

**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 SUBPOENAS AND
MOTION TO QUASH**

Cynthia Goldsby ("Goldsby"), 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 deposition subpoena and subpoena duces tecum, that were issued on April 14, 2010, at the request of the Missouri Public Service Commission Staff ("Staff"). These subpoenas were served on Goldsby on April 15, 2010. Because the Missouri Public Service Commission ("Commission") lacks the statutory authority to issue these subpoenas 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 subpoenas, and thereby release Goldsby from the obligations stated therein.

In support of her motion, Goldsby states as follows:

1. Goldsby is a full-time employee of Public Water Supply District No. 4 of Camden County, and neither she nor her employer is a party to either of the above-captioned rate cases. Goldsby is not, as alleged in Staff's letter requesting the subpoenas here at issue, "the accountant of Lake Region Water & Sewer Company." Her relationship to Lake Region Water & Sewer Company ("LRWS") is limited to the following: pursuant to an agreement between the Public Water Supply District No. 4 of Camden County and LRWS, Goldsby sends out monthly bills to customers, collects payments from those customers, and then deposits those payments in an

appropriate bank account. Goldsby has a similar relationship with RPS Properties, L.P. (“RPS”), d/b/a Lake Utility Availability 1: pursuant to an agreement between her employer and RPS, Goldsby also sends out monthly bills for availability fees payable to RPS, collects those fees, and then deposits the payments in an appropriate bank account. Goldsby has no direct relationship with LRWS or RPS, either as an employee or a contractor. Whatever work she performs for either of those companies is done solely on an indirect basis in her capacity as an employee of Public Water Supply District No. 4 of Camden County.

2. The subpoenas issued to Goldsby require her 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 duces tecum requires her 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. Because her involvement with the rates and charges of SRWS and the availability fees assessed by RPS is limited to sending out bills and collecting and depositing remittances, Goldsby has little, if any, information that would be germane or relevant to issues in either of the pending rate cases. In addition, whatever records, documents, or other materials Goldsby has access to that may be responsive to the subpoena duces tecum here at issue do not belong to Goldsby but, instead, are the property of Public Water Supply District No. 4 of Camden County, LRWS, or RPS. Consequently, Goldsby’s ability to produce any such records, documents, or other materials that may be relevant to matters at issue in the pending rate cases, is questionable,

at best, and could only occur if the lawful owner of those records, documents, or materials gives its consent to such production.

4. Staff is aware – or should be aware – of all of these facts. Moreover, some or all of the documents, records, and other materials the subpoena duces tecum orders Goldsby to produce also have been requested from one or more of the other parties or non-parties who have been served with similar subpoenas to give depositions and produce documents at the same time and place as Goldsby. Accordingly, both the testimony sought from Goldsby and the documents, records, and other materials she has been ordered to produce will almost certainly be duplicated by one or more other persons, at least some of whom may be parties to this case. No justification therefore exists for Staff to require Goldsby, a non-party, to expend the time and effort, and to bear the expense associated with, contesting and/or complying with the subpoenas that have been issued to her. Considerations of fairness to a non-party, alone, warrant quashing Goldsby's subpoenas.

5. A further reason to quash the subpoenas 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 that statute, the scope of that authority is limited to witnesses "who shall appear before the commission or a commissioner by its or his order." Based on that language, 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. Because witnesses at depositions do not "appear before the commission or a commissioner," the Commission has no authority under the applicable statute to issue a subpoena to compel a witness to attend a deposition and give testimony. Because the subpoena that purports to compel Goldsby to appear and give testimony at a deposition exceeds the Commission's authority under Section 386.440.1, RSMo, the subpoena is unlawful and should be quashed.

6. In its application for the subpoenas here at issue, Staff cites 4 CSR 240-2.100 – the Commission’s rule governing the issuance of subpoenas – as a basis for the issuance of those subpoenas. Based on the citation, Goldsby anticipates that Staff will attempt to rely on that rule as authority for the subpoenas that were issued. But that reliance is 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 any limitations on the Commission’s authority that are prescribed or implied by a specific statute. It is well established both 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.

7. In addition, there is no language in Section 386.440, RSMo, that specifically authorizes the Commission to issue a subpoena duces tecum for the production of records, documents, or other materials by a non-party. 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, to the extent the Commission has the statutory authority necessary to compel a non-party to produce documents under any circumstances, those circumstances would be 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. That subpoena is unlawful and therefore should be quashed.

