

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

In the Matter of Lake Region Water &)	<u>File No. SR-2010-0110</u>
Company's Application to Implement a General)	Tariff No. YS-2010-0250
Rate Increase In Water and Sewer Service)	

In the Matter of Lake Region Water &)	<u>File No. WR-2010-0111</u>
Company's Application to Implement a General)	Tariff No. YW-2010-0251
Rate Increase In Water and Sewer Service)	

**OBJECTIONS TO SUBPOENA AND
MOTION TO QUASH**

RPS Properties, L.P. ("RPS"), a Kansas limited partnership whose principal office is located at 10777 Barkley, Suite 210, Overland Park, Kansas 66211, by and through its undersigned attorney, and pursuant to 4 CSR 240-2.100(3) and the *Order Directing Discovery and Directing Filing*, which was issued in the above-captioned cases on April 8, 2010, hereby files the following objections to the subpoena duces tecum that was issued on April 14, 2010, at the request of the Missouri Public Service Commission Staff ("Staff"). The subpoena was served on RPS on April 16, 2010. Because the Missouri Public Service Commission ("Commission") lacks the statutory authority to issue this subpoena and also because Staff has failed to observe and comply with principles and rules generally applicable to subpoenas duces tecum issued to a non-party witness, the Commission should grant this motion to quash the subpoena and thereby release RPS from the obligations stated therein.

In support of its motion, RPS states as follows:

1. RPS is a Kansas limited partnership. RPS holds a Certificate of Foreign Limited Partnership, issued by the Missouri Secretary of State, and conducts business in this state under the registered fictitious name "Lake Utility Availability 1." RPS is not a "water corporation," a "sewer corporation," or a "public utility," as each of those terms is defined in Section 386.020, RSMo, and none of RPS's business activities is subject to regulation by the Commission under applicable law.

2. RPS is not a party to either of the above-captioned cases, and its relationship to any matters at issue in those cases is purely tangential. Pursuant to rights duly and lawfully obtained or acquired by RPS, the company has collected and continues to collect availability fees from certain property owners in the area known as Shawnee Bend, which is located at or near the Lake of the Ozarks. Those fees do not involve or relate to any "service," as that term is defined in Section 386.020(48), RSMo, provided by Lake Region Water & Sewer Company ("LRWS"), either currently or in the past, and are not included in LRWS's tariff. Instead, the basis for a property owner's obligation to pay an availability fee is a certain Declaration of Restrictive Covenants, as amended, which imposes and creates mutual equitable servitudes and reciprocal rights on and among the owners of lots in the Shawnee Bend area.

3. The subpoena issued to RPS requires the company to "designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf" to appear at the Camden County Prosecuting Attorney's office at 9:00 a.m. on April 27, 2010, "to testify at a deposition in the matter of Lake Region Water & Sewer Company's Application to Implement a General Rate Increase in Water and Sewer Service." In addition, the subpoena requires RPS to produce, at the same time and place:

all reports, notes memorandum [sic.], receipts, correspondence, or other documentation and records relating to Lake Region Water & Sewer Company, Lake Utility Availability and Lake Utility Availability 1 regarding to [sic.] availability fees or charges for the area known as Shawnee Bend at or near Lake Ozark Missouri, and including, but not limited to the acquisition of the right to receive or otherwise collect availability fees; the maintenance, collection, billing, administration, distribution, profits, dividends, and office supplies relating to availability fees; for inspection and copying . . .

4. Because RPS's primary business office is located in Kansas, in order to comply with the subpoenas the company's representative will be required to identify, accumulate, and copy whatever documents may be responsive to the subpoena duces tecum and then travel with those documents more than 320 miles round trip. In addition to whatever time and expense the company will incur identifying and accumulating responsive documents, its representative will

also be required to devote one or more days to deliver the subpoenaed materials and to give his/her deposition. This is a significant burden to impose on a company that is not a party to, and that has no interest in, either of the pending rate cases.

