 240-3.605(D).

The direct testimony offers evidence that Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. The direct testimony filed in this case also offers evidence that Respondents have failed to provide safe and adequate service to customers. The direct testimony offers evidence that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the Missouri Department of Natural Resources (DNR), through the Attorney General, to file suit against Mr. Jaeger in the circuit court of Ralls County

(Case No. CV805-12CC) to compel him to comply with DNR's regulations. No rebuttal testimony was filed which offers evidence to the contrary.

Therefore, if the Commission would determine that Respondents are in violation of statutory standards that affect the safety and adequacy of the service provided by Respondents or determine that it is not reasonable to expect that Respondents will furnish safe and adequate service and facilities in the future, the Commission has the authority to order a "capable public utility" to acquire Blue Lagoon sewer system from Respondents, subject to a determination that the transfer is not detrimental to the public interest.

In this case, Cannon Water District No. 1 (Cannon) is not a "capable public utility" as defined in Section 393.146.1 (1). Cannon is not a public utility under the jurisdiction of the Commission. Therefore, the Commission has no power to order Cannon to acquire Blue Lagoon sewer system from Respondents, nor does it have the power to order Cannon to accept the transfer of Blue Lagoon sewer system from Respondents.

Even if the Commission would determine that another third party meets the definition of "capable public utility" and is financially, managerially, and technically capable of acquiring and operating Blue Lagoon sewer system in compliance with applicable statutory and regulatory standards, a showing must still be made that the transfer would not be detrimental to the public interest.

It is Public Counsel's position that Respondents' actions plainly show that Respondents are not financially, managerially, and technically capable of operating Blue Lagoon sewer system in compliance with applicable statutory and regulatory standards for a public sewer utility. Therefore, if it is found that the Blue Lagoon sewer system is

subject to regulation by the Commission, Public Counsel would have no objections to the transfer of assets to a third party that meets the definition of “capable public utility” and which is financially, managerially, and technically capable of acquiring and operating Blue Lagoon sewer system in compliance with applicable statutory and regulatory standards, subject to a determination that the transfer would not be detrimental to the public interest.

6. If the Blue Lagoon sewer system is subject to regulation by the Commission, should the Commission order its general counsel to seek the imposition of penalties against the Respondents, pursuant to the provisions of Section 386.570, RSMo?

Missouri’s statutes give the Commission the power to order its general counsel to seek the imposition of penalties. Section 386.570, RSMo states:

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. RSMo. 2000.

The statute gives the Commission authority to seek penalties for violations related to operating a public utility without a Certificate of Convenience and Necessity as well as for failure to provide safe and adequate service to customers.

The direct testimony filed in this case offers evidence that Respondents have violated the statute related to operating a public utility without a Certificate of Convenience and Necessity. The direct testimony offers evidence that Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. The direct testimony filed in this case also offers evidence that Respondents

have failed to provide safe and adequate service to customers. The direct testimony offers evidence that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the Missouri Department of Natural Resources (DNR), through the Attorney General, to file suit against Mr. Jaeger in the circuit court of Ralls County (Case No. CV805-12CC) to compel him to comply with DNR's regulations. No rebuttal testimony was filed which offers evidence to the contrary.

Therefore, if it is found that the Blue Lagoon sewer system is subject to regulation by the Commission, it is Public Counsel's position that the Commission should order its general counsel to seek the imposition of penalties. These penalties should be related to operating a public utility without a Certificate of Convenience and Necessity as well as for failure to provide safe and adequate service to customers.

7. If the Blue Lagoon sewer system is subject to regulation by the Commission, should the Commission order its general counsel to seek appointment of a receiver for the Respondents pursuant to the provisions of Section 393.145, RSMo?

Missouri's statutes give the Commission the authority to seek appointment of a receiver. Section 393.145, RSMo states:

1. If, after hearing, the commission determines that any sewer ... corporation that regularly provides service to eight thousand or fewer customer connections is unable or unwilling to provide safe and adequate service (or) has been actually or effectively abandoned by its owners...the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver...RSMo 2006 Cum. Supp.

The statute requires that a determination that Respondents are unable or unwilling to provide safe and adequate service or that Blue Lagoon sewer system has been actually or effectively abandoned by Respondents.

The direct testimony filed in this case offers evidence that Respondents have violated the statute related to operating a public utility without a Certificate of Convenience and Necessity. The direct testimony offers evidence that Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. The direct testimony filed in this case also offers evidence that Respondents have failed to provide safe and adequate service to customers. The direct testimony offers evidence that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the Missouri Department of Natural Resources (DNR), through the Attorney General, to file suit against Mr. Jaeger in the circuit court of Ralls County (Case No. CV805-12CC) to compel him to comply with DNR's regulations. No rebuttal testimony was filed which offers evidence to the contrary.

While the direct testimony may offer evidence so that the Commission would be justified in determining that Respondents are unable or unwilling to provide safe and adequate service or Blue Lagoon sewer system has been actually or effectively abandoned by Respondents, no specific determination to that effect has been made by the Commission.

It is Public Counsel's position that Respondents' actions plainly show that Respondents are not financially, managerially, and technically capable of operating Blue Lagoon sewer system in compliance with applicable statutory and regulatory standards

for a public sewer utility. Therefore, if it is found that the Blue Lagoon sewer system is subject to regulation by the Commission, and the Commission determines that Respondents are unable or unwilling to provide safe and adequate service or Blue Lagoon sewer system has been actually or effectively abandoned by Respondents then Public Counsel would have no objections to the Commission ordering its general counsel to seek appointment of a receiver for the Respondents.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

By:_____

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CERTIFICATE OF SERVICE

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