8. Among the other citations of authority that appear on Staff’s application for the subpoenas issued to Goldsby 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 apparently relies on this rule because 4 CSR 240-2.090(1) 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, the Commission rule that incorporates by reference the “means and conditions” of discovery rules applicable in civil court does not provide an independent basis for the subpoena duces tecum issued to Goldsby by the Commission. That is true because, as noted previously, such a subpoena is beyond the scope of the Commission’s authority under Section 386.440, RSMo.

9. To the extent Rule 57.09 applies here, subsection (c) of the rule specifies certain considerations that must be observed and protections that must be afforded a non-party who is served with a subpoena duces tecum. These include: (i) the requirement that the attorney responsible for the issuance of a 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 to that subpoena; and (iii) a provision that, after the timely filing of an objection, prevents the party seeking discovery from inspecting or copying the requested 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 Goldsby, and that failure necessitated the filing and prosecution of this motion to quash. Another consequence of Staff’s failure to observe the considerations and protections required by Rule 57.09(c) is that the documents, records, and other materials requested from Goldsby will remain unavailable to Staff unless and until it obtains a court order granting access to those materials.

10. It is clear that in seeking the subpoena duces tecum here at issue Staff’s counsel has imposed significant burdens of time, effort, and expense on Goldsby that are contrary to the dictates of Rule 57.09(c). Among these burdens are the expenses she will incur to file and prosecute this motion to quash, and the time she will be required to spend identifying, accumulating, and printing or copying documents and other materials – assuming she receives

permission to do so – and preparing for her deposition. Beyond that, however, Staff's conduct with respect to the scheduling of Goldsby's deposition is particularly egregious and burdensome.

11. Staff has issued subpoenas to at least six (6) witnesses, along with associated subpoenas duces tecum, for depositions 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 Goldsby's subpoenas, 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 Goldsby actually will give her deposition on April 27th. In fact it is possible – indeed likely – that, because of the number of subpoenas that have been issued, the volume and nature of the materials that may be produced in response to the numerous subpoenas duces tecum, and the time it will take Staff to review those materials, some or all of the persons who have been subpoenaed to give depositions that date will not be able to do so. Even under best of circumstances, Goldsby and the other subpoena recipients will be forced to waste some or all of their day on April 27th waiting for Staff's counsel to complete its review of documents and actually commence the scheduled depositions. The cavalier and uncaring attitude displayed by Staff's counsel toward Goldsby and the other subpoenaed witnesses is the antithesis of the consideration that a counsel serving subpoenas is supposed to show a non-party witness under Rule 57.09(c).

12. In addition, Goldsby estimates that to comply with Staff's subpoena duces tecum she will be required to produce documents, records, and other materials totaling more than 15,000 pages. Most or all of these materials currently exist in electronic form on one or more computers or storage devices that are owned by Public Water Supply District No. 4 of Camden County. Complying with the subpoenas here at issue will require Goldsby to, at a minimum: (i) search

those computers and storage devices to identify all responsive materials; (ii) search paper files to identify whatever additional responsive materials may exist in those files; and, (iii) print materials that currently are in electronic format and copy materials currently in paper format. But, as noted previously, none of these materials belongs to Goldsby; therefore, in order to obtain and produce copies of responsive materials she must first obtain permission of the owner or owners of those materials, which permission may or may not be granted. And, after all that, Goldsby will be required to expend additional time and effort, and bear all expense, associated with printing or copying thousands of documents, records, and other materials.

13. Another reason the subpoenas should be quashed is that Staff failed to advance Goldsby any of 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 incurred by non-parties that are required to produce documentary evidence and materials pursuant to a subpoena duces tecum. However, the subpoenas issued to Goldsby did not advance any fees whatsoever, and Staff has not stated or otherwise indicated that it will be willing to reasonably compensate Goldsby for the time, effort, and expense that she will be required to expend or incur to give her deposition and to identify, gather, and produce the voluminous records called for under the subpoena duces tecum. The applicable law is clear: as a non-party, Goldsby should not be required to appear to give her deposition or to respond to a subpoena duces tecum unless and until: (i) Staff has agreed to pay all witness fees to which Goldsby is entitled and pay all reasonable costs of complying with the subpoena duces tecum; (ii) the Commission has authorized such payments; and (iii) Goldsby has received all or most of the amounts to which she is entitled in advance of date on which her deposition and production of documents is scheduled. Otherwise, the burdens of time, effort, and expense that Goldsby must bear because of Staff's subpoenas not only will continue they will compound.

WHEREFORE, for any or all of the reasons stated herein, the Commission should grant this motion and should quash the subpoenas issued to Goldsby 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.

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ATTORNEYS FOR CYNTHIA GOLDSBY

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 22nd day of April, 2010.

/s/ L. Russell Mitten