BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Gerald and Joanne Reierson,	)	
	)	
Complainants,	)	
	)	
v.	)	**Case No. SC-2005-0083**
	)	
Kenneth Jaeger and Blue Lagoon Sewer Corp.,	)	
	)	
	)	
Respondents.	)	

STAFF'S BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and, for its Brief, states to the Missouri Public Service Commission as follows.

PROCEDURAL BACKGROUND

Complainants Gerald and Joanne Reierson filed their Complaint against Blue Lagoon Sewer Corp. and Kenneth Jaeger ("Respondents") in Case No. SC-2005-0083 ("the Reierson Case") on October 4, 2004. Complainant Robert M. Hellebusch filed his Complaint against Respondents in Case No. SC-2005-0099 ("the Hellebusch Case") on October 14, 2004. The Complainants in both cases requested that the Blue Lagoon sewer system be a private utility regulated by the Commission, sewer district or homeowners association. They said independent oversight of the operation is needed. The Commission consolidated the two cases on January 4, 2007.

On April 17, 2007, the parties jointly filed a Proposed List of Issues, consisting of seven issues to be decided by the Commission. The first and most significant issue on that list was whether the Blue Lagoon sewer system is subject to regulation by the Commission. In the Statement of Position that they filed on May 9, 2007, Respondents admitted they qualify to be

regulated by the Commission, and the Commission thereafter granted the motion of the Office of Public Counsel ("OPC") to amend the List of Issues by striking the first issue.

The other six issues remain for decision by the Commission. In this Brief, the Staff will address these six issues in the order shown on the OPC's Amended Issues List.

In addition, the Staff will address the issue of double jeopardy. Although this was not identified as an issue in the case, the Respondents have asserted that Complainants' claims are barred by the principle of double jeopardy, so the Staff will explain why it does not apply in this case.

ARGUMENT

Issue No. 1: Have the Respondents failed to provide safe and adequate service to their customers?

Respondents have failed to provide safe and adequate service to their customers as required by § 393.130.1, RSMo.[1]

Complainant Gerald Reierson testified that there have been several sewer backups, and the lagoon has overflowed on a couple of occasions, running effluent through the customers' yards.[2] He attached to his Direct Testimony pictures of the damage that the backups caused to his home, and he testified about these pictures.[3] Respondents admitted in their Statement of Position that "there was an unauthorized release of effluent by this system,"[4] and their counsel again acknowledged in his opening statement that "there was an unauthorized issue of effluent."[5]

[1] Unless otherwise indicated, all statutory references are to RSMo 2000, as currently supplemented.
[2] T-69, Lines 9-21.
[3] Reierson Direct, Exh. 1, seventh page of attachments; also, T-69, Line 24 – T-71, Line 4.
[4] See Paragraph 2 of Respondents' Statement of Position in the Reierson Case (EFIS Document No. 64).
[5] T-62, Lines 23-24.

Complainant Robert M. Hellebusch also testified that Respondents had allowed the lagoon to overflow into the customers' houses,[6] and testified that Blue Lagoon's spray-off system did not work properly, effluent from the lagoon runs into the creek behind his house, and that an emergency spillway is required.[7]

Staff witness Martin Hummel testified that physical facility improvements are needed in order for Blue Lagoon to provide safe and adequate service to its customers,[8] that the lagoon treatment facility is loaded beyond its capacity,[9] that Respondents have failed to design or construct a permanent irrigation system that is capable of properly disposing of the lagoon effluent,[10] and that the Staff does not have information to support Respondents' assumption that the proposed application of the effluent can be sustained.[11] He concluded that "the existing sewage treatment facility is not yet capable of providing safe and adequate service."[12]

Respondents did not present any evidence to refute this testimony. In fact, Blue Lagoon admitted in its Answers that "it will be necessary to upgrade the license, upgrade the facilities and take other actions necessary to remain in compliance with DNR regulations."[13] And again, in their Statement of Position, Respondents acknowledged that they did "not understand[] the problems with the system, nor the need for upgrades," and that they "were unable to upgrade the system in the manner required."[14]

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[6] T-83, Lines 5-14.
[7] T-81, Line 5 – T-82, Line 11.
[8] Hummel Direct, Exh. 3, Page 2, Lines 18-20.
[9] Hummel Direct, Exh. 3, Page 4, Lines 2-5.
[10] Hummel Direct, Exh. 3, Page 4, Lines 7-9.
[11] Hummel Direct, Exh. 3, Page 4, Lines 20-23.
[12] Hummel Direct, Exh. 3, Page 5, Lines 13-15.
[13] See Paragraph 3 of the Answer to Complaint in the Reierson Case (EFIS Document No. 4), and Paragraph 3 of the Answer to Complaint in the Hellebusch Case (EFIS Document No. 4).
[14] See Paragraph 2 of Respondents' Statement of Position in the Reierson Case (EFIS Document No. 64).

