BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

OBJECTIONS TO SUBPOENA(S) AND MOTION TO QUASH

COMES NOW RPS Properties, L.P. ("RPS"), by and through undersigned counsel, and moves the Missouri Public Service Commission for an order quashing the Subpoena Duces Tecum Order to Produce Documents, Business Record Affidavit and Notice of Subpoena for Production of Documents described below. In support thereof, RPS states as follows:

1. RPS is a limited partnership duly organized and existing under and by virtue of the laws of the State of Kansas and is duly authorized to conduct business in Missouri. RPS's principal place of business is 10777 Barkley, Suite 210, Overland Park, Kansas (KS) 66211. Its telephone number is 913-385-1555. RPS does some of its business in Missouri under a fictitious name, duly registered with the Missouri Secretary of State, of "Lake Utility Availability 1." RPS is a shareholder of Lake Region Water & Sewer Company.

2. The Staff of the Commission has caused certain documents to be served on RPS's Missouri registered agent, namely a Subpoena Duces Tecum Order to Produce Documents, Business Record Affidavit, and Notice of Subpoena for Production of Documents (collectively, "the Subpoena"). A copy of these documents is attached to this Motion as **Exhibit A** (filed as a separate pdf file). RPS respectfully requests that the Commission quash the Subpoena (and each part thereof) for the reasons set out below.

3. Assuming arguendo that "the Subpoena" was properly served (see argument to the contrary below), that service was accomplished on January 2, 2014. Under the

Commission's rules, 4 CSR 240-2.100 (3), objections or motions to quash are to be made within ten (10) days from the date the subpoena is served. That would have been Sunday, January 12, 2014. Under 4 CSR 240-2.050 ("Computation of Time"), the last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which case the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Thus, this Motion to Quash is timely filed within the meaning of the Commission's rules.

4. The documents sought by Staff's Subpoena relate or pertain solely to an entity that is not regulated by this Commission. RPS is not a party to this case, has not filed testimony in this case and is not a public utility under the jurisdiction of the Missouri Public Service Commission. RPS Properties, L.P. d/b/a Lake Utility Availability 1 is not a water company nor a sewer company. The utility customers of Lake Region Water & Sewer Company do not pay the "availability fees" about which Staff asks and the revenue stream generated by the availability fees is not generated by the provision of a regulated utility service. That revenue stream is the result of a contractual relationship between subdivision developers and lot owners.

5. Lake Region Water & Sewer Company has no access to the revenue stream generated by the availability fees and has no legally enforceable right to acquire the revenue stream generated by the availability fees. The private business information of RPS sought by the Subpoena is irrelevant to any legitimate issue in this case.

6. This Commission has no legal jurisdiction over the shareholders of the public utilities under its jurisdiction, nor any legal right to subpoena the private business records of the shareholders of public utilities, and Staff has cited no such jurisdiction or right. The Commission has no more right to subpoena the records of RPS Properties, L.P. than it

does to subpoena the personal or business records of any individual or institutional shareholder of Ameren or AT&T.

7. The purported legal basis for the various documents served upon the Missouri registered agent of RPS (collectively referred to herein as "the Subpoena") is not entirely clear. To the extent it (or any part of it) is based on Court Rule 57.09 ("Subpoena for Taking Deposition"), the Subpoena should be quashed because it was not issued in conjunction with a deposition properly noticed under Rule 57.03 and because it is unreasonable and oppressive. The litany of documents sought to be produced could amount to thousands of pages and are only vaguely defined or described in the Subpoena. In addition, the Subpoena did not proffer the reasonable cost of producing the books, papers, documents or tangible things sought by the Subpoena. (Section 386.440.1, RSMo; Rule 57.09 (b)(2); *State ex rel. Weinstock,* 916 S.W.2d 861, 862-63 (Mo.App. E.D. 1996).)