5. It also is likely that some or all of the documents, records, and other materials sought from RPS through the subpoena duces tecum also have been requested from one or more of the five (5) or more other parties and non-parties who have been served with similar subpoenas to give depositions and produce documents at the same time and place as RPS. Accordingly, it appears that RPS is being asked to bear the significant burdens imposed by the subpoena to produce materials and testimony that almost certainly will be duplicated by one or more other persons, at least some of whom are parties to this case. No justification therefore exists for Staff to require RPS, a non-party, to expend the time and effort, and to bear the expense, associated with the subpoena, especially when other, less oppressive means exist for Staff to obtain the information it seeks from RPS. Considerations of fairness to a non-party, alone, warrant quashing RPS's subpoena.

6. A further reason to quash the subpoena is that the Commission has no authority to issue a subpoena to compel a non-party to attend a deposition and give testimony. Section 386.440, RSMo, governs both the Commission's authority to issue subpoenas and the procedures that must be followed to obtain and serve those subpoenas. Under subsection 1 of the statute, the scope of that authority is limited to witnesses "who shall appear before the commission or a commissioner by its or his order." Therefore, the Commission's ability to issue a subpoena to compel testimony is limited to those situations where the testimony will be given before the full Commission or one or more commissioners. Witnesses at depositions do not "appear before the commission or a commissioner"; consequently, the Commission has no authority to issue a subpoena to compel a witness to attend a deposition and give testimony. Because the subpoena exceeds the Commission's authority under Section 386.440.1, RSMo, it is unlawful and should be quashed.

7. In its application for the subpoena here at issue Staff cites several statutes and rules including 4 CSR 240-2.100, which is the Commission's rule governing the issuance of subpoenas. Based on that citation, RPS anticipates that Staff will attempt to rely on 4 CSR 240-2.100 as authority for the subpoena that was issued. But that reliance would be both misplaced and unfounded because although the Commission has broad authority under Section 386.410, RSMo, to promulgate rules of procedure and evidence to govern its own proceedings, the scope of such rules cannot exceed whatever limitations on the Commission's authority are prescribed or implied by statute. It is well established that an administrative agency, like the Commission, enjoys no more authority than that which is granted to it by statute, and that an agency cannot infer authority from a statute simply because that power would facilitate accomplishment of an end deemed beneficial. *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 303-04 (Mo.App. 1997). Accordingly, rules that exceed the authority of the promulgating agency are null and void. *Id.* at 304.

8. In addition, there is no language in Section 386.440, RSMo, that specifically authorizes the Commission to issue a subpoena duces tecum. Instead, as noted previously in this motion, the statute only provides a means to compel a "witness" to "appear before the commission or a commissioner." Therefore, if the Commission has any authority to compel a non-party to produce documents, the circumstances under which that can occur are limited to situations where the non-party witness "appear[s] before the commission or a commissioner by its or his order." Because depositions do not involve an appearance "before the commission or a commissioner," the Commission had no authority to issue the subpoena duces tecum here at issue. The unlawful subpoena therefore should be quashed.

9. Among the other citations of authority that appear on Staff's application for the subpoena here at issue is Rule 57.09(b), Missouri Rules of Civil Procedure, which prescribes the rules governing the production of documents in conjunction with depositions taken in civil court proceedings. Staff's reliance on this rule appears to be based on 4 CSR 240-2.090(1), which states

that discovery in proceedings before the Commission “may be obtained by the same means and under the same conditions as in civil actions in circuit court.” Although the Missouri Rules of Civil Procedure provide the basis and means for a circuit court to issue a subpoena duces tecum, merely incorporating by reference the civil court’s “means and conditions” of discovery does not provide an independent basis for the Commission to issue a subpoena duces tecum to RPS. Because Section 386.440, RSMo, does not provide authority to the Commission to issue a subpoena duces tecum to a non-party, no rule can expand the Commission’s powers to include that authority.

