

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of Lake Region Water & Sewer	)	File No. SR-2010-0110
Company's Application to Implement a General	)	Tariff No. YS-2010-0250
Rate Increase in Water & Sewer Service	)	

In the Matter of Lake Region Water & Sewer	)	File No. WR-2010-0111
Company's Application to Implement a General	)	Tariff No. YW-2010-0251
Rate Increase in Water & Sewer Service	)	

**OBJECTION AND MOTION TO QUASH SUBPOENAS DUCES TECUM**

Come now, Lake Region Water & Sewer Company (Lake Region), Vernon Stump and John R. Summers, by and through their attorneys, and pursuant to 4 CSR 240-2.100 (3), and for their objection and motion to quash subpoenas duces tecum submit the following to the Commission:

1. On April 8, 2010, the Commission entered an order directing its staff to renew discovery in this matter. Remarking that it has an incomplete record on which to base its decision, the Commission explained in the order that “[d]uring the hearing numerous questions arose that appeared to the Commission to be better addressed to individuals that were not scheduled witnesses.”

2. On April 15, 2010, the Staff caused to be served on Dr. Stump and Mr. Summers Orders to Appear for Deposition and Orders to Produce Documents *sub nomine* Subpoenas Duces Tecum (the Subpoenas) which are attached to this motion as Exhibits 1 and 2 respectively, both of which are incorporated by reference herein as if fully set forth. The Subpoenas cite several statutes and rules including Rules 57.03, 57.09(b) and 58.01. The order pertaining to Dr. Stump contemplates a deposition by telephone. In each Subpoena, the witness is directed to produce:

all reports, notes, memorandum[sic], receipts, correspondence, or other documentation and records relating to Lake Region Water & Sewer Company, Lake Utility Availability and Lake Utility Availability 1 regarding to availability fees or charges for the area known as Shawnee Bend at or near Lake Ozark, Missouri, and including, but not limited to, the acquisition of the right to receive or otherwise collect availability fees; the maintenance, collection, billing, administration, distribution, profits, dividends, and office supplies relating to availability fees;

3. Dr. Stump and Mr. Summers were witnesses who testified at hearing in this matter, and they were extensively questioned, over continuing objection, about the charges levied for availability of water and sewer infrastructure on Shawnee Bend, Lake of the Ozarks.

4. In his direct testimony, (Lake Region Exhibit No. 5) and during his cross examination, Mr. Summers made clear that Lake Region was not involved, and that he was not involved, with the billing or collection of availability fees. He made clear that he had no duties or responsibilities over records regarding the billing or collection of availability fees by the persons entitled to receive those fees.

5. Dr. Stump confirmed that the shareholders of Lake Region, specifically, his wife, Sally, and RPS Properties LP, were the legal owners of the revenue derived from the availability fees collected on Shawnee Bend; that records pertaining to the billing and collection of those fees were maintained by RPS Properties LP; and that he had no management responsibility with respect to how availability fees were billed and collected.

6. The Subpoenas should be quashed because an inquiry by the Staff or the Commission concerning the billing and collection of availability fees for infrastructure improvements on Shawnee Bend is beyond the subject matter jurisdiction of the Commission and hence irrelevant. Furthermore, the Subpoenas should be quashed because the information or matter sought from Dr. Stump and Mr. Summers is legally irrelevant in that these witnesses have already testified such that further testimony from them would be cumulative or repetitive of that

already of record, and moreover, they have affirmed that they have no possession, custody or control of the records sought in the Subpoenas.

### **The Commission's Jurisdiction.<sup>1</sup>**

7. The Commission's jurisdiction is tied tightly to the definition of "service" in Section 386.020(48) RSMo Cum. Supp 2009<sup>2</sup>:

(48) "**Service**" includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons;

This term is woven into the enabling legislation for the Commission at key points. For instance, the Commission is to "ascertain, determine and fix" for public utilities "standard units of *service*" pursuant to Section 386.260. Regarding its rule making authority, the Commission's jurisdiction extends:

(6) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility *service*, disconnecting or refusing to reconnect public utility service and billing for public utility service. [emphasis supplied]

Section 386.250(6).

Lake Region has contended throughout every phase of this proceeding, and staff witness Mr. Merciel agrees, that the availability of a water line or sewer line or both at an undeveloped lot is not a "service" as defined in these sections. (Merciel Rebuttal, page 7).

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<sup>1</sup> Lake Region's objections to availability fee testimony based on lack of jurisdiction and relevancy have previously been rejected by the Commission. Lake Region respectfully suggests that the Commission's April 8, 2010 order and Staff's response to that order, specifically the raft of questionable subpoenas served, or purportedly served, on witnesses, justifies reconsideration of its objections to these inquiries.

<sup>2</sup> Statutory citations herein are to RSMo or its current cumulative supplement.