8. To the extent the Subpoena (or any part of it) is based on Court Rule 58.01 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes"), the Subpoena should be quashed because RPS is not a party to the case (58.01 (b) (2) (B)), the Subpoena requests production of documents within 10 days instead of 30 (58.01 (c) (1)) and it does not list the items to be inspected in consecutively numbered paragraphs or with reasonable particularity (58.01 (b) (1)).

9. To the extent the Subpoena is based on Rule 58.02, it is further objectionable because the Subpoena is overbroad and imposes undue burden and expense on RPS. Rule 58.02 (e) (1). The documents requested are not specified and have no date limitations. The Subpoena requests "all reports, notes, memoranda, receipts, correspondence, or other documentation and records regarding availability fees or charges … including, but not limited to, documents and records regarding the maintenance,

collection, billing, administration, disbursement, profits, and dividends relating to availability fees, along with the attached Business Record Affidavit." (See Exhibit A, 2nd page.) The broad scope of this request would force RPS personnel to expend an enormous and excessive amount of time and resources locating, identifying, copying and delivering these records. Consequently, the Subpoena is unreasonable and oppressive and should be quashed on that basis. *See State ex rel. Horenstein v. Eckelkamp,* 228 S.W.3d 56, 56-58 (Mo.App. E.D. 2007) (finding that a discovery order compelling an expert to produce current list of testimonial history, tax forms for a period of four years, and appointment books, calendars, and schedules for a period of four years was intrusive and unduly burdensome.)

10. The Subpoena should be quashed because it does not "specify the particular document or record to be produced" as required by 4 CSR 240-2.100 (1). Rather, it appears to be a fishing expedition for any and all documents of whatever shape or size relating in any way to "availability fees."

11. Further, the Subpoena should be quashed because it was improperly served upon the Missouri registered agent of RPS and not upon on the custodian of records of RPS. Subpoenas served on a corporation or partnership must be delivered to actual officers or employees and not to the registered agent for a corporation or entity. The subpoena works on the person so that the sheriff can actually bring the person subpoenaed to court or to the Commission. Service on the registered agent is not the same. The sheriff could bring the registered agent to the Commission's offices but the registered agent is not in charge of the records upon which the subpoena is designed to act. Service on the registered agent of RPS Properties also slowed down actual notice of the Subpoena by roughly one week. RPS physically received the Subpoena in its offices in

Overland Park, Kansas on or about Wednesday, January 8, 2014 and undersigned counsel was retained to respond to the Subpoena on Thursday, January 9, 2014, creating a significant hardship in responding in a timely fashion. The Subpoena itself makes it clear that Staff knew the physical location of RPS's offices and could have arranged service there.

12. In addition to the multiple procedural grounds stated above, substantial substantive grounds exist for the Commission to quash the Subpoena in this matter. In a nutshell, the Subpoena is in furtherance of Staff's pursuit of an "availability fee" issue that should not be an issue in this case. The *Subpoena Duces Tecum – Order to Produce Documents* states that Staff seeks "information relating to availability fees because Staff believes the fees should be factored into rate calculations for Lake Region." **This question was addressed extensively in Lake Region's last rate case,** Case No. WR-2010-0111. The Report and Order in that case (issued August 18, 2010) contains 23 pages of discussion of the "availability fee" issue under *Findings of Fact* (from pages 43-65) and another 22 pages of discussion of the issue under *Conclusions of Law* (from pages 86-107).

13. **For more than 40 years now, these availability fees have been untariffed and have not been included by the Commission in ratemaking for Lake Region and its predecessors.** In Lake Region's immediately preceding rate case (SR-2010-0110 and WR-2010-0111), the Commission considered a different treatment of availability fees, as discussed in detail below. However, the Commission also acknowledged that such a different treatment "would be a substantial departure from past Commission decisions, policy and practice" on which Lake Region has relied. The Commission further acknowledged that such a change in treatment would affect entities not parties to that rate

