

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

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

**STAFF'S RESPONSE AND REQUEST TO DENY OBJECTIONS AND
MOTION TO QUASH SUBPOENA DUCES TECUM**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the Staff Counsel's Office, and respectfully submits to the Missouri Public Service Commission (Commission), in response to Peter N. Brown's *Amended Objections and Motion to Quash Subpoena Duces Tecum and Request for a Hearing on the Objections and Motion* (Amended Motion), that the Commission has authority to issue the subpoenas *duces tecum* served upon Peter N. Brown, a developer of Lake Region Water & Sewer Company's (LRWS) water and sewer systems, a former owner of the LRWS water and sewer systems and the primary individual with information about the initiation and collection of availability fees, and that Staff still believes it is necessary to depose Mr. Brown because his affidavit did not adequately answer the questions the Commission asked, which Staff believes Mr. Brown has answers to, and in support states as follows:

1. On April 23, 2010, Peter N. Brown filed his Objections and Motion to Quash Staff's subpoena *duces tecum* to produce documents and appear at a deposition scheduled for April 27, 2010, to provide information to the Commission as requested in the Commission's Order Directing Discovery and Directing Filing (Order). Then on April 30, 2010, Mr. Brown filed an Amended Motion, with Mr. Brown's Affidavit filed Sunday, May 2, 2010.

2. Throughout discovery and during the evidentiary hearing, Mr. Brown's name was brought to Staff's attention by various parties as the son-in-law of the initial developer of the LRWS water and sewer systems on Horseshoe Bend and as an individual involved in the Porta Cima development including the water and sewer system contained within the development.¹ Further, Staff is under the belief that Mr. Brown is still receiving payment from availability fees collected by Lake Utility Availability and/or Lake Utility Availability 1 (collectively referred to as "LUA") relating to the water and sewer systems.

3. Mr. Brown's late filed affidavit does not serve as a substitute for a deposition in this matter, as it only began to address the first question as asked by the Commission's Order, when Mr. Brown should know the answer to at least five other questions asked, if not more.

4. Mr. Brown's affidavit does not address whether he is still receiving any benefits from the availability fees. It only states that Sally Stump and RPS Properties have the right to collect availability fees. So the question still remains to ask who is receiving the availability fees? Additionally, the affidavit only states that "all or virtually all of the lots developed by Four Seasons Lakesties, Inc, on Shawnee Bend have been sold." The affidavit does not state the actual number of lots sold. Furthermore, the affidavit does not state what the initial investment of the water and sewer system was, and how much of that initial investment has been recovered. While the affidavit does address some of the Commission's questions, the affidavit does not address all of questions the Commission has for Mr. Brown.

5. Staff is also confused by the inconsistency in Mr. Brown's Amended Motion and affidavit. In paragraph 3 of the Amended Motion, Mr. Brown states that he "has no access to the information and material being sought or subpoenaed and is not the custodian of any records, documents or materials being sought or subpoenaed." In paragraph 7 of Mr. Brown's affidavit,

¹ See Tr. Vol. 5, pg 618-19, 639-42.

he states that “[n]one of the records requested are in [his] personal possession.” Later in the paragraph he states that “Four Seasons Lakesites, Inc., has no staff to accumulate and copy these documents. It would require that the Company hire former employees or others to locate and produce the files and copy them.” Staff is confused by the fact Mr. Brown states he has no control over any records, but then states he would have to hire someone to produce the records. So, the question remains does Mr. Brown have access to the documents and what documents does he have access to?

6. The burden of proof for a motion to quash is on the party moving to quash a subpoena *duces tecum* to show why documents responsive to the subpoenas should not be produced. *In re Contempt of Crenshaw*, 708 N.E.2d 859 (Ind. 1999). Reinstatement granted, 736 N.E.2d 263 (Ind. 2000). Here, Mr. Brown’s objections and basis for the motion to quash does not meet this burden of proof to quash the subpoena *duces tecum*, and therefore it should be denied.

7. The Commission’s April 8, 2010 *Order Directing Discovery and Directing Filing* (Order) specifically asked Staff to find out information on the following questions which the developer would be able to answer:

- 1) What was the original purpose for assessing the availability fees? Was it to recover initial investment in the water and sewer systems, or was it to be used to maintain the water and sewer system?
- 2) Did and does the price for purchasing a lot in this development include any recovery for the water and sewer infrastructure?

- 4) Please disclose the terms of the confidential settlement that resolved the dispute over the availability fees related to the 1998 sale of Four Seasons Lakesites Water and Sewer Company to Roy and Cindy Slates and the related assignment of rights to collect availability fees from the Shawnee Bend subdivisions, as described in the answer to Staff’s Data Request

44.1, but only to the extent those terms identify any availability fees that are subject to collection by Lake Utility Availability 1?