10. But to the extent Rule 57.09, Missouri Rules of Civil Procedure, applies here, subsection (c) of the rule specifies certain protections and considerations that must be observed if a subpoena duces tecum is served on a non-party. These include: (i) the requirement that the attorney responsible for the issuance of the subpoena “take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena”; (ii) the ability of a non-party served with a subpoena to file a written objection; and (iii) a provision that, after the timely filing of an objection, prevents the party seeking discovery from inspecting or copying the subpoenaed materials “except pursuant to an order of the court.” Staff’s counsel failed to take any steps to avoid imposing undue burden and expense on RPS, which necessitated the filing and prosecution of this motion to quash. As a consequence, the documents, records, and other materials requested from RPS will remain unavailable to Staff unless and until it obtains a court order granting access to those materials.

11. As noted previously, in seeking the subpoena duces tecum here at issue Staff’s counsel has imposed significant burdens of time, effort, and expense on RPS that are contrary to the dictates of Rule 57.09(c). But however great these burdens are on their own, they are compounded by Staff’s egregious conduct with respect to the scheduling of RPS’s deposition. Staff has issued subpoenas duces tecum to at least six witnesses for depositions and document productions that are scheduled to commence at the same time and at the same place on April 27th.

The following excerpt from a letter from Staff's counsel, which accompanied RPS's subpoena, explains the schedule and process that Staff intends to follow that date:

Please be advised that I will be reviewing the documents for the first time at the deposition and all deponents will not be excused until I am able to review the documents and question the individual about the documents. Therefore, it will take extra time to conduct each deposition (of which multiple witnesses will be deposed).

Based on this statement, it is uncertain what time RPS's representative actually will give his/her deposition on April 27th. In fact, it is possible – indeed likely – that, due to the number of subpoenas that have been issued, the volume and nature of the materials that may be produced in response to those subpoenas, and the time it will take Staff to review those materials, some or all of the persons who have been summoned to give depositions on April 27th will not be able to do so. Even under the best of circumstances, RPS's representative and all of the other subpoenaed witnesses will be forced to waste some or all of April 27th waiting for Staff's counsel to review the subpoenaed materials and commence the scheduled depositions. The cavalier and uncaring attitude displayed by Staff's counsel toward RPS and the other subpoenaed witnesses is the antithesis of the consideration toward a non-party witness that a counsel requesting subpoenas is required to show under Rule 57.09(c), Missouri Rules of Civil Procedure.

12. The subpoena should also be quashed because Staff has failed to advance RPS any of the witness fees and other expenses to which it is entitled. Both Rule 57.09, Missouri Rules of Civil Procedure, and Section 386.440, RSMo, require the payment of witness fees and further provide for reimbursement of all reasonable costs of production that are incurred by non-parties to produce documentary evidence and materials pursuant to a subpoena duces tecum. However, the subpoena issued to RPS did not advance any fees whatsoever, and Staff has not stated or otherwise indicated that it will be willing to reasonably compensate RPS for the time, effort, and expense that the company and its representative will be required to expend or incur to identify, gather, and print or copy the documents, records, and other materials called for by the subpoena duces tecum, and then to travel to Camdenton to produce those documents and give a deposition.

The applicable law is clear: as a non-party, RPS should not be required to give a deposition or to respond to a subpoena duces tecum unless and until it has been fully and fairly compensated to do so. Consequently, RPS should be relieved of any obligation to comply with the subpoena until: (i) Staff has agreed to pay all witness fees and travel expenses to which RPS and its representative are entitled and to reimburse the reasonable costs of complying with the subpoena duces tecum; (ii) the Commission has authorized such payments; and (iii) RPS has received the compensation to which it is entitled in advance of the date on which the deposition and production of documents is scheduled.

WHEREFORE, for any or all of the reasons stated herein, the Commission should grant this motion and should quash the subpoenas issued to RPS that require the company's designated representative to appear for a deposition and to produce documents at 9:00 a.m. on April 27, 2010.

Respectfully submitted,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By: /s/ L. Russell Mitten
L. Russell Mitten MBN 27881
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
rmitten@brydonlaw.com
(573) 635-7166 (phone)
(573) 635-0427 (fax)

ATTORNEYS FOR RPS PROPERTIES, L.P.

Certificate of Service

I hereby certify that the foregoing has been sent by United States mail, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record on the 23rd day of April, 2010.

/s/ L. Russell Mitten