case and that a *rulemaking* would be necessary for redefining service, reclassification of revenue streams and a complete reversal of the Commission's historic practice after at least 37 years (at that time) of following existing practice. Although the Commission established a workshop proceeding to begin such a rulemaking process, no such rulemaking has occurred and neither Staff nor OPC has filed proposed rules to implement the change in policy to which the Commission expressed openness in 2010. Instead, Staff appears to want to re-open this issue anew, and drag RPS into it as the contractual custodian of availability fees (which are not the property of Lake Region), in yet another contested case. Further, as acknowledged by the Commission in 2010, a definitional change would not answer the question of whether the Commission has the jurisdiction to reach the assets or income of a non-utility such as RPS and bring them into the ratemaking process, even if the Commission finally determined it wished it could do so.

14. The availability charge is the subject of a contract between the subdivision developer and property owners (persons purchasing lots in the subdivision), a contract which also requires that the property owner connect to the central water and sewer systems when they become available. **Lake Region Water & Sewer Company is not a party to these contracts.** Lake Region, an entirely separate legal entity, has no contractual right to the availability fees. The availability charge for both water and sewer service has existed since 1971.

15. In 1973, the Commission granted a Certificate of Convenience and Necessity to Four Seasons Lake Sites Water and Sewer Company, Lake Region's predecessor in interest, for water service. MoPSC Case No. 17,954, effective December 27, 1973. **The Commission's Order** acknowledged the use of availability fees, but **distinguished the contractual agreement for those charges from the rates and charges proposed for**

rendering metered and unmetered water service. (Report and Order, Case Nos. SR-2010-0110 and WR-2010-0111, Paragraph 159.) That 1973 Order required Lake Region's predecessor-in-interest to file tariffs including the rates for metered and unmetered water service, but **did not require the tariffing of availability fees**. (*Id.,* Paragraph 160)

16. In Lake Region's immediately preceding rate case (Case Nos. SR-2010-0110 and WR-2010-0111), the Commission concluded: "… the only competent and substantial evidence in the record as a whole supports the conclusion that the availability fees were created by the developer in land sales contracts and restrictive covenants to recover the cost of the infrastructure." (Report and Order at page 99, 2nd full paragraph, last sentence.)

17. Lot owners paying the availability fees received a benefit from paying them, namely, access to required utility service without having to sustain additional costs of installing a well or a septic system. (*Id.,* Paragraph 163.) And Lake Region customers have benefited from the availability fees because the contributed plant associated with those fees lowers rate base and lowers utility rates for ratepayers. (*Id.,* Paragraph 164.)

18. As previously stated, for more than 40 years now, these availability fees have been untariffed and have not been included by the Commission in ratemaking for Lake Region and its predecessors. (Report and Order, Case Nos. SR-2010-0110 and WR-2010-0111, Paragraphs 159-161; page 98, paragraph numbered (6); *Order Regarding Motions for Rehearing, Motion for Reconsideration and Request for Clarification,* SR-2010-0110 and WR-2010-0111, issued and effective September 1, 2010, at page 3.) In 2006, the Commission Staff requested changes in Lake Region's MoPSC Annual Reports to specifically exclude any revenue collected as availability fees and any expense associated with collecting those fees, because they were "unregulated revenue." (Report and Order, Paragraph 201.) The Commission made findings of fact concerning the historical treatment

of availability fees in its Report and Order in SR-2010-0110 and WR-2010-0111 in Paragraphs 203 through 210, finding that, "Staff's subject matter experts have consistently testified in their expert capacity that availability fees are not utility services" (Paragraph 208) and citing recent Commission precedents for the proposition that availability fees are not utility services.[1] (Paragraph 209)

19. Notwithstanding the long-standing consistency of the Commission's treatment of these availability fees, the Commission did entertain the possibility of adopting a different view of the matter, *prospectively*, in its 2010 Report and Order in SR-2010-0110 and WR-2010-0111. The Commission stated: "While the Commission has not done so in the past, availability fees could be construed to be a 'commodity' and thus fall under the definition of a 'service,' despite its expert Staff's testimony to the contrary." (Report and Order, SR-2010-0110 and WR-2010-0111, at page 101.) However, also at page 101, the Commission noted that:

