

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

In the Matter of Lake Region Water & Sewer	)	
Company's Application to Implement a General	)	File No. WR-2013-0461
Rate Increase in Water and Sewer Service	)	

**REPLY OF RPS PROPERTIES, L.P. TO STAFF AND OPC RESPONSES TO AND  
SUGGESTIONS REGARDING OBJECTIONS AND MOTION TO QUASH**

COMES NOW RPS Properties, L.P. ("RPS"), by and through undersigned counsel, and replies to *Staff's Response to RPS Properties, L.P.'s Objections and Motion to Quash* and to *The Office of the Public Counsel's Suggestions in Opposition to Motion to Quash*, both filed in this matter on January 17, 2014.

1. Staff asserts that RPS' Motion to Quash was not timely because it was not filed before 10:30 a.m. on January 13, 2014. (Paragraphs 1-3.) This assertion is without merit for the following reasons:

a. The Commission's rules govern the discovery process in Commission cases, including this case. The Commission's rules provide 10 days to object or seek to quash, per 4 CSR 240-2.100 (3), and gave RPS until the end of the day on January 13, 2014 to file same, per 4 CSR 240-2.050, because the 10<sup>th</sup> day was a Sunday. The Commission's rules take precedence over the Court Rules. The Commission rules defer to the Missouri Court Rules for certain limited purposes, not vice versa. The Commission rules clearly permit objections and motions to quash to be filed within 10 days after service, with no qualification that such objections or motions must be filed before a certain time of day, as is suggested in the Court Rule (Rule 58.02(e)(2)). Any discrepancy between the Commission's rules and the Court rules in this instance must be interpreted in favor of the Commission's rules.

b. In any event, Staff waived any argument about objections or motions to quash needing to be filed before 10:30 a.m. on January 13 by stating in the Subpoena that it had sought and acquired the agreement of all parties to the case that RPS need not appear in person with the documents but could instead send the documents to Staff. The office address of Staff counsel was provided in the Subpoena for that purpose. This provision in the Subpoena makes it clear that Staff would have considered the Subpoena fulfilled if Staff counsel had received documents in his office in Jefferson City, by mail or other delivery mechanism, at any time during the day of January 13. There was, therefore, no reasonable expectation on the part of Staff that a representative of RPS was going to appear in person in Kansas City and produce documents at 10:30 a.m. on January 13.

c. In hindsight, as a matter of professional courtesy, counsel for RPS regrets that no notice was filed early on January 13 simply informing the Commission and parties that objections and a motion to quash would be filed later that day, which would have prevented any confusion as to what Staff should expect that day.

2. RPS continues to object to the Subpoena(s) served by Staff because the information sought is irrelevant and immaterial, imposes undue burden and expense on RPS, is unreasonable and oppressive. The Subpoena is overbroad and does not specify the particular document(s) or record(s) to be produced. The Subpoena is not reasonably calculated to lead to the discovery of admissible evidence in this case.

3. The utility customers of Lake Region Water & Sewer Company do not pay the “availability fees” about which Staff asks and the revenue stream generated by the availability fees is not generated by the provision of a regulated utility service. That revenue stream is the result of a private contractual relationship between subdivision developers

and lot owners. Lake Region Water & Sewer Company has no access to the revenue stream generated by the availability fees and has no legally enforceable right to acquire the revenue stream generated by the availability fees. The private business information of RPS sought by the Subpoena is irrelevant to any legitimate issue in this case.

4. Neither Staff nor OPC, nor the Commission itself, has any legal right to appropriate revenues from private real estate contracts in order to apply those revenues to the Revenue Requirement of any regulated utility company.

5. Staff asserts that its Subpoena is not a “fishing expedition,” as alleged by RPS. Staff states, “On the contrary, Staff knows exactly what it needs and has asked for it specifically; ....” (Staff Response at page 4, Paragraph 8.) Whether Staff believes it “knows exactly what it needs” or not, it has not articulated anything even remotely “exact” into its Subpoena.

6. OPC states that the Motion to Quash “has no basis under the statutory powers of the Commission to require production of any documents from any person or entity,” citing Section 386.450, RSMo. OPC would apply a highly exaggerated reading of this statute to the instant circumstance. Even if RPS Properties were construed to be a “person” under this statute, OPC has not requested a Commission order nor shown “good cause” for such a request or order as contemplated by Section 386.450. Further, that statute does not suddenly turn a fishing expedition into private business matters of a utility shareholder into a reasonable and relevant inquiry. As discussed in the Motion to Quash, RPS’ non-regulated business activities are not subject to the Commission’s jurisdiction. Discovery of information concerning those business activities would not lead to admissible evidence, but only to the disclosure of the private details of contractual relationships

between developers and lot owners that are entirely irrelevant to any issue in this case and are not jurisdictional to the Commission.

