

**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, et. al**
Rate Increase in Water and Sewer Service)

**STAFF'S RESPONSE TO RPS PROPERTIES, L.P.'S
OBJECTIONS AND TO MOTION TO QUASH**

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and asks the Commission to deny RPS Properties, L.P.'s (RPS) *Motion to Quash*, stating:

1. On January 2, 2014, Staff served RPS, a Kansas partnership, with a *Subpoena Duces Tecum, Order to Produce Documents*,¹ inquiring into the fees it charges Missouri residents for a service it cannot provide, namely, the right to eventually connect to the water and sewer infrastructure of a Missouri regulated utility.² Specifically, Staff's subpoena requested that RPS produce:

copies of all reports, notes, memoranda, receipts, correspondence, or other documentation and records regarding availability fees or charges for the areas known as Shawnee Bend and Horseshoe Bend at or near Lake Ozark, Missouri, including, but not limited to, documents and records regarding the maintenance, collection, billing, administration, disbursement, profits, and dividends relating to availability fees, along with the attached Business Record Affidavit.

Pursuant to Rule 58.02(d), Staff sought and acquired the agreement of all parties to this case that RPS need not appear in person with the documents but could instead send the documents to Staff. The time specified for production of the requested documents

¹ Missouri Court Rule 58.02.

² Lake Region has repeatedly insisted in this case that it has no affiliates. If RPS is not an affiliate of Lake Region, how can it charge anyone for the right to connect to Lake Region's infrastructure? Even if RPS is an affiliate of Lake Region, monopoly public utilities such as Lake Region must provide services upon request to anyone in its certificated service area. Availability fees charged by a utility can serve multiple functions; availability fees charged by an entity separate from the utility are unjustifiable.

was 10:30 a.m. on the 13th day of January. The location specified for production of the requested documents, in the event RPS decided not to send the requested documents to Staff, was the Kansas City office of the Commission, which was chosen as a location most convenient to RPS in an attempt to fulfill Staff's responsibility to take reasonable steps to avoid imposing undue burden or expense on RPS (Rule 58.02(e)(1)).

2. On the morning of the 13th, since Staff had seen no objections to its request and received no documents, Staff attempted to contact RPS to determine whether the company intended to send a representative with documents to the location specified for production. Staff was unable to reach RPS and so sent one of its attorneys to the Kansas City office. By 10:30 a.m. on the 13th, Staff had received neither the requested documents nor objections, and RPS did not appear at the location specified in the subpoena.

3. Rule 58.02(e)(2) requires that a non-party commanded to produce documents serve the issuing party with written objections or a motion to quash "within 10 days after service of the subpoena or before the time specified for compliance, *whichever is earlier.*" [emphasis added] While RPS is correct that the tenth day after service was a Sunday, and thus the tenth day for computation of time purposes was Monday, January 13th, RPS was required to file its objections before the time specified for compliance, which was 10:30 a.m. on the 13th. RPS filed its objections and motion to quash at 2:37 p.m. on the 13th; thus, RPS' motion is not timely and should be denied. Without timely and specific objection, Staff is entitled to inspect and copy the documents it requested (Rule 58.02(e)(3)).

4. Assuming that Staff's subpoena was properly served (see legal basis for proper service below), RPS should not be excused from adhering to the rules of discovery based on an argument that its registered agent was slow to pass along Staff's subpoena. Staff could not foresee that a registered agent in Kansas City, Missouri, would require one week to deliver a subpoena to RPS' offices, which RPS points out are in Overland Park, Kansas, roughly a 15 minute drive away. Staff served its subpoena on RPS in plenty of time for RPS to hire an attorney and submit objections.³

5. Although Staff believes RPS' motion is not timely and should therefore be denied, Staff also asserts that the remainder of RPS' objections are unfounded, are inapplicable to the subpoena at issue, or are substantive arguments regarding the relevance of availability fees to the underlying case, which are themselves not relevant to whether Staff's subpoena should be quashed.

6. First, RPS' argument that the Commission does not have the legal right to subpoena the private business records of RPS is unfounded. RPS has cited no authority for the proposition that the Commission does not have the right to subpoena non-parties. On the contrary, Commission Rule 4 CSR 240-2.090 states, "[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Commission Staff, as a party to this case, may make use of any discovery method available to any party in a civil action in circuit court, including any method available for discovery directed to a non-party, such as Court Rule 58.02.

³ The Staff had further reason to believe that RPS would timely receive the Subpoena as it had served an earlier subpoena on RPS and received a response in this case.