- 5) How many of the 1285 identified undeveloped lots in Lake Region's service territory have been purchased and how many are still owned by the developer?

*** *** *** *** *** ***

- 8) How much of the \$5.1 million original contribution of plant has been recovered?

- 9) How much of the \$5.1 million original contribution of plant has been recovered from charging availability fees?

It further directed Staff to address the above referenced questions to Peter N. Brown.

8. As the former owner and developer of the water and sewer system utilized by LRWS on Shawnee Bend, developer of the lots paying availability fees, and former and potential current beneficiary of availability fees, it is completely reasonable and foreseeable that Mr. Brown will have substantive information regarding some or all of the above referenced questions.

9. Rule 56.01(b)(1) limits discovery to matters "reasonably calculated to lead to the discovery of admissible evidence." *In Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. banc 2007), the Supreme Court, which found that the trial court abused its discretion in denying a motion to quash a subpoena *duces tecum*, stated "the record does not show that the expert or defendant has failed or refuses to comply with prior discovery attempt or that any specific reason exists to believe that relevant bias could not be ascertained through less intrusive measures." *Id.* Here the documents are limited to availability fees and their inception. This is not intrusive or unduly burdensome; it is reasonably calculated to lead to the discovery of admissible evidence.

10. The term "relevant" is broadly defined to include material "reasonabl[y] calculated to lead to the discovery of admissible evidence." *State of Missouri ex rel. Rod Wright*

and Unicom Group, Inc., v. Honorable Robert Campbell, 938 S.W.2d 640, 643 (Mo. App. E.D. 1997). Staff believes that Mr. Brown has information that would be germane and relevant to the issues pending in this rate case. Mr. Brown was present during the development of the Shawnee Bend addition to LRWS's water and sewer systems. He has personal knowledge of availability fees, their purpose, design and/or nature.

11. Mr. Brown claims that the Commission's jurisdiction is tied to the definition of "service" in Section 386.020(48) RSMo Sum. Supp 2009:

(48) "**Service**" includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purpose of such corporation, person or public utility, and to the use and accommodation of consumers or patrons. (emphasis added)

However, on March 31, 2010, Dr. Stump, president of LRWS, testified that availability fees are paid for contributed plant.²

12. Mr. Brown also incorrectly relies on Section 386.250(6) RSMo as a basis for his claim that the Commission is without jurisdiction to review availability fees. Section 386.250(6) states:

(6) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility *service*, disconnecting or refusing to reconnect public utility service and billing for public utility service. [emphasis supplied]

Dr. Stump admitted that availabilities fees are plant in which the Commission clearly and reasonably has jurisdiction over. While Staff witness James A. Merciel Jr. stated he did not believe availability fees were for water and sewer service in the traditional sense, he also stated

² Tr. Vol. 5, pg. 581-583.

that his answer was not based upon on legal definition.³ Availability fees for water and sewer service are related to the traditional definition of water and sewer service, and are for the plant that allows service to be rendered to ratepayers.

13. The Commission has primary exclusive jurisdiction to determine whether availability fees should be considered charges pursuant to Sections 393.130 and 393.140, RSMo, and the Commission has ratemaking authority granted under Chapter 386 and 393; therefore, the subpoenas issued regarding discovery of information about availability fees as relating to LRWS's rate cases is proper.

14. If Mr. Brown does not have the documents or the ability to get the documents requested, then Mr. Brown is not violating the subpoena and can indicate so on the record during the deposition. Six subpoena *duces tecum* were issued to different individuals or entities to determine and assess who has possession of the documents and information relevant to water and sewer availability fees.

WHEREFORE, Staff believes it is still necessary to depose Peter N. Brown as the answers provided in the May 2, 2010 filed Affidavit are insufficient to fully and completely address the Commission's questions, and Staff respectfully requests that the Commission deny Mr. Brown's *Motion to Quash* the subpoena *duces tecum* and overrule Mr. Brown's objections.

³ Tr. Vol. 4, pg. 497.

Respectfully submitted,

/s/ Jaime N. Ott_____

Jaime N. Ott

Assistant General Counsel

Missouri Bar No. 60949

Attorney for the Staff of the
Missouri Public Service Commission

P. O. Box 360

Jefferson City, MO 65102

(573) 751-8700 (Telephone)

(573) 751-9285 (Fax)

jaime.ott@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 3rd day of May 2010.

/s/ Jaime N. Ott_____