7. RPS reaffirms the other allegations and arguments in its *Objections to Subpoena(s) and Motion to Quash* of January 13, 2014. Particularly, RPS asserts that the line of inquiry represented by Lake Region's Subpoena (and that represented by Staff's earlier Subpoena) is irrelevant, immaterial and unreasonable.

8. RPS hereby incorporates by reference into the instant pleading, Paragraphs 14 through 25 (inclusive) of its *Objections to Subpoena(s) and Motion to Quash* filed in this matter on January 13, 2014.

9. Although it is well-established that the Public Service Commission is not bound by the legal principles of *stare decisis* or *res judicata*, Missouri courts have recognized the doctrine of *quasi-estoppel*.<sup>1</sup> The Commission itself cited the doctrine of quasi-estoppel in its Report and Order in WR-2010-0111, at page 101.

10. For more than 40 years now, these availability fees have been untariffed and have not been included by the Commission in ratemaking for Lake Region and its predecessors. (Report and Order, Case Nos. SR-2010-0110 and WR-2010-0111, Paragraphs 159-161; page 98, paragraph numbered (6); *Order Regarding Motions for Rehearing, Motion for Reconsideration and Request for Clarification*, SR-2010-0110 and WR-2010-0111, issued and effective September 1, 2010, at page 3.) Lake Region and its shareholders (including RPS) have reasonably relied on that regulatory treatment. This question was addressed extensively in Lake Region's last rate case, Case No. WR-2010-

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<sup>1</sup> See, *Sapp v. City of St. Louis*, 320 S.W.3d 159 (Mo.App.E.D. 2010); *Twelve Oaks Motor Inn, Inc. v. Strahan*, 110 S.W.3d 404, 408 (Mo.App.S.D. 2003).

0111. The Report and Order in that case (issued August 18, 2010) contains 23 pages of discussion of the “availability fee” issue under *Findings of Fact* (from pages 43-65) and another 22 pages of discussion of the issue under *Conclusions of Law* (from pages 86-107).

11. Notwithstanding the long-standing consistency of the Commission’s treatment of these availability fees, the Commission did entertain the possibility of adopting a different view of the matter, *prospectively*, in its 2010 Report and Order in SR-2010-0110 and WR-2010-0111. However, the Commission declared that it would not change its policy of long-standing without a rulemaking. (Report and Order, pages 104-105.) The Commission conceded that even a finding that availability fees are a “service” does not confer jurisdiction over those fees to the Commission (Report and Order at page 102, first paragraph) and observed that such a determination “will have a future effect which will act on unnamed and unspecified persons and facts – persons or entities not party to this proceeding.” (*Id.*, page 103-104.) However, no rulemaking has been completed nor was ever actually undertaken.<sup>2</sup>

12. The Commission’s reasoning in WR-2010-0111 was clear – Lake Region may continue to rely on the Commission’s historic treatment of availability fees (not tariffed and not included in ratemaking) *at least* until a rulemaking is concluded that might facilitate a change to that historic treatment. Yet, Staff here wants to conduct a fishing expedition into the books and records of RPS Properties, L.P. and proceed as though the Commission had said no such thing.

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<sup>2</sup> See, Paragraphs 22-24 of RPS’ *Objections to Subpoena(s) and Motion to Quash* of January 13, 2014.

13. In undersigned counsel's 34 years at, on and around the Public Service Commission of Missouri, few if any cases may have cried out more loudly than the instant one for the Commission to refer and defer to its own precedent(s) by voluntarily practicing *stare decisis* or applying *quasi-estoppel*. In MoPSC Case No. WR-2010-01111, the Commission clearly expressed a willingness to move toward the position Staff and OPC advocated in that case (and are advocating in the instant case) and created a procedural pathway (rulemaking) for doing so.<sup>3</sup> That pathway was not followed by Staff and OPC. Until it is, this issue should not be reconsidered by the Commission.

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<sup>3</sup> RPS observes that it disagrees that the Commission has any legal right to appropriate or impute any revenues from availability fees toward the Revenue Requirement of Lake Region Water & Sewer Co. or for any other purpose.

WHEREFORE, RPS Properties, L.P., respectfully requests that the Commission issue an order quashing the Supboena Duces Tecum and other requests for documents caused to be served upon its Missouri registered agent by the Commission Staff in this case.

Respectfully submitted,

***/s/ William D. Steinmeier***

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ATTORNEY FOR RPS PROPERTIES, L.P.

Dated: January 22, 2014

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing document has been served electronically on all parties of record in this case on this 22<sup>nd</sup> day of January 2014.

***/s/ William D. Steinmeier***

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William D. Steinmeier