

**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.)	

**STAFF'S RESPONSE TO
OFFICE OF THE PUBLIC COUNSEL'S REQUEST
FOR THE COMMISSION TO ISSUE ITS DECISION**

COMES NOW the Staff of the Missouri Public Service Commission and, for its Response to Office of the Public Counsel's Request for the Commission to Issue Its Decision, states to the Missouri Public Service Commission as follows.

On June 12, 2008, the Office of the Public Counsel ("OPC") filed its Request for the Commission to Issue Its Decision in This Case ("OPC's Request"). On June 16, 2008, the Commission ordered the Staff to file its response to the OPC's request, by no later than June 23, 2008.

The Staff agrees with all of the statements contained in Paragraphs 1 through 5 of OPC's Request. The Staff also states that it desires to have this case resolved as promptly as it can lawfully be resolved. The Staff does have some concern, though, about the interplay between the Bankruptcy Code and the jurisdiction of the Commission, as set forth in more detail below.

The Staff agrees with the OPC that, under the Bankruptcy Code, the filing of a bankruptcy petition operates as an automatic stay of certain judicial and administrative

proceedings. However, under § 362 (b) (4), an exception is made for an action or proceeding “by a governmental unit” to enforce that governmental unit’s police and regulatory power. It is the application of that paragraph, and specifically of the phrase placed in quotes above, that is of some concern to the Staff.

The OPC has filed, in another case (No. SO-2008-0358), a Motion for Appointment of an Interim Receiver and Order to General Counsel to Petition the Circuit Court for the Appointment of a Receiver. As the Staff has previously noted in a pleading filed in that case, the Staff believes that OPC’s proceeding seeking the appointment of receiver is permitted by the terms of the § 362 (b) (4) exception. This is so, because the appointment of a receiver for a failing sewer company is clearly an exercise of the Commission’s police and regulatory power, and because that proceeding was filed “by a governmental unit” – specifically the Office of the Public Counsel.

The authority of the Commission to continue the proceedings in the instant case, however, is not as clear. The Commission’s exercise of its jurisdiction over the complaint cases of the Reiersons and Mr. Hellebusch is also clearly an exercise of the Commission’s police and regulatory power. However, the proceedings in those cases were not filed “by a governmental unit” (as the receivership case was), but rather by private individuals. It is therefore at least arguable that the instant cases do not qualify as an exception to the automatic stay provisions of 11 U.S.C. § 362 (a). However, it does not appear that the law on the subject is entirely settled, as evidenced by the cases discussed below.

A bankruptcy court held that Congress intended to exclude actions to enforce the police power only when they were brought by a governmental unit; the exception to the stay did not apply to “private attorney general actions.” *In Re Revere Copper and Brass, Inc.*, 29 B.R. 854,

(Bkrcy. S.D. N.Y., *affirmed* 32 B.R. 725. Another court held that the government unit exception did not apply to a suit by a private citizens group to enforce the state's regulatory power under the Clean Water Act. *In Re Chateaugay Corp.*, 118 B.R. 19 (Bkrcy. S.D.N.Y., 1990). And in another case, the United States Court of Appeals held that actions brought by private individuals were not subject to the police or regulatory exception to the automatic stay. *United States (EPA) v. Environmental Waste Containment, Inc.*, 131 B.R. 1410, *affirmed* 973 F.2d 1320, (N.D. Ill. 1991). It appears, though, that the individuals who brought the latter case were particularly litigious and unappealing to the court.

Other cases have held to the contrary. In *In Re Dervos*, 37 B.R. 731 (Bkrcy. N.D. Ill., 1984), the bankruptcy court held that it is not fatal to a complaint brought under the § 364 (b) (4) exception to application of the automatic stay that the complaint was not actually filed by a government unit. This may be especially true where the action was filed before the commencement of the bankruptcy proceedings. In *In Re Pacific Gas & Electric Company*, 263 B.R. 306 (Bkrcy. N.D. Cal. 2001), the bankruptcy court held that an accounting *decision* by a public utilities commission, which implemented important policies of ratemaking fell within the exception to the stay. And in *In Re Reyes*, 227 B.R. 818 (Bkrcy., S.D. Ind. 1997), the court held that an administrative hearing to determine whether a doctor's hospital privileges should be terminated fell under the exception to the stay.

Courts have held that where the governmental unit is acting to stop a violation of fraud, environmental protection, or regulatory laws, or attempting to fix damages for violations of such laws, then the automatic stay provision does not apply, because the action would fall within the exceptions listed in § 362 (b) (4). *People of State of Illinois v. Electrical Utilities*, 41 B.R. 874 (D.C. Ill. 1984). The court even held that the exception to the stay "extends to permit an

injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. *Id.* At 877. See, also, *In re Wheeling-Pittsburgh Steel Corp.*, 63 B.R. 641 (Bkrcy. W.D. Pa., 1986), which is to the same effect.

The exceptions to the automatic stay do not, however, operate to permit a seizure of property from the estate without a court order. 21 B.R. 181.

Assuming that the Commission determines that it may proceed in this case, the Staff joins with the OPC in requesting that the Commission issue its decision in this case as soon as possible. The Staff specifically requests that the Commission grant the relief that Staff requested in Staff's Brief, filed July 9, 2007: a finding that Respondents are subject to regulation by the Commission; an order that Respondents make improvements to their system as required to provide safe and adequate service and to bring the Blue Lagoon system into compliance with the regulations of the Missouri Department of Natural Resources; and an order that Respondents produce an engineering report, signed by a professional engineer, that describes the sizing and the application rates of a system to dispose of Blue Lagoon's wastewater for the next seven years.

WHEREFORE, the Staff submits its Response to Office of the Public Counsel's Request for the Commission to Issue Its Decision.

Respectfully submitted,

/s/ Keith R. Krueger

Keith R. Krueger
Deputy General Counsel
Missouri Bar No. 23857

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-4140 (Telephone)
(573) 751-9285 (Fax)
keith.krueger@psc.mo.gov (e-mail)

Certificate of Service

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronic mail to all counsel and/or parties of record this 23rd day of June 2008.

/s/ Keith R. Krueger