

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

In the Matter of)	
Missouri Public Service Commission)	
)	
Complainant,)	
v.)	Case No. WC-2008-0079
)	
Universal Utilities, Inc.)	
)	
Respondent.)	

**MOTION TO QUASH SUBPEONA DUCES TECUM OR
REQUIRE ADVANCEMENT OF COSTS**

COME NOW Richard J. Wilhelm (“Wilhem”) and all other entities that may be subject to the subpoena referenced below, by and through their attorneys, (“Movants”) and move the Commission for an order quashing the Subpoena Duces Tecum described below. In support thereof, Movants state as follows:

1. On or around November 13, 2007, Wilhelm was served with the Subpoena Duces Tecum attached hereto as Exhibit A and incorporated by reference as if fully set forth herein (the “Subpoena”).
2. The Subpoena is directed to “Richard Wilhelm, his affiliates, representatives, business entities, associates in any way related to Universal Utilities, Inc.” (“Subpoenaed Parties”).
3. The Subpoena commands all Subpoenaed Parties to produce numerous documents and other information, but fails to state where, when, how and to whom the documents are to be produced.
4. Wilhelm has no individual business relationship with Respondent Universal Utilities, Inc. (“Universal”).
5. Wilhem has an ownership interest in two Illinois limited liability companies that

do business with Universal. Neither of these companies do business in Missouri or engage in any other Missouri operations.

6. Neither Wilhelm nor the other Subpoenaed Parties are parties to case no. WC-2008-0079 currently pending before the Missouri Public Service Commission (the “Commission”).

7. Section 386.440,1. RSMo grants the Commission the power to issue subpoenas.

8. This subpoena power includes the power to issue subpoenas duces tecum. 4 CSR 240-2.100.

9. Subpoenas duces tecum invalidly obtained or inappropriate for other reasons are subject to objection and motions to quash. *Id.* Subpoenas duces tecum issued by the Commission may be quashed for the same reasons as those issue by Missouri courts. *See* 4 CSR 240-2.090(1) (“[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court”).

10. Pursuant to Missouri Rule of Civil Procedure 57.09(b):

In conjunction with a deposition properly noticed under Rule 57.03, a subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

The court may:

(1) Quash or modify the subpoena if it is unreasonable or oppressive, or

(2) Require the party seeking discovery to advance the reasonable cost of producing the books, papers, documents, or tangible things.

11. In addition, “[a] party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.” Mo. R. Civ. Pro. 57.09(c).

12. The Subpoena should be quashed because it is invalid. The plain language of Missouri Rule 57.09 states that “[i]n conjunction with a deposition properly noticed under Rule 57.03, a subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.” (emphasis added). Thus, Rule 57.09 contemplates the production of documents under a subpoena duces tecum contemporaneous with a properly noticed deposition. The Subpoena makes no reference to a deposition. In fact, the Subpoena does not designate a location, date or time at which the documents are to be produced nor does it designate the party requesting the Subpoena.¹ Additionally, the Subpoena does not indicate whether Universal, Respondent in this case, was given notice of the Subpoena. Because of these deficiencies, the Subpoena was improperly issued and is invalid. *See State v. Ek*, 834 S.W.2d 828, (Mo.App. W.D. 1992) (holding that a subpoena duces tecum which failed to include information of the place, time and date of a deposition was improper).²

13. Furthermore, the Subpoena should be quashed because the records it seeks are irrelevant. The only information the Subpoenaed Parties possess relates to operations conducted in Illinois by Illinois entities. As set forth above, Wilhelm has an ownership interest in two Illinois limited liability companies that do business with Universal. Neither of these companies does business in Missouri or engages in any other Missouri operations. The Commission’s jurisdiction does not extend to Illinois business operations. As a result, the Subpoena should be quashed on these grounds.

14. Furthermore, the Subpoena should be quashed pursuant 4 CSR 240-2.100(3) and

¹ Although the Notice of Issuance of Subpoena indicates that the Subpoena was issued by Commission Staff, this is indicated nowhere on the Subpoena itself.

Rule 57.09(b) and (c) because it is unreasonable and oppressive. As set forth above, the Subpoena fails to designate a location, date and time for delivering the documents. This fact alone renders the Subpoena unreasonable and oppressive because compliance essentially is impossible.

