

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 5th day of
February, 2014.

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

ORDER REGARDING MOTION TO QUASH LAKE REGION'S SUBPOENA

Issue Date: February 5, 2014

Effective Date: February 5, 2014

On July 16, 2013, Lake Region Water & Sewer Company ("Lake Region") filed its formal request to increase rates for its utility service. On January 21, 2014, RPS Properties, L.P. ("RPS"), which is not a party to this case, filed a motion asking the Commission to quash a subpoena duces tecum served on January 17, 2014, by which Lake Region seeks to obtain records from RPS. The Lake Region subpoena and RPS motion to quash are substantially similar to a Staff subpoena and related RPS motion to quash that was previously resolved by the Commission in this case by order issued on January 22, 2014. More than ten days have elapsed since the motion was filed, and no party has responded or objected to RPS's motion to quash the subpoena.¹

RPS objects to the Lake Region subpoena on the following grounds:

- The Commission has no legal jurisdiction over RPS and no legal right to subpoena its private business records.
- The subpoena does not specify the particular document or record to be produced.

¹ Commission Rule 4 CSR 240-2.080(13) states that "[p]arties shall be allowed ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission".

- The subpoena was not issued in compliance with Missouri Supreme Court Rules 57.09 or 58.01.
- The subpoena is overbroad and imposes undue burden and expense on RPS.
- The information sought by the subpoena is irrelevant because availability fees should not be a legitimate issue in this case.

RPS asserts that there is no provision in state law that would allow the Commission to issue a subpoena to a non-party, such as RPS. RPS is a shareholder of Lake Region and allegedly possesses information relevant to one of the issues in this case. Section 393.140(10), RSMo 2000, gives the Commission the authority to “subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.”² That statute also provides that the Commission has the “power to compel, by subpoena duces tecum, the production of any accounts, books, contract, records, documents, memoranda and papers”.³ In addition, Section 386.420.2, RSMo Supp. 2012, explicitly authorizes the Commission, any Commissioner, or any party in any hearing before the Commission to “cause the deposition of witnesses”, and “to that end may compel the attendance of witnesses and production of books, waybills, documents, papers, memoranda, and accounts.” That authority is not limited to persons and corporations subject to the Commission’s supervision. Missouri’s courts have made it clear that the Commission has the authority to inquire into matters beyond the strict confines of utilities directly subject to the Commission’s regulation, where those entities are closely related to the regulated utility.⁴ In addition, Section 386.450, RSMo 2000,

² This proceeding is brought pursuant to the authority granted to the Commission by Sections 393.140 and 393.150, RSMo 2000, to generally supervise water and sewer corporations and approve their rates.

³ Section 393.140(9), RSMo 2000.

⁴ See, *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870 (Mo App. W.D. 1985); *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 764, (Mo. banc 2003).

authorizes the Commission, on its own initiative, to require “any corporation, person or public utility” to produce “any books, accounts, papers or records” kept by the person or entity. The Commission concludes that it has the legal right to subpoena the RPS business records.

RPS also asserts that the subpoena is improper because it does not specify the particular document or record to be produced. Commission Rule 4 CSR 240-2.100(1) requires that “[a] request for a subpoena *duces tecum* shall specify the particular document or record to be produced”. While the subpoena does not state the title or name of a particular document, it does describe the documents or records sufficiently for RPS to identify what is being requested. The Commission concludes that the subpoena does not violate Commission Rule 4 CSR 240-2.100(1) and should not be quashed on those grounds.

RPS alleges that the subpoena was not issued in compliance with Missouri Supreme Court Rules 57.09 or 58.01. However, since RPS is not a party to this proceeding, the relevant rule is Supreme Court Rule 58.02, which concerns subpoenas served on non-parties. Therefore, any alleged deficiencies under other rules are irrelevant and not grounds for quashing the subpoena.

RPS argues that the subpoena is overbroad and imposes an undue burden and expense on it. Discovery requests are improper when overbroad, burdensome and oppressive.⁵ The Lake Region subpoena requires RPS to produce “all reports, notes, memoranda, receipts, correspondence, or other documentation and records depicting or regarding charges for available water and sewer connections – sometimes referred to as

⁵ *State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan*, 777 S.W.2d 247, 252 (Mo. Ct. App. 1989); *State ex rel. Horenstein v. Eckelkamp*, 228 S.W.3d 56, 56-58 (Mo. Ct. App. 2007).

availability fees – assessed against owners of lots in areas known as Shawnee Bend and Horseshoe Bend at or near Lake Ozark, Missouri, or the Lake of the Ozarks generally including, but not limited to, documents and records regarding the maintenance, collection, billing, administration, disbursement, deposit, or withdrawal of availability fees ...” Notably, the subpoena does not include any time limitations. RPS contends that since availability fees have been collected for more than 40 years, compliance with the subpoena will require it to expend enormous amounts of time and resources.

Courts have the authority to quash or modify a subpoena if it is unreasonable or oppressive.⁶ The Commission agrees with RPS that the request as written is overbroad and unduly burdensome. However, Staff alleges in its pre-filed testimony that availability fees should be included as revenue in Lake Region’s cost of service. Revenue received by Lake Region during the test year (the 12 months ending June 30, 2013) is relevant in determining its cost of service. The Commission finds that the information requested by the subpoena for the test year is relevant and production of that limited amount of information would not be unduly burdensome to RPS. The request for information for times other than the test year would be overbroad, burdensome and oppressive to RPS. The Commission concludes that the subpoena should be modified to include only the documents described in the subpoena that pertain to the rate case test year.

Finally, RPS contends that the information sought by the subpoena is irrelevant because availability fees should not be a legitimate issue in this case. RPS alleges in its motion a detailed history of the availability fee issue both in Lake Region’s immediately preceding rate case (File Nos. SR-2010-0110 and WR-2010-0111) and during the time

⁶ *State ex rel. Pooker ex rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. 2007); *Johnson v. State*, 925 S.W.2d 834, 837 (Mo. 1996).

after the conclusion of that case and argues that the prior case decision forecloses consideration of the issue in this case. However, the Commission's past decisions do not restrict the Commission's decisions in this case or constitute a body of case law, like appellate court opinions with the weight of stare decisis. Stare decisis does not bind the Commission to past decisions.⁷ Since the issue of availability fees has been raised in the pre-filed testimony and pleadings, it is a legitimate issue in this case at this point in time regardless of RPS's opinion to the contrary. The Commission concludes that the subpoena should not be quashed for that reason.

THE COMMISSION ORDERS THAT:

1. RPS Properties, L.P.'s *Objections to Subpoena and Motion to Quash* filed on January 21, 2014, is granted, in part, and denied, in part, and the Lake Region subpoena modified, as described in the body of this order.
2. This order shall become effective immediately upon issuance.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.

Bushmann, Regulatory Law Judge

⁷ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).