Respondents' only defense is that "they ran the system to the best of their ability, and provided sewer service to complainants in the best manner available to them."[15] That is not enough. They have an obligation under the law to provide safe and adequate service, and they have failed to do so.

Issue No. 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 clearly has the authority to order a corporation that is subject to regulation by the Commission to make improvements to its utility system.

Section 393.140 (2) provides that the Commission shall:

> … have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such … sewer system …

Similarly, § 393.270.2 provides that, after a hearing, the Commission:

> may order such improvement … in the collection, carriage, treatment and disposal of sewage … as will in its judgment be adequate, just and reasonable.

Respondents do not hold a certificate from the Commission authorizing them to provide sewer service, and they are not providing safe and adequate service. Those violations of the law must be remedied. The Staff submits that the best solution to this problem would be for Respondents to transfer their system to another qualified operator. To date, however, no qualified operator has agreed to acquire this system. Furthermore, § 393.190 provides that Respondents may not transfer their assets unless the Commission has issued an order authorizing them to do so.

In the meantime, Complainants and Respondents' other customers have a right to receive safe and adequate sewer service. The Commission should therefore order Respondents to make

[15] See Paragraph 2 of Respondents' Statement of Position in the Reierson Case (EFIS Document No. 64).

such improvements to their system as are necessary to bring the system into compliance with the requirements of the Missouri Department of Natural Resources.

Issue No. 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?

Blue Lagoon admitted in its Answers to the Complaints that it had been collecting or accepting fees for its sewer service. In its Answer in the Reierson Case, it stated there that "Complainant's right to utilize the sewage lagoon owned by Respondent is based solely upon a private contractual agreement between the parties, and that Complainant is in breach of that agreement by their failure to pay the sewage fees previously agreed upon."[16] Blue Lagoon also stated, in its Answers in both cases, that "the amount of Complainant's bill is directly related to the costs of maintenance of the sewer system and the operation of the lagoon."[17]

Respondents also admitted, in their Statement of Position, that they "accepted voluntary fees" that were "reasonable … based upon the water bills charged to each recipient of sewer service," and admitted that "such fees were not authorized by the commission."[18]

Mr. Reierson testified that Respondents had sent him some bills for sewer service two years ago,[19] and that Respondents are currently charging other residents of the Lost Valley Subdivision for sewer services.[20] Likewise, Mr. Hellebusch testified that Respondents charged him for sewer service until December of 2004,[21] and that Respondents are currently charging other residents of the Lost Valley Subdivision for sewer services.[22]

[16] See Paragraph 5 of the Answer to Complaint in the Reierson Case (EFIS Document No. 4).
[17] See Paragraph 3 of the Answer to Complaint in the Reierson Case (EFIS Document No. 4), and Paragraph 3 of the Answer to Complaint in the Hellebusch Case (EFIS Document No. 4).
[18] See Paragraph 4 of Respondents' Statement of Position in the Reierson Case (EFIS Document No. 64).
[19] T-68, Lines 12-21.
[20] T-68, Lines 3-8.
[21] T-80, Lines 6-18.
[22] T-80, Line 23 – T-81, Line 4.

Respondents offered no evidence on this issue, but their counsel has argued that the payments were "voluntary."[23] However, Mr. Hellebusch testified that the payments were not voluntary, at all, and that, in fact, he had been making payments based upon a payment book.[24]

Blue Lagoon also made it clear that the payments were not "voluntary," stating in Paragraph 5 of its Answer in the Reierson Case that "it is Respondent's intent to terminate Complainant's connection to the sewage system within 30 days of their notice of this answer under their contractual agreement."[25]

It is beyond dispute that Respondents were collecting and accepting fees for their service, and that those fees were not voluntary.