> To make this determination in this matter would be a substantial departure from past Commission decisions, policy and practice. … It has been established that Lake Region has indeed relied upon this Commission's past decisions and the directions it received from the Commission's Staff for guidance with how availability fee revenue was not regulated revenue and would not receive ratemaking treatment. And Missouri Courts have applied the doctrine of quasi-estoppel to prevent agencies from taking positions contrary to, or inconsistent with, positions they have previously taken. [citations omitted.]

20. **Thus, the Commission declared that it would not change its policy of long-standing without a rulemaking. (Report and Order, pages 104-105.)** The Commission observed that even a finding that availability fees are a "service" does not alone confer jurisdiction over those fees to the Commission (Report and Order at page

[1] *See, Orler v. Folsom Ridge, LLC,* 2007 WL 2066385, 16 (Mo.P.S.C.) (Mo. PSC 2007); *Central Jefferson County Utilities, Inc.,* 2007 WL 824040, 11 (Mo.P.S.C.) (Mo. PSC 2007).

102, first paragraph) and that such a determination "will have a future effect which will act on unnamed and unspecified persons and facts – persons or entities not party to this proceeding." (*Id.,* page 103-104.) The Commission announced it would open a workshop docket to lead to the rulemaking that would be needed to change its historic policy on availability fees.[2] (*Id.,* page 106.)

21. In two subsequent orders in the same rate case, the Commission appeared to step back from the pronouncement in its August 18 Report and Order that it was asserting jurisdiction over revenue derived from availability fees. (*Id.,* page 104.) First, on August 25, 2010, in its *Order Approving Tariff Filings in Compliance with Commission Order,* the Commission rejected the Office of Public Counsel's insistence that Lake Region must list the availability charges in its compliance tariff sheets. The Commission stated that OPC's objection to Lake Region's proposed compliance tariffs was "based upon a misunderstanding of the Commission's Report and Order." After quoting from page 104 of the Report and Order, the Commission stated,

> The determination that the Commission made was that it was going to assert jurisdiction over availability fees in future actions after undertaking a formal rulemaking process. The Commission specifically noted that it could not assert jurisdiction based upon the adjudicatory process in this single action. Public Counsel's objection is based upon a misreading of the Commission's order.[3]

22. Then, on September 1, 2010, the Commission issued its *Order Regarding Motions for Rehearing, Motion for Reconsideration and Request for Clarification* in which it once again disagreed with OPC's interpretation of the Report and Order language concerning availability fees. Quoting from the Report and Order at page 101 (quoted above

[2] *See* Case Nos. SW-2011-0042 and WW-2011-0043.
[3] *Order Approving Tariff Filings in Compliance with Commission Order,* Case Nos. SR-2010-0110 and WR-2010-0111, issued August 25, 2010, effective September 6, 2010, at page 2.

in Paragraph 19 of this Motion), the Commission stated that the parties (in their motions for rehearing) had taken "completely out of context" the Commission's discussion regarding the word "commodity" (in the statutory definition of "service") and had failed to observe "that the Commission specifically, and separately, concluded that under the facts of this case giving availability fees ratemaking treatment by either imputing revenue or classifying it as contributions in aid of construction would be unjust and unreasonable." (*Order Regarding Motions for Rehearing, Motion for Reconsideration and Request for Clarification,* at page 2).The Commission went on to state the following:

> Indeed, the Commission painstakingly delineated how rulemaking is necessary for redefining service, reclassification of revenue streams and a complete reversal of its statement of general applicability that implements, interprets or prescribes law, policy, procedure and practice after at least 37 years of following one practice, based upon its interpretation and applications of the law. The Commission provided additional clarification regarding the declaration of its intent to address its jurisdiction over availability fees prospectively where found appropriate in the future in its order approving Lake Region's compliance tariffs. [footnote omitted.]

