

Gerald and Joanne Reiersen)
)
Complainants,)
)
v.)
)
Kenneth Jaeger and Blue Lagoon Sewer)
Corp.,)
)
Respondents.)

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**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.)	

POST-HEARING BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel (Public Counsel) and states for its Post-Hearing Brief as follows:

Preliminary Issue

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?

Respondents, by their own admission, are subject to regulation by the Missouri Public Service Commission (Commission) therefore, this preliminary issue was not an issue in controversy at the evidentiary hearing.

On April 17, 2007, the Staff of the Missouri Public Service Commission (Staff), on its own behalf and on behalf of the other parties, filed a List of Issues. The April 17, 2007 List of Issues contained an Issue #1 which asked “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?” All other issues depended on an affirmative answer to this Issue #1.

In its May 9, 2007 Position Statement, Respondents stated “In regards to issue one, Respondents admit that they qualify to be regulated by the Missouri Public Service Commission.” Therefore, it was the position of all parties that the Blue Lagoon sewer system, which is owned by the Respondents and serves the Lost Valley Subdivision, was subject to regulation by the Missouri Public Service Commission and this preliminary issue was no longer in controversy.

Since this preliminary issue was no longer in controversy and the qualifying language on the remaining issues no longer applied, Public Counsel submitted a Motion to Amend the Issues List. Public Counsel’s motion was taken up at the beginning of the evidentiary hearing. (Tr. Pg. 48) When asked if Respondents had any response to Public Counsel’s motion, Respondents stated they had no objection. (Tr. Pg. 48) Upon no objection by any of the parties, Public Counsel’s motion was granted. (Tr. Pg. 50)

Therefore, the Commission took notice that Respondents, by their own admission, are subject to regulation by the Missouri Public Service Commission and amended the Issues List as follows:

AMENDED ISSUES LIST

1. Have the Respondents failed to provide safe and adequate service to their customers?
2. 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?

3. 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?
4. 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?
5. 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?

Issue #1

Have the Respondents failed to provide safe and adequate service to their customers?

The evidence provided to the Commission shows 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 and Respondents have 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 evidence shows that the physical improvements are needed for the system to be able to provide safe and adequate service. (Tr. Pg. 104) However, this upgrade process has been ongoing for a long time without resolution. (Tr. Pg. 106) Mr. Reiersen gave evidence regarding

improperly sized sewer lines, sewer backups and the lagoon overflowing causing effluent to run through residents' yards. (Tr. Pg. 69-71) Mr. Reiersen and Mr. Hellebusch both gave evidence regarding the improper condition of the spray-off equipment which included leaky hoses and connections, effluent going into the nearby creek and having the ground saturated by effluent. (Tr. Pg. 71-72, 75-76, 82) Mr. Hummel gave evidence that Staff has concerns regarding the application of 40 inches of wastewater per year on the proposed 4.95 acres. (Tr. Pg. 104)

Mr. Hellebusch gave evidence that because an emergency spillway was not built into the lagoon, effluent has come over the sides of the lagoon, flooding the subdivision. (Tr. Pg. 82) Mr. Hummel gave evidence that the integrity of the lagoon seal has not been verified despite requests for verification. (Tr. Pg. 100-102) Mr. Hellebusch also gave evidence that 31 homes had been connected to the lagoon in violation of Missouri Department of Natural Resources (DNR) regulations. (Tr. Pg. 82, 96)

Evidence shows that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the DNR, through the Attorney General, to file suit against Mr. Jaeger in Ralls County Circuit Court (Case No. CV805-12CC) to compel him to comply with DNR's regulations. (Ex. 4; Tr. Pg. 75, 88, 90, 111, 112-113, 115)

The DNR suit in Ralls County Circuit Court is evidence 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. The evidence provided to the Commission regarding improperly sized sewer lines, sewer backups and the lagoon overflowing causing effluent to run through residents' yards and into the creek shows that Respondents have failed to provide safe and adequate service to their customers.

Issue #2

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?

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.

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.