The Commission has never found these fees to be just and reasonable, nor has it even addressed this issue.[26]

Issue No. 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?

Section 393.146.2 authorizes the Commission to order a "capable public utility" to acquire a small sewer corporation, if it follows the procedures described in the statute and makes certain findings.

Section 393.146.1 defines the term "capable public utility" to include only public utilities that regularly provide service to more than 8,000 customer connections, and that are not sewer districts established pursuant to Article VI, section 30(a) of the Missouri Constitution, sewer

[23] See Respondents' Opening Statement, T-62, Lines 6-8, and T-62, Lines 19-22.
[24] See T-80, Lines 19-22 and T-83, Line 20 – T-84, Line 18. See also Mr. Hellebusch's payment book, which was admitted into evidence as Exhibit 5.
[25] See Paragraph 5 of the Answer to Complaint in the Reierson Case (EFIS Document No. 4).
[26] See Hummel Direct, Exh. 3, Page 2, Line 22 – Page 3, Line 6. See also Paragraph 4 of Respondents' Statement of Position in the Reierson Case (EFIS Document No. 64).

districts established under the provisions of Chapter 204, 249, or 250, RSMo, or water supply districts established under the provisions of Chapter 247, RSMo.

Cannon Water District does not regularly provide service to more than 8,000 customers, and therefore does not meet the statutory definition of a "capable public utility." Furthermore, the procedural requirements described in § 393.146, which must be met before the Commission can order a "capable public utility" to acquire Blue Lagoon have not been satisfied. Finally, neither Cannon Water District nor any "capable public utility" is a party to this case.

The Commission does not have statutory authority to order Cannon Water District to acquire the assets of Blue Lagoon, and does not have personal jurisdiction in this case over Cannon Water District or any other potential transferee.

Issue No. 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?

Section 386.570.1 provides that a corporation, person or public utility that fails to comply with the provisions of the Public Service Commission Law, or that fails to comply with any order or decision of the Commission is subject to a penalty of not less than $100 nor more than $2,000 for each offense. In the case of a continuing offense, each day's continuance thereof shall be deemed to be a separate and distinct offense.[27]

As noted above, the evidence in this case clearly establishes that Blue Lagoon has violated the statute that prohibits a corporation from providing public utility service without a certificate of convenience and necessity. As also noted above, the evidence also clearly establishes that Blue Lagoon has failed to provide safe and adequate service to its customers, as required by § 393.130. There is thus a statutory basis for seeking the imposition of penalties.

[27] Section 386.570.2.

However, the Complainants did not request in their Complaints that the Commission seek the imposition of penalties, and the issue has not been raised by the pleadings. The parties did identify the imposition of penalties as an issue in this case, but neither the Complainants, nor the Staff, nor the Public Counsel submitted evidence regarding this issue.

The imposition of penalties was not litigated in this case, and the Commission should not direct the general counsel to seek penalties.

If Blue Lagoon does not obtain a certificate from the Commission, and does not make the needed improvements to its system, or if the owners do not sell the utility assets to a qualified operator, however, the general counsel could seek the imposition of penalties at a later date.

Issue No. 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?

Section 393.145.1 authorizes the Commission to seek the appointment of a receiver for a sewer corporation if it determines that the corporation is unable or unwilling to provide safe and adequate service, if it has been actually or effectively abandoned by its owners, or if it has defaulted on certain financial obligations.

There is no evidence in this case that Blue Lagoon has been abandoned by its owners, nor that it has defaulted on any financial obligations. As noted above, however, Blue Lagoon is failing to provide safe and adequate service. There is thus a statutory basis for seeking the appointment of a receiver.

However, the Complainants did not request in their Complaints that a receiver be appointed, and the issue has not been raised by the pleadings. The parties did identify the appointment of a receiver as an issue in this case, but neither the Complainants, nor the Staff, nor the Public Counsel submitted evidence regarding the need for a receiver. There was no evidence

that Blue Lagoon would be better managed in the hands of a receiver, and no potential receivers were identified.

Furthermore, the Staff submits that if the Commission orders Blue Lagoon to make improvements to its system, and if Blue Lagoon complies with that order, there will be no need for a receiver. Most, if not all, of the improvements that are needed at Blue Lagoon would require a capital investment. But, from a practical standpoint, receivers cannot invest new capital, and must instead rely only on the available revenues to operate a system. It is not likely that these revenues would be sufficient to both pay for ordinary operation and maintenance expenses and also fund capital improvements.