7. Second, several of RPS' arguments regarding Court Rules are inapplicable to Staff's subpoena. For instance, Staff has not violated Rule 57.09 ("Subpoena for Taking Deposition") because it has not issued a subpoena for deposition of a representative of RPS. Staff also has not violated Rule 57.03 because, again, it did not seek to depose anyone. Staff has not violated any of Rule 58.01 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purpose") because it has not issued such a subpoena. Rule 58.01 is specifically for use only against parties, not non-parties, and Staff has made no request to enter the property of RPS. All of these arguments, which comprise paragraphs 7 and 8 of RPS' motion, are inapplicable to the subpoena at issue.

8. RPS' only argument pertaining to the Rule under which Staff issued its subpoena, Rule 58.02 ("Subpoena to Non-Party for Production of Documents and Things"), is that Staff's request is overbroad and imposes undue burden and expense on RPS. Related to this is RPS' argument that Staff's request is not specific and is a "fishing expedition." On the contrary, Staff knows exactly what it needs and has asked for it specifically; if RPS finds responding to Staff's request time-consuming, this is due to the nature of the information Staff must request in order to present a detailed case to the Commission regarding the scope of the availability fees RPS has collected and disbursed over the years. For instance, Staff seeks information that will allow it to determine the total amount of availability fees collect by RPS over the years, which goes to the question of whether those fees were used to recover investment, as has been argued. Staff seeks information that will allow it to determine what has been and is currently charged for availability fees annually, as well as what is actually collected, as it

is possible what is charged and what is collected are different. This goes to the question of what would be a just and reasonable amount to include in rates for Lake Region; Staff does not wish to over-estimate what is collected. Staff also seeks information that will allow it to determine how the availability fees revenue is disbursed and to whom, which goes to the question of how much of that revenue should be allocated to Lake Region. Again, Staff does not wish to over-estimate. These are some of the questions Staff is attempting to answer with its request. Just because responding to a request is time-consuming, which may or may not be the case, does not mean it is unduly burdensome, and just because the requested documents are of several different types does not mean the request is not specific.

9. RPS cites *State ex rel. Horenstein v. Eckelkamp*⁴ in support of its assertion that Staff's request is overly burdensome, particularly that complying with the request would require "an enormous and excessive amount of time and resources locating, identifying, copying and delivering these records." *Horenstein* is easily distinguishable from this matter. In *Horenstein*, the court determined that a portion of the information sought by subpoena was not limited to documents relating to the issues of that case. For that reason, the court judged the subpoena to be intrusive, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. There is no discussion in *Horenstein* regarding whether the amount of information sought was in itself overly burdensome, and there is no question that the subject of Staff's request is related entirely to the main issue of this case, namely availability fees.

⁴ 228 S.W.3d 56, 56-58.

10. RPS' final procedural argument against Staff's subpoena is that it was improperly served. Specifically, RPS claims that Staff should not have served its subpoena on the Missouri registered agent of RPS but rather on the custodian of records of RPS, presumably in Kansas. RPS states, "Subpoenas served on a corporation or partnership must be delivered to actual officers or employees. . . ." Although RPS cites no authority for its assertion, Staff assumes it refers to the statute regarding service of process on foreign corporations, which is Section 351.594. However, if this is the case, RPS is mistaken in its reading of this Section. First, Section 351.594(1) specifies that a "registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation." There is nothing in Court Rule 58.02 to indicate service of a subpoena to a non-party for production of documents may not be made on a foreign corporation. Therefore, the registered agent is the appropriate subject of service. Section 351.594(2) does allow for service of process on actual officers or employees, but this is only if the foreign corporation "Has no registered agent or its registered agent cannot with reasonable diligence be served. . . ."

11. Again, because RPS did not cite authority for its assertion that the registered agent of RPS is not the appropriate subject of a Rule 58.02 subpoena, Staff cannot be sure upon what legal basis RPS relied. However, based on the wording of RPS' assertion, it seems possible that RPS is confusing a subpoena with a summons. A summons is used to notify a person to appear in court to respond to a lawsuit, and the rules for serving a summons on a foreign corporation or partnership are found in

Section 506.150(3), which states that service shall be made, “by delivering a copy of the summons and of the petition to an officer, partner, a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof. . . .” Even if the subpoena Staff served was actually a summons and subject to Section 506.150(3), the statute goes on to say that service may also be made by delivery “to any other agent authorized by appointment or required by law to receive service of process. . . .” In short, Staff finds no applicable legal basis for RPS’ claim that Staff improperly served RPS through its registered agent in Missouri; its objection is unfounded.