15. Additionally, the cost of compliance would be unduly burdensome to Wilhelm and the Subpoenaed Parties. The majority of documents requested under the Subpoena date back to 2003. *See* Exh. A, ¶¶ 2-7, 11. The remaining requests have no date limitations. *See* Exh. A, ¶¶ 1, 8-10, 12. The broad scope of these requests would force the Subpoenaed Parties to expend an excessive amount of time and resources devoted to locating, identifying, copying, and delivering these records. Consequently, the Subpoena is unreasonable and oppressive and should be quashed on this basis. *See State ex rel. Horenstein v. Eckelkamp*, 228 S.W.3d 56, 57-58 (Mo.App. E.D. 2007) (finding that a discovery order compelling an expert to produce current list of testimonial history, tax forms for a period of four years, and appointment books, calendars, and schedules for a period of four years was intrusive and unduly burdensome).

16. The Subpoena also is unreasonable and oppressive because it may subject the Subpoenaed Parties to unnecessary civil liability. The purpose of requiring the attendance in court or at a deposition of the person to whom a subpoena commanding the production of documentary evidence is addressed is to prevent impermissible disclosures. *See State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 342 (Mo. 1998). Missouri court decisions reveal that under no circumstances should businesses copy and mail records to the requesting attorney in

² Movants suggest that even though the subpoena duces tecum at issue in *Ek* was issued under Missouri Rule of Criminal Procedure 26.02, *Ek*'s discussion related to the propriety of the subpoena is applicable. Rule 26.02 appears to be the criminal counterpart to Civil Rule 57.09.

lieu of attending a deposition or appearing in court because such businesses risk disclosing privileged and confidential information and may be liable for breach of a fiduciary duty owed to their clients to keep the records in confidence. *See id.*; *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo.App. E.D. 2000). At depositions and trials, safety measures are present insofar as counsel is available and can object to the discovery of irrelevant or privileged information. *Crowden*, 970 S.W.2d at 342. As stated above, however, the subpoena at issue in this case fails to mention a date or time to appear in court or at a deposition. This failure may subject the Subpoenaed Parties to unnecessary and serious civil liability. The Subpoena should be quashed on this basis.

17. Moreover, the Subpoena is invalid because it violates 4 CSR 240-2.100(4) which states in pertinent part that “[t]he name and address of the witness shall be inserted in the original and subpoena or subpoena duces tecum.” As explained above, the Subpoena is directed to “Richard Wilhelm, his affiliates, representatives, business entities, associates in any way related to Universal Utilities, Inc.” It fails to list any names other than Richard Wilhelm, who has no business relationship with Respondent. Moreover, it does not contain any address for any witness. Accordingly, the Commission should quash the Subpoena.

18. In the alternative, should the Commission decide to overrule Movants’ request to quash the Subpoena, Movants request that the Commission require the party seeking the documents requested in the Subpoena to advance the Subpoenaed Parties’ reasonable costs of producing the documents pursuant to Rule 57.09(b)(2). This Rule states that a court may “[r]equire the party seeking discovery to advance the reasonable cost of producing the books, papers, documents, or tangible things. *See State ex. rel. Weinstock*, 916 S.W.2d 861, 862-63

(Mo. App. E.D. 1996) (explaining that courts may condition denial of motion to quash upon advancement by person in whose behalf the subpoena is issued for the reasonable cost of producing the things requested).

WHEREFORE, Richard Wilhelm and all other entities that may be subject to the subpoena referenced above move the Commission to quash the Subpoena Duces Tecum or, in the alternative, to require the person on whose behalf the Subpoena was issued to advance the reasonable costs of producing the documents requested, and to grant such other and further relief as the Court deems just and proper.

Respectfully submitted

/s/ Mark W. Comley

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Attorneys for Richard J. Wilhelm and all
other entities that may be subject to the
Subpoena

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 30th day of November, 2007, to General Counsel's Office at gencounsel@psc.mo.gov; Office of Public Counsel at opcservice@ded.mo.gov; and Paul DeFord at pdeford@lathropage.com.

/s/ Mark W. Comley

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SUBPOENA DUCES TECUM



THE STATE OF MISSOURI.