It is also possible that the owners of Blue Lagoon may sell the utility assets to another qualified operator. Because of the capital investment issued discussed above and the need for improvements, a new operator – or the present operator – would be better able to do this than a receiver would be.

The appointment of a receiver was not litigated in this case, and the Commission should not direct the general counsel to seek the appointment of a receiver.

If Blue Lagoon does not make the needed improvements to its system, and if the owners do not sell the utility assets to a qualified operator, however, the general counsel could seek the appointment of a receiver at a later date.

THE DOUBLE JEOPARDY ISSUE

In their Statement of Position, Respondents asserted that the Ralls County Circuit Court has taken jurisdiction of the issues that are currently identified as Issue No. 2, Issue No. 4, Issue No. 5, and Issue No. 6 in this case, and that if the Commission issues orders on these issues, it would violate Respondents' "due process rights as to double jeopardy." Counsel for

Respondents repeated this claim in his opening statement, where he said that Issues 2, 3, 4, 5 and 6 in the present case may violate Mr. Jaeger's due process rights and subject him to double jeopardy.[28]

Double jeopardy is an affirmative defense, and it is the defendant's burden to prove that double jeopardy applies. *State v. Mullenix,* 73 S.W.3d 32, 34 (Mo. App. E.D. 2002). Respondents did not assert this defense in their Answer, so it is doubtful that they have sustained this burden. Furthermore, they have not cited any cases, or provided any explanation of why they believe double jeopardy exists in this case, so the Staff can only guess at what arguments Respondents may make in their brief. However, because the Staff will not have an opportunity to respond to such arguments, the Staff will briefly explain why double jeopardy does not bar this action.

The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Missouri's double jeopardy protection is based on the common law, and is the same as the Fifth Amendment guarantee. *Id.*

The Double Jeopardy Clause protects against three kinds of abuses, including multiple punishments for the same offense, which is what is at issue in this case. The Western District of the Court of Appeals stated:

> With regard to multiple punishments, the Double Jeopardy Clause does not prohibit all additional sanctions that could be considered punishment. *Hudson v. U.S.,* 522 U.S. 93, 98-99, 118 S.Ct. 488, 493, 139 L.Ed.2d 450 (1997). "The clause protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." *Id.* at 99, 118 S.Ct. at 493 (citations omitted).

Mullenix, supra, at 35.

[28] T-65, Line 23 – T-66, Line 19.

Thus, the Double Jeopardy Clause would apply in this case only if both the Ralls County Circuit Court Case and the instant case could result in the imposition of criminal punishments for the same offense.

Whether a proceeding is labeled as civil or criminal is not of paramount importance to double jeopardy analysis, because both criminal and civil sanctions may serve remedial and punitive goals at the same time. *State v. Mayo,* 915 S.W.2d 758, 760 (Mo. banc 1996). The determination of whether a particular sanction involves punishment that violates the double jeopardy clause requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. *Id.* Civil sanction constitute "punishment" under the double jeopardy clause when the sanction, as applied in the individual case, serves the goals of punishment – the twin aims of retribution and deterrence. *Id.* A civil penalty is only considered punishment under the double jeopardy clause when it may not fairly be characterized as remedial, but only as a deterrent or retribution. *In re Caranchini,* 956 S.W.2d 910, 914 (Mo. banc 1997).

Applying these lessons to the present case, it is clear that Issue No. 3 asks only for a factual determination, and does not seek any punishment whatsoever; it does not result in double jeopardy.

Issue No. 2 asks whether the Commission should order Respondents to make improvements to their system. Such relief would be purely remedial, to insure that the sewer customers receive safe and adequate service. It is not solely a deterrent or retribution, and it does not constitute double jeopardy.

Issue No. 4 asks whether the Commission should order Respondents to transfer their utility assets to a third party. This relief would also be purely remedial, to insure that the sewer

customers receive safe and adequate service. It is not solely a deterrent or retribution, and it does not constitute double jeopardy.

Issue No. 6 asks whether the Commission should seek the appointment of a receiver for Respondents. This relief would also be purely remedial, to insure that the sewer customers receive safe and adequate service. It is not solely a deterrent or retribution, and it does not constitute double jeopardy.