12. The remainder of RPS’ arguments for quashing Staff’s subpoena relate to the relevance of the information Staff seeks to the case at hand. These arguments must be rejected. In its December 18, 2013 *Order Denying Evidentiary Motions*, the Commission decided that it was not appropriate to make a ruling on the relevance of availability fees testimony until the evidentiary hearing in this case,⁵ and also noted that issuing a ruling on the relevance of availability fees in this particular case would be, in effect, summary judgment, which is not permitted in rate cases.⁶ Furthermore, RPS’ arguments regarding relevance are essentially arguments against the admissibility of availability fees evidence in this case, and such arguments are not valid grounds for an objection to discovery, which may be had as long as the requested information “appears

⁵ “Lake Region also requests that the Commission strike portions of testimony pre-filed by Staff and OPC witnesses pertaining to availability fees. . . . Considering that this issue involves disputed material facts and that the Commission is not bound by its past decisions, the Commission concludes that it would be preferable for parties to make timely objections to offered evidence during the course of an evidentiary hearing, rather than attempting make such determinations at the present time.”

⁶ “Commission Rule 4 CSR 240-2.117(1)(A) states that “[e]xcept in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination . . .” (emphasis added) Therefore, the use of summary determination is not permitted in rate cases such as this one.” *Order Denying Evidentiary Motions*, December 18, 2013.

reasonably calculated to lead to the discovery of admissible evidence.”⁷ Staff’s subpoena is clearly calculated to lead to discovery of availability fees information and only availability fees information; any ruling that the substance of Staff’s subpoena is not relevant would effectively be a ruling on the admissibility of availability fees information in Lake Region’s rate case.

13. Although RPS’ arguments regarding availability fees are not relevant to the decision the Commission must make on the motion to quash, Staff notes that it disagrees with RPS’ position on availability fees as well as much of RPS’ representation of facts and history regarding availability fees. However, in the interest of not muddying the issue of the motion to quash, Staff refrains from delving into those arguments in this *Response* and instead offers Appendix A, attached to this *Response* and incorporated by reference herein, as a brief rebuttal of certain inaccuracies included in RPS’ discussion of availability fees.

WHEREFORE, Staff submits this *Response to Objections and to Motion to Quash*, asking that the Commission deny RPS’ *Motion to Quash* based on the forgoing reasons and grant what other relief it deems just and necessary.

⁷ Court Rule 56.01(b)(1). See also, *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. 1992). “Courts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is ‘relevant’ to the proceedings and subject matter of the case not protected by privilege. *State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan*, 777 S.W.2d 247, 251 (Mo.App.1989). It is not grounds for objection that the information may be inadmissible at trial, but it is sufficient if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Rule 56.01(b)(1)*.”

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 electronically mailed to all counsel of record this 17th day of January, 2014.

/s/ Amy E. Moore

Response to Inaccuracies in RPS Properties' Motion to Quash

RPS asserts that the availability fees revenue stream is the result of a contractual relationship between a subdivision developer and lot owners. It is true, but the revenue stream was also originally utility revenue per that same contract.

RPS asserts that Lake Region does not have access to the availability fees revenue stream. It is true that Lake Region assigned away its rights to receive availability fees revenue directly, and there is a prudence question regarding its decision to do so, which is relevant to the calculation of rates for this company.

RPS asserts that the question of availability fees was addressed extensively in Lake Region's last rate case. It is certainly true that this question was addressed. However, the question was not resolved, and the determinations made in the Commission's previous order, as well as the factual findings in that order, do not bind the current Commission.

RPS asserts repeatedly, often in bold type, that availability fees have never been tariffed or included by the Commission in ratemaking for Lake Region and its predecessors for the forty years they have been in existence. This is entirely inaccurate. Availability fees revenue was included in Lake Region's (then Four Seasons Lake Sites Water & Sewer Company) water rates on the Horseshoe Bend section of its system, which is now Ozark Shores. Ozark Shores, a Commission-regulated utility, continues to have rates that include availability fees revenue.

RPS also asserts repeatedly that including availability fees revenue in rates would be a substantial departure from past Commission decisions. As noted, Ozark Shores' rates include availability fees revenue (and as a related utility, Lake Region has been well aware of this), as does another regulated utility currently, and as did yet another regulated utility until fairly recently.

RPS asserts that neither Staff nor Public Counsel has filed a proposed rulemaking, despite the intention of the Commission as stated in its previous Lake Region order. It is true that none of the parties to this case, including the Company, has filed a proposed rulemaking regarding availability fees. However, the failure of a workshop to result in a rule does not mean the Commission is precluded from addressing the question in this rate case that is so clearly left unresolved. Furthermore, an unbiased review of the workshop docket RPS mentions must result in a conclusion, rather than unjustifiably and irresponsibly failing to produce a rule, a decision was made that the docket would be closed and any unresolved issues would be addressed on a case-by-case basis.