

**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)
Rate Increase in Water and Sewer Service) **File No. WR-2013-0461 et al.**

STAFF'S RESPONSE TO MOTION TO COMPEL

COMES NOW the Staff ("Staff") of the Missouri Public Service Commission ("Commission"), by and through counsel, and respectfully submits its *Response* asking that the Commission grant the Office of the Public Counsel's ("Public Counsel") *Motion to Compel Discovery and Request for Expedited Treatment (Motion to Compel)*.

On January 9, 2014, Public Counsel filed a *Motion to Compel* relating to a discovery dispute between Public Counsel and Lake Region Water & Sewer Company ("Lake Region"). On January 10, 2014, the Commission ordered Lake Region and Staff to respond to Public Counsel's *Motion to Compel* no later than January 14, 2014. While Staff and Lake Region do not currently have an active discovery dispute regarding availability fees in this case, Staff has an ongoing interest in gaining access to the same information Public Counsel seeks, and Staff is currently engaged in pursuing that information from entities other than Lake Region.

One part of Staff's pursuit of the availability fees information relevant to Lake Region's rate case was cited by Public Counsel in its *Motion to Compel* and in the Commission's order regarding that motion. On December 31, 2013, Staff made a request for records pursuant to the Missouri Sunshine Law directed to the

Camden County Public Water Supply District Number Four (“the District”).¹ Mr. John Summers is the custodian of records for the District.² Staff’s Sunshine Law request, directed to Mr. Summers, sought:

. . .all reports, notes, memoranda, receipts, correspondence, or other documentation and records in your possession relating to 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 by Camden County Public Water Supply District Number Four. Such documents and records should include information related to, but not limited to: number of accounts billed annually, total number of lots represented by the accounts billed annually, the current amount charged to each lot, total amounts collected annually, and total amounts dispersed annually and to whom.

In response to that request, Mr. Summers provided detailed information regarding the thirty-two customers the District bills for availability fees annually on behalf of itself but did not provide any information regarding any billing of availability fees it performs on behalf of other entities. Of specific concern to Staff, and evidently to Public Counsel, is the last sentence of Mr. Summers’ response, which stated that, “The District maintains its billing records on a computer owned by Lake Region Water & Sewer Company but has no authority to release any data maintained on the computer other than data belonging to the District and reflected on the Districts books of record.” This seems to indicate that the billing records the District produces regarding availability fees are maintained on a computer in the possession and control of Lake Region.

The Commission may look to the Missouri Supreme Court’s interpretation of Court Rule 58.01(a) for guidance on whether information stored on Lake Region’s

¹ Staff has sought related information from RPS Properties, L.P. by way of a non-party subpoena for production of documents, served on January 2, 2014. RPS Properties filed its *Objections to Subpoena(s) and Motion to Quash* on January 13, 2014.

² Mr. Summers is also the General Manger of the District and of Lake Region and has submitted testimony on behalf of Lake Region in its current rate case.

computer is discoverable from Lake Region as information in its “possession, custody or control.” In *Hancock v. Shook*, the Court explained that, “The basic test of the rule is ‘control’ rather than custody or possession,”³ and “control” is not about legal ownership.⁴ Instead, “documents are considered to be under a party's control when that party has the right, authority, *or practical ability to obtain* the documents from a non-party to the action.”⁵ [emphasis added]

What has become clear from the District’s response to Staff’s Sunshine Request is that Lake Region’s objections that it does not have possession or control of documents related to availability fees should not be upheld. The Commission need not be concerned with parsing the difference between actual physical possession versus legal possession because the Supreme Court has already said legal ownership is not the most important factor to consider with such an objection. What the Commission should rely on is that Lake Region has the “practical ability to obtain” the requested information from whatever non-party theoretically has legal ownership of it because that information is actually stored on Lake Region’s computer. Therefore, to the extent it is true that at least some of the information Public Counsel seeks is stored on a computer in the control of Lake Region – and this certainly appears to be the case judging by Mr. Summers’ letter – Staff supports Public Counsel’s legal arguments that Lake Region should produce this information.

Aside from the legal arguments regarding Public Counsel’s discovery dispute with Lake Region, Staff also sympathizes with Public Counsel’s frustration regarding what feels very much like a game of hide-the-ball. History has shown that

³ 100 S.W.3d 786, 796 (Mo. 2003).

⁴ 100 S.W.3d 786, 796 (Mo. 2003).

⁵ *Id.* at 797.

RPS Properties and its various affiliated entities are extremely reluctant to provide the Commission with information regarding availability fees and are willing to employ a multitude of tactics to avoid providing that information to the Commission. Knowing that Lake Region would continue to insist it had no access to or authority over the information Staff seeks and that RPS Properties in the past has mounted a vigorous fight against providing that information, Staff chose to include in its discovery plan what should have been the most direct route of acquiring part of the information Staff seeks: Staff requested information about the relevant availability fees from the public entity, the District, that actually bills the individuals who pay those availability fees, pursuant to the law that requires from such entities a level of transparency that strongly favors the public and is only narrowly construed to allow for some exceptions to that transparency.

In response to that request, the District seems to rely upon a theory that the records it generates on behalf of another entity, namely RPS properties, are not records subject to the Missouri Sunshine Law, especially if the District successfully squirrels those records away on a third entity's (Lake Region) computer. Staff found this response unsatisfactory. On January 9, 2014, Staff sent Mr. Summers a letter requesting that the District provide a written statement, pursuant to Section 610.023(4), RSMo, of the legal grounds for its denial of Staff's request, to the extent the request was denied.⁶ Staff received a response on January 10, 2014, indicating that the District believes it fully complied with Staff's request and stating, "If your request is regarding records owned by parties other than the District the District's role as contractor does not grant us the authority to release those records. Please request those records from the

⁶ Staff acknowledges that the District provided records of the availability fees billing it conducts on behalf of itself.

party who owns them.” Staff will continue to communicate with the District regarding this matter until Staff agrees the District has no legal obligation to provide the entirety of what Staff requested or until Staff must decide whether to pursue enforcement of the District’s compliance with Missouri’s Sunshine Law.

While Staff continues to take what steps are necessary to acquire the information it needs to present a competent case to the Commission, Staff notes that this group of affiliated entities continues to resist providing the Commission with any details about the availability fees it collects. Specifically, as the Commission is aware, RPS Properties has filed objections and a motion to quash Staff’s subpoena for documents regarding availability fees. With this in mind, Staff is considering moving the Commission to extend the discovery period and postpone the hearing dates in this rate case. It is not in the best interest of the public or of the Commission to reach the hearing date without having fully exhausted all options for discovery on this issue, and though it may be in the interest of the company to run out of time, in the interest of efficiency and justice, Staff argues that the Commission should have the opportunity to consider a full body of evidence in order to resolve this issue that has lingered for several years now. Though Staff is not yet asking for postponement of the hearing, in the interest of preparing the Commission for such a motion, Staff notes that the operation of law date for Lake Region’s suspended tariffs is not until June 13, 2014.

WHEREFORE, for the reasons set forth above, Staff asks that the Commission grant the Office of the Public Counsel’s *Motion to Compel Discovery and Request for Expedited Treatment* as well as what other relief the Commission deems just and appropriate.

Respectfully Submitted,

/s/ Amy E. Moore

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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 14th day of January, 2014.

/s/ Amy E. Moore