To Richard Wilhelm, his affiliates, representatives, business entities, associates in any way related to Universal Utilities, Inc.: You are hereby commanded to produce, within twenty (20) days, originals for copying of the documents contained in Attachment A, pertaining to the matter of *Missouri Public Service Commission v. Universal Utilities*, Case no. WC-2008-0079.

and hereof fail not at your peril. The person or officer serving this writ is commanded to have the same at the time and place aforesaid, certifying thereon its return. Given under my hand, this 8th day of November, 2007,

Richard E. Hunsley [Name], Regulatory Law Judge [Title]

RETURN

I HEREBY CERTIFY that I have served the within writ by reading the same in the presence and hearing of the within named Richard Wilhelm on the ____ day of _____, 2007, in _____ County, in the State of Missouri.

_____[Name]_____, _____[Title]_____

ATTACHMENT A

DEFINITIONS

For the purposes of this request for production, the following definitions control:

- A. "Documents" are documents, records, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, photographs, drawings, charts, maps, graphs, other writings, recording tapes, recording discs, mechanical or electronic information or recording elements, and any other "documents" as defined in Rule 34, FRCP. If a document has been prepared in several versions, or if additional copies have been made which are not identical or are no longer identical by reason of subsequent notation or marking of any kind, each nonidentical copy is a separate document.
- B. "Relating" means referring to, being evidence of, memorializing, or concerning in any way all or any portion of the specified facts or contentions.

REQUESTS

1. Records of any accounting records, accounting history, billing statements, billing sheets, usage reports, generated by or on behalf of Universal Utilities, Inc.
2. Records, from January 1, 2003, to date, of any accounting records, accounting history, billing statements, billing sheets, usage reports, generated by or on behalf of RJW Investments, pertaining to any mobile home park, tenement or entity owned or operated by RJW Investments or Richard Wilhelm for which any arrangement with Universal Utilities, Inc. exists, regardless of whether currently memorialized in writing.
3. Records, from January 1, 2003, to date, of any all repairs, maintenance or improvements to property owned or managed by RJW Investments, Richard Wilhelm, or any of his associates, affiliates or representatives, including invoices, receipts, canceled checks and any other documents which refer or relate to any such repairs, maintenance or improvements to water and/or sewer facilities.
4. From January 1, 2003, to date, checks or records for any expenses related to discontinuation or 'shut-off' of water supply or service, sewer service, or refuse service proceedings or any other expenses related to the business of selling, renting, leasing or subleasing mobile homes (including attorneys' fees) for any mobile home park owned, managed or controlled by Richard Wilhelm or RJW Investments and having any arrangement with Universal Utilities, Inc.

5. From January 1, 2003, to date, checks or records for any income or fees received by Richard Wilhelm or RJW Investments, related to discontinuation or 'shut-off' of water supply or service, sewer service, or refuse service proceedings or any other expenses related to the business of selling, renting, leasing and subleasing mobile homes (including attorneys' fees) for any mobile home park owned, managed or controlled by Richard Wilhelm or RJW Investments and having any arrangement with Universal Utilities, Inc.
6. Any financial statement including any application you have produced for any purpose relating to the provision of water and/or sewer facilities in the State of Missouri since January 1, 2003.
7. Books and Records of your income and business affairs relating to the provision of water and/or sewer facilities in the State of Missouri since January 1, 2003.
8. Any world wide web address and access codes used for communication or business dealing of any and every type with Universal Utilities, Inc.
9. Plaintiff requests that Richard Wilhelm permit Plaintiff to access the website of Universal Utilities, Inc. by producing the access codes necessary to be allowed entry onto said site as Richard Wilhelm accesses said website for business and communication purposes.
10. Any contracts with Universal Utilities, Inc. (including those not yet final or agreed to since January 1, 2003) and RJW Investments or Richard Wilhelm.
11. Any documentation received from Universal Utilities, Inc. since January 1, 2003 or sent by Universal Utilities to RJW Investments, Richard Wilhelm, and/or residents of any mobile home park owned, managed or controlled by Richard Wilhelm or RJW Investments and having any arrangement with Universal Utilities, Inc., and/or customers of water and/or sewer service provided by, maintained by, billed by, or affiliated with Universal Utilities, Inc.
12. Any documentation relating to RJW Investments or Richard Wilhelm acting as an agent, employee, representative or assignee of Universal Utilities, Inc.