

**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**

Sally Stump ("Stump"), an individual, by and through her 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"). That subpoena, which orders Stump to appear for a deposition and also to produce records, documents, and other requested materials, was served on Stump in Alpine, Texas, on April 21, 2010. Because the Missouri Public Service Commission ("Commission") lacks the statutory authority necessary to issue the 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 Stump from the obligations stated therein.

In support of her motion, Stump states as follows:

1. Stump is a resident of the state of Texas, whose address is 47203 Highway 118, Alpine, Texas 79830. She is not a party to either of the above-captioned cases, and her only relationship to any party to the cases is that she serves on the board of directors of Lake Region Water & Sewer Company ("LRWS").

2. Although, as will be described below, there is considerable confusion regarding what Stump must do to comply with her subpoena, it appears she will be required to appear at the

Camden County Prosecuting Attorney's office, either in person or by telephone, 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," and 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 . . .

3. The confusion regarding Stump's obligations under the subpoena here at issue are the result of contradictory instructions that appear on: (i) two different versions of the subpoena that were served on Stump; (ii) Staff's letter requesting the subpoena; and (iii) the return notice that Staff filed on April 22, 2010. The contradictory information included in those documents is as follows:

- One version of the subpoena, which bears the Commission's seal and is signed by Regulatory Law Judge Stearley, and which is attached to this motion as Exhibit 1, states that Stump is to appear on April 27th "via telephone";
- A second version of the subpoena, which is attached as Exhibit 2, appears to have been generated in Texas and is signed by Jennie Beth Fannin as "Attorney of Record" for the Secretary of the Commission. That subpoena commands Stump to "attend and give testimony at a deposition . . . at the Camden County Prosecuting Attorney's Office," thereby implying she must attend the deposition in person;
- Staff's letter requesting Stump's subpoena, which is attached as Exhibit 3, states that the subpoena is "for the attendance" of Stump at a deposition at the Camden County Prosecuting Attorney's office "beginning on **April 27, 2010 at 9:00 a.m.** and continuing thereafter until excused" (emphasis original); and
- Staff's "Notice of Subpoena Duces Tecum Return," which is attached as Exhibit 4, states that Stump's deposition will be "via telephone."

These contradictory statements make it impossible for Stump to know where and/or how she is supposed to comply with the subpoena. Therefore, she should not be required to do so until, at a minimum, she receives clear and non-contradictory instructions.

4. Although Stump serves on the board of directors of SRWS, she is not involved in the day-to-day operation or management of the company and is not regularly present at its business office in the state of Missouri. From her home in Texas, Stump has no access to, and therefore no ability to produce, any documents, records, or other materials that belong or are related to SRWS, its business, or operations. In addition, due to her limited role in the company, it is unlikely that Stump has any information that would be germane or relevant to issues in either of the pending rate cases.

5. In stark contrast to the negligible benefit that likely will result from Stump's compliance with Staff's subpoena, compelling compliance with that subpoena will impose significant burdens on Stump. For example, to comply with the subpoena duces tecum by producing in Camdenton, Missouri, any or all of the materials Staff has requested, Stump will be required to travel almost 2,000 miles round trip to LRWS's offices to identify and accumulate whatever documents, records, or other materials may exist that are responsive to the subpoena. This will almost certainly require multiple travel days and significant expenditures for air travel and lodging. Stump may also be required to expend additional time, and to incur additional expense, to print or copy the subpoenaed materials, produce them in Camdenton, and also to prepare for and give her deposition. It is fundamentally unfair for Staff to impose such a significant burden of both time and expense on an individual who is not a party to, and who has no direct interest in, either of the pending rate cases.

6. The Commission should also take note that whatever information Stump may provide through her deposition, as well as most or all of the documents, records, and other materials sought from her through the subpoena duces tecum, are likely available, and also have been requested, from one or more of the five other parties and non-parties who have been subpoenaed to give depositions and produce documents at the same time and place as Stump. Under such circumstances, it is unfair to require Stump to bear the previously described burdens if whatever

testimony she may give and whatever documents she may produce almost certainly will be duplicated by one or more other persons, some of whom are parties to this case. This is especially true in light of the fact that other, less burdensome means likely exist for Staff to obtain from Stump any information that she, alone, may have.

7. Stump's subpoena should also be quashed because the Commission has no authority to issue a subpoena to be served beyond the borders of the state of Missouri. Section 386.440, RSMo, which governs both the Commission's authority to issue subpoenas and the procedures that must be followed to obtain and serve those subpoenas, states in subsection 1 as follows: "All subpoenas shall be signed and issued by a commissioner or by the secretary of the commission, *and shall extend to all parts of the state.*" (emphasis added). Issuing a subpoena to a Texas resident and serving the subpoena in Texas are clearly outside the scope of the powers granted to the Commission by that statute.

8. The scope of the Commission's subpoena power under Section 386.440.1, RSMo, is further limited to witnesses "who shall appear before the commission or a commissioner by its or his order." Because witnesses at depositions do not "appear before the commission or a commissioner," the Commission has no authority to issue a subpoena to compel a witness to give deposition testimony. In addition, there is no language in the statute that specifically authorizes the Commission to issue a subpoena duces tecum to a non-party. And even if such authority can be implied, it, too, would be limited to circumstances where the responding witness is asked to "appear before the commission or a commissioner."

9. 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, Stump 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 specifically prescribed 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.

10. 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 Stump. 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.

11. 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 Stump, which necessitated the filing and prosecution of this motion to quash. As a consequence, the documents, records, and other materials requested from Stump will remain unavailable to Staff unless and until it obtains a court order granting access to those materials.

12. 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 Stump that are contrary to the dictates of Rule 57.09(c), Missouri Rules of Civil Procedure. But however great these burdens are on their own, they are compounded by Staff’s egregious conduct with respect to the scheduling of Stump’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 Stump’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 Stump actually will give 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, Stump 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 documents and commence the scheduled depositions. The cavalier and uncaring attitude displayed by Staff’s counsel toward Stump 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.

13. Stump's subpoena also should be quashed because Staff has failed to advance her the witness fees and other expenses to which she 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 who are compelled to produce documents and materials pursuant to a subpoena duces tecum. However, the subpoena issued to Stump included with it an check for only \$10.00, an amount that will not begin to compensate her for the time, effort, and expense she 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 travel to Camdenton to produce those documents and give her deposition. The applicable law is clear: as a non-party, Stump should not be required to appear to give a deposition or to respond to a subpoena duces tecum unless and until she has been fully and fairly compensated to do so. Consequently, Stump 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 she is entitled and to reimburse the reasonable costs of complying with the subpoena duces tecum; (ii) the Commission has authorized such payments; and (iii) Stump has received the compensation to which she 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 Stump that require her 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

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ATTORNEYS FOR SALLY STUMP

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 26th day of April, 2010.

/s/ L. Russell Mitten