Only Issue No. 5 – which asks whether the Commission should seek the imposition of penalties – could even arguably be considered solely a deterrent or retribution. The U.S. Supreme Court provided a refined test of double jeopardy in the case of *Hudson v. U.S.,* 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). The *Hudson* test has two prongs. First, the court determines whether the legislature intended the penalty to be civil or criminal. If the penalty is civil, the court must then determine whether the civil penalty is so punitive in nature as to transform it into a criminal penalty. In this second prong, the court must consider seven factors:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether the sanction has historically been regarded as a punishment;
3. Whether the sanction only comes into play on a finding of scienter;
4. Whether the sanction's operation will promote the traditional aims of punishment – retribution and deterrence;
5. Whether the behavior to which the sanction applies is a crime;
6. Whether an alternative purpose to which the sanction may rationally be connected is assignable; and
7. Whether the sanction appears excessive in relation to the alternative purpose assigned.

The Staff submits that the legislature intended that the penalties authorized by § 386.570 would be civil, and that the civil penalty is not so punitive in nature as to transform it into a criminal penalty. Therefore, under the *Hudson* test, the penalties that may be imposed pursuant to § 386.570 do not constitute jeopardy.

But even if such penalties do constitute jeopardy, the Respondents are only subjected to double jeopardy if the proceedings in the Ralls County Circuit Court Case also constituted jeopardy.

The Ralls County Circuit Court issued a preliminary injunction against Respondent Jaeger (but not against Blue Lagoon) in Case No. CV805-12CC on May 3, 2005. The court then issued a judgment of contempt against Mr. Jaeger, for failing to comply with the injunction, on April 11, 2006, and it issued a second judgment of contempt against Mr. Jaeger, for continuing to fail to comply with the injunction, on July 12, 2006.[29]

There are two kinds of contempt – civil and criminal. The judgments in the Ralls County case were clearly civil in nature, to enforce compliance with the court's order, and were therefore remedial and not punitive or deterrent in nature. Furthermore, the Ninth Circuit held, in *Alder Creek Water Users Association v. Alder Creek Water Co.,* 823 F.2d 343, 345 (C.A. 9, 1987), that "punishments for contempt of court and a conviction under indictment for the same acts are not within the protection of the constitutional prohibition against double jeopardy."

The Ralls County case did not result in jeopardy, and the Commission could seek the imposition of penalties against the Respondents without running afoul of the constitutional prohibition against double jeopardy.

CONCLUSION

Respondents have admitted, and the Commission has found, that the Respondents are subject to regulation by the Commission. Accordingly, they are bound by all of the provisions of the Public Service Commission Law, in general, and of Chapter 393, in particular.

Even though they do not hold a certificate of convenience and necessity to provide sewer services to their customers, the Respondents are required to provide safe and adequate service.

[29] See Exhibit 4.

The Commission can also order the Respondents to make improvements to their sewer system, as provided in §§ 393.140 (2) and 393.270.2. In appropriate circumstances, the Commission can also seek the imposition of civil penalties, pursuant to § 386.570, RSMo, seek the appointment of a receiver for Respondent, pursuant to § 393.145, or order a "capable public utility" to acquire Respondent's utility assets, pursuant to § 393.146.

The evidence shows that the Respondents have failed to provide safe and adequate service, as they are required by law to do. The Complainants filed their Complaints in these case 33 months ago, but the Respondents have not yet remedied the problems of which they complained, despite the best efforts of the Staff to assist them in arranging for the transfer of their assets to a qualified operator.

The Commission should order Respondents to make improvements to their system as required to provide safe and adequate service and to bring the system into compliance with the regulations of the Missouri Department of Natural Resources. The Commission should also order Respondents to produce an engineering report, signed by a professional engineer, that describes the sizing and the application rates (daily, weekly, or monthly) of a system to dispose of Blue Lagoon's wastewater for the next seven years.

Respondents' argument that these complaints are barred by the prohibition against double jeopardy is without merit, and should be rejected.

WHEREFORE, the Staff submits its Brief to the Commission for its information and consideration.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or transmitted via e-mail to all counsel and/or parties of record this 9th day of July 2007.

/s/ Keith R. Krueger