Since it has been established that 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 evidence shows that the physical improvements are needed for the system to be able to provide safe and adequate service. (Tr. Pg. 104) However, this upgrade process has been ongoing for a long time without resolution. (Tr. Pg. 106) Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. Evidence shows that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the DNR, through the Attorney General, to file suit against Mr. Jaeger in Ralls County Circuit Court (Case No. CV805-12CC) to compel him to comply with DNR's regulations. (Ex. 4) The Ralls County Circuit Court case is evidence that Respondents currently do not comply with DNR's regulations. As there is no resolution of this case, there is no indication of when Respondents will comply.

Since the system is currently not able to provide safe and adequate service, 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, 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.

Issue #3

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?

Respondents have been collecting or accepting fees for their services. 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.

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 evidence shows that Blue Lagoon sewer system, which is owned by the Respondents, has been charging customers for sewer service. Both Mr. Reiersen and Mr. Hellebusch have been charged for sewer service. (Tr. Pg. 68-69 and 80-81) In fact a payment book was provided to Mr. Hellebusch for that very purpose. (Ex. 5) Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. It was only after Mr. Reiersen and Mr. Hellebusch learned that Respondents were not authorized to collect payments that they discontinued payments. (Tr. Pg. 68-69, 80)

Therefore, the evidence shows that Respondents have been collecting or accepting fees for their services. 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.

Issue #4

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?

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. Also, given the limited determinations in this case, a transfer to another third party cannot be ordered by the Commission at this time.

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).

Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. The evidence shows that the physical improvements are needed for the system to be able to provide safe and adequate service. (Tr. Pg. 104) Evidence shows that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the DNR, through the Attorney General, to file suit against Mr. Jaeger in Ralls County Circuit Court (Case No. CV805-12CC) to compel him to comply with DNR's regulations. (Ex. 4)

If the Commission determines 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.

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. But, 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. The evidence shows that the Commission would be justified in ordering 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. However, this determination was not made in the present case and such a transfer to a third party cannot be ordered by the Commission at this time.

Issue #5

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?

The Commission should order its general counsel to seek the imposition of penalties 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.

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.

Respondents have violated the statute related to operating a public utility without a Certificate of Convenience and Necessity. Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. Respondents have failed to provide safe and adequate service to customers. The evidence shows that the physical improvements are needed for the system to be able to provide safe and adequate service. (Tr. Pg. 104) Evidence shows that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the DNR, through the Attorney General, to file suit against Mr. Jaeger in Ralls County Circuit Court (Case No. CV805-12CC) to compel him to comply with DNR's regulations. (Ex. 4; Tr. Pg. 75, 88, 90, 111, 112-113, 115)

Therefore, 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.

Issue #6

Should the Commission order its general counsel to seek the appointment of a receiver for the Respondents pursuant to the provisions of Section 386.145, RSMo?

A determination 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

was not an issue in the present case and therefore, the Commission cannot order its general counsel to seek appointment of a receiver for the Respondents at this time.

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.

Respondents have violated the statute related to operating a public utility without a Certificate of Convenience and Necessity. Respondents do not possess the required Certificate of Convenience and Necessity, nor have they applied for one. Respondents have failed to provide safe and adequate service to customers. The evidence shows that the physical improvements are needed for the system to be able to provide safe and adequate service. (Tr. Pg. 104) However, this upgrade process has been ongoing for a long time without resolution. (Tr. Pg. 106) Evidence shows that the lagoon treatment facility is loaded beyond its capacity, to the point that it can, and has, overflowed, prompting the DNR, through the Attorney General, to file suit against Mr. Jaeger in Ralls County Circuit Court (Case No. CV805-12CC) to compel him to comply with DNR's regulations. (Ex. 4; Tr. Pg. 75, 88, 90, 111, 112-113, 115)

It can be argued that the evidence shows 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.

However, no specific determination to that effect has been made by the Commission nor is this determination to be made in this case. Therefore, the Commission cannot order its general counsel to seek appointment of a receiver for the Respondents at this time.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

By:_____

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CERTIFICATE OF SERVICE

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