8. Undeterred by the provisions of the law, Staff and Office of Public Counsel propose to the Commission that it take regulatory authority over what Lake Region will classify for argument only as a “non-utility service” and impute an amount of income derived from that “non-utility service” to the revenue requirement for a water and sewer corporation. The Commission has been asked to implement a rule which provides that where shareholders of a water and sewer corporation have been assigned exclusive rights to collect availability fees charged to owners of undeveloped lots in the Company’s service territory, the revenue from those fees will be an offset to the Company’s revenue requirement, notwithstanding the Company’s lack of control over the right to collect those fees. The Commission has no more authority to impute such fee revenue than it would to impute a shareholder’s income from a trust or retirement account which has income from a subdivision development in the Company’s certificated territory.<sup>3</sup>

9. Likewise the Commission has no right or authority to disregard the distinctions and separateness between the corporate entity of Lake Region and its shareholders. In their proposals on availability fee revenue treatment in this case, Staff and OPC have assumed the shareholders and the corporation are one and the same contrary to law. Ordinarily, a corporation is regarded as a separate entity, distinct from the members who compose it. The corporate entity will be disregarded when it appears the corporation is controlled and influenced by one or a few persons and in addition, that the corporate cloak is utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud. However,

[i]t must appear not only that the corporation is controlled and influenced by one or a few persons, but, in addition, it is necessary to demonstrate that the corporate

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<sup>3</sup> The implied converse of Staff’s and OPC’s proposal is that if the shareholders cease billing and collection of the availability fee, the revenue that could be derived from the charge will not be imputed to revenue requirement. In each case, the Commission is asked to regulate shareholder transactions in “unregulated” business enterprises all of which is beyond Commission jurisdiction.

cloak is utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud. Furthermore, the corporate entity will not be disregarded where to do so would promote an injustice or contravene public policy.

*Sampson Distributing Co. v. Cherry*, 346 Mo. 885, 890-891, 143 S.W.2d 307, 309 (Mo.1940).

10. Lake Region serves the public convenience under regulation by the Commission. The record shows that it provides safe, reliable and adequate service. Customers are not just satisfied but pleased by that service. Providing potable water and sanitary permanent sewer service is a public good, and cannot seriously be labeled as wrongful. Lake Region's corporate cloak has not been manipulated by its owners and to disregard its corporate organization promotes injustice to its shareholders. The personal assets of the shareholders of Lake Region --- assets which in this instance were acquired after negotiation and pursuant to a stock purchase contract that was independent and apart from the regulated utility--- should not be the source of revenue support for Lake Region's provision of water and sewer service to its customers.

11. The Commission's questions concerning: 1) the intentions of a real estate developer ten or more years ago in setting the prices for lots in a subdivision; 2) the developer's purposes in assessing availability fees; and 3) the terms of a confidential settlement between persons not parties to this rate case are testament that the Commission ventures well outside its statutory sphere of authority. The Commission lacks subject matter jurisdiction over the billing and collection of availability fees and the Subpoenas are subject to nullification on that point alone.

### **Legal Relevancy**

12. Discovery in the Commission is obtainable by the same means as in circuit court. 4 CSR 240-2.090. Under Rule 56.01 (b)(1),

[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, . . . .

\* \* \*

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

13. To be admissible, evidence must be both logically and legally relevant.

“Evidence is logically relevant if it tends to prove or disprove a fact in issue or corroborates other evidence.” [citation omitted]. “ ‘Legal relevance involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of evidence).’ ” [citation omitted].

*UMB Bank, NA. v. City of Kansas City*, 238 S.W.3d 228, 232 (Mo.App. W.D.,2007).

14. Dr. Stump and Mr. Summers have already testified in this matter and it is submitted that their deposition testimony on this issue will be merely cumulative of what they have spoken already. The Subpoenas seek testimony that lacks “legal” relevance. They should be quashed.

15. Additionally, Dr. Stump and Mr. Summers do not possess or have control over the records described in the Subpoenas. They are not the custodian of records for RPS Properties LP or for Ms. Sally Stump, the legal owners of the availability fee revenue. The command of the Subpoenas is limited to what the witnesses have in their possession, custody or control. The witnesses are not under compulsion to supply documents in the possession, custody or control of others.

A “subpoena duces tecum” has been defined as “[a] court process, initiated by a party in litigation, compelling production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of person or body served with process.” Black's Law Dictionary 1426 (6<sup>th</sup> ed.1990).

*Gerlach v. Missouri Commission on Human Rights*, 980 S.W.2d 589, 593 (Mo.App. E.D., 1998). The Subpoenas also cite Rule 58.01 as authority. This rule limits the scope of requests for production of documents and things to documents and records “that are in the possession, custody or control of the party upon whom the request is served.” Since Dr. Stump and Mr. Summers have already extensively testified on the issue of availability fees and cannot produce the documents described in the Subpoenas if they were to sit for deposition, Lake Region submits that there is no relevance to their deposition testimony and the Subpoenas should be quashed.

On the basis of the above and foregoing, Lake Region, Dr. Vernon Stump and Mr. John R. Summers register their objection to the Subpoenas and respectfully move that they be quashed.

Respectfully submitted,

**/s/ Mark W. Comley**

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via email, on this 22<sup>nd</sup> day of April, 2010, to:

Jaime Ott at [jaime.ott@psc.mo.gov](mailto:jaime.ott@psc.mo.gov);  
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**/s/ Mark W. Comley**