The *Order* went on to discuss the workshops that had been opened in the meantime "to lead to rulemaking."[4] (*Id.,* Page 3.) The *Order* recites that Staff had been specifically directed "to perform an exhaustive review of all current water and sewer regulations and prepare a comprehensive set of definitions, uniform and in conformity with Section 386.020(48), Cum. Supp. 2009. … During the workshop/rulemaking process the Commission will examine proposed definitions and finally determine whether availability fees are a commodity or if they fall under one or more of the other categories listed in the statute." (*Id.,* page 4.)

23. **However, no rulemaking has been completed nor was ever actually undertaken.** The docket sheet for those workshop proceedings, Case Nos. SW-2011-0042

and WW-2011-0043, show 18 entries: 4 are notices and orders (including one correction order) getting the dockets started, 6 are returned mail (mostly from Chambers of Commerce that had apparently moved their offices), one is a response from AGC expressing an interest in the docket(s), one is an order directing additions to the service list, two are motions by Staff for extensions of time and two are orders granting those motions. The other two are the order consolidating the workshops into Case No. WW-2009-0386 (a more general workshop proceeding on small water company issues) and the EFIS notice of that consolidation. Nothing of substance is shown to have occurred in the workshop dockets created by the Commission out of Case Nos. SR-2010-0110 and WR-2010-0111.

24. A review of case WW-2009-0386 also reflects no Staff studies as contemplated by the Commission in SR-2010-0110 and WR-2010-0111, no conclusions or product of any sort, no Commission orders and no proposed rulemaking on any subject, including the ratemaking treatment of availability fees. The reports of workshop meetings filed in that docket do not reflect that the availability fee rulemaking subject was ever addressed in that workshop proceeding by Staff, OPC or any other party.

25. In Case Nos. SR-2010-0110 and WR-2010-0111, the Commission directed Lake Region to file another rate case within three years, which is the pending case. Now at least 40 years of precedent reflect the historic non-treatment in rates of availability fees. The Commission revisited that subject in 2010 and determined that to change that precedent would require a rulemaking, which has not occurred. In fact, the Commission went to the trouble of pointing out that Missouri Courts have applied the doctrine of quasi-estoppel to prevent agencies from taking positions contrary to, or inconsistent with,

[4] *See* Case Nos. SW-2011-0042 and WW-2011-0043.

positions they have previously taken.[5] **The Commission's reasoning is sound and clear – Lake Region may continue to rely on the Commission's historic treatment of availability fees (not tariffed and not included in ratemaking) *at least* until a rulemaking is concluded that might facilitate a change to that historic treatment.** Yet, Staff here wants to conduct a fishing expedition into the books and records of RPS Properties, L.P. and proceed as though the Commission had said no such thing.

26. While RPS can certainly appreciate how inviting it might be to Staff and OPC to dream of a benefactor whose private, non-jurisdictional assets could be tapped into in order to provide lower cost (and possibly even free) utility service to a group of customers,[6] it would impose an undue and unnecessary burden on RPS Properties to respond to the Subpoena in question (in any or all of its parts).

[5] Citing *Sapp v. St. Louis,* L 2749645, 5-6 (Mo. App. 2010). *See Report and Order* at p. 101 and footnote 370.
[6] See Report and Order, Case Nos. SR-2010-0110 and WR-2010-0111, at pages 90 and 91.

WHEREFORE, RPS Properties, L.P., respectfully requests that the Commission issue an order quashing the Supboena Duces Tecum and other requests for documents caused to be served upon its Missouri registered agent by the Commission Staff in this case.

Respectfully submitted,

/s/ William D. Steinmeier

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ATTORNEY FOR RPS PROPERTIES, L.P.

Dated: January 13, 2014

Exhibit A attached as separate pdf file

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been served electronically on all parties of record in this case on this 13th day of January 2014.

/s/ William D. Steinmeier

William D. Steinmeier