

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 22nd day of
January, 2014.

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

ORDER REGARDING MOTION TO QUASH SUBPOENA

Issue Date: January 22, 2014

Effective Date: January 22, 2014

On July 16, 2013, Lake Region Water & Sewer Company ("Lake Region") filed its formal request to increase rates for its utility service. On January 13, 2014, RPS Properties, L.P. ("RPS"), which is not a party to this case, filed a motion asking the Commission to quash a subpoena duces tecum served on January 2, 2014, by which Staff seeks to obtain records from RPS. Lake Region joins and concurs with RPS's objections to the subpoena. Staff and the Office of Public Counsel responded to and opposed the motion on January 17, 2014.

RPS objects to the subpoena on the following grounds:

- The Commission has no legal jurisdiction over RPS and no legal right to subpoena its private business records.
- The subpoena does not specify the particular document or record to be produced.
- The subpoena was not properly served.
- The subpoena was not issued in compliance with Missouri Supreme Court Rules 57.09 or 58.01.
- The subpoena is overbroad and imposes undue burden and expense on RPS.
- The information sought by the subpoena is irrelevant because availability fees should not be a legitimate issue in this case.

Staff argues that the RPS motion is untimely and should be rejected on that basis. Staff cites to Missouri Supreme Court Rule 58.02(e)(2), which states that “[t]he objection shall be served on all parties to the action within 10 days after service of the subpoena or before the time specified for compliance, whichever is earlier”. Staff argues that although the motion was filed on the 10th day after service (as computed under Commission rules), it was untimely because it was filed several hours after the time listed on the subpoena. RPS asserts that the motion was timely because it was filed on the 10th day after service as required by Commission Rule 4 CSR 240-2.100(3), which does not include the requirement that objections be made prior to the time specified for compliance. Since there is a conflict between the two rules concerning the time for objecting to a subpoena, the Commission determines that the Commission’s own specific rule regarding subpoenas should control over a general rule of civil procedure. Therefore, the RPS motion to quash, which was timely filed under the Commission rule, should not be rejected for that reason.

Staff also argues that the motion was properly served, the Commission does have the legal right to issue a subpoena to RPS, the subpoena is not overbroad or burdensome, and the information requested in the subpoena is relevant to an issue in this case. The Office of Public Counsel notes that Section 386.450, RSMo 2000, provides statutory authority for the Commission to issue a subpoena to RPS.

RPS asserts that there is no provision in state law that would allow the Commission to issue a subpoena to a non-party, such as RPS. RPS is a shareholder of Lake Region and allegedly possesses information relevant to one of the issues in this case. Section 393.140(10), RSMo 2000, gives the Commission the authority to “subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or

examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.”¹ That statute also provides that the Commission has the “power to compel, by subpoena duces tecum, the production of any accounts, books, contract, records, documents, memoranda and papers”.² In addition, Section 386.420.2, RSMo Supp. 2012, explicitly authorizes the Commission, any Commissioner, or any party in any hearing before the Commission to “cause the deposition of witnesses”, and “to that end may compel the attendance of witnesses and production of books, waybills, documents, papers, memoranda, and accounts.” That authority is not limited to persons and corporations subject to the Commission’s supervision. Missouri’s courts have made it clear that the Commission has the authority to inquire into matters beyond the strict confines of utilities directly subject to the Commission’s regulation, where those entities are closely related to the regulated utility.³ In addition, Section 386.450, RSMo 2000, authorizes the Commission, on its own initiative, to require “any corporation, person or public utility” to produce “any books, accounts, papers or records” kept by the person or entity. The Commission concludes that it has the legal right to subpoena the RPS business records.

RPS also asserts that the subpoena is improper because it does not specify the particular document or record to be produced. Commission Rule 4 CSR 240-2.100(1) requires that “[a] request for a subpoena *duces tecum* shall specify the particular document or record to be produced”. While the subpoena does not state the title or name of a

¹ This proceeding is brought pursuant to the authority granted to the Commission by Sections 393.140 and 393.150, RSMo 2000, to generally supervise water and sewer corporations and approve their rates.

² Section 393.140(9), RSMo 2000.

³ See, *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870 (Mo App. W.D. 1985); *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 764, (Mo. banc 2003).

particular document, it does describe the documents or records sufficiently for RPS to identify what is being requested. The Commission concludes that the subpoena does not violate Commission Rule 4 CSR 240-2.100(1) and should not be quashed on those grounds.

RPS, a Kansas limited partnership, states that the subpoena was not properly served because it was served on the registered agent for RPS. A subpoena is a form of judicial process directing a person to appear and give testimony or produce records at a specified time and place.⁴ A subpoena is served by delivery of a copy of the subpoena to the person to be summoned. The statute that describes how subpoenas are to be issued by the Commission does not specify the method of service.⁵ In general, subpoenas issued in a contested case by an administrative agency must be served as in civil actions in circuit court.⁶ Missouri Supreme Court Rule 54.14(b) requires that personal service outside the state shall be made as provided in Rule 54.13(b), which states that service upon a foreign partnership shall be made by (1) delivering a copy of the summons to an officer, partner, or managing or general agent, (2) by leaving the copy at any business office of the person being summoned, or (3) by delivering a copy to the foreign partnership's registered agent. In this case, the affidavit of service provided by RPS indicates that the subpoena was served on RPS by delivering a copy to RPS's registered agent for service of process. Since this method of service is permitted by the Missouri rules of civil procedure, the Commission concludes that service of the subpoena was proper and should not be quashed on those grounds.

⁴ Section 491.090, RSMo 2000.

⁵ Section 386.440, RSMo 2000.

⁶ Section 536.077, RSMo 2000.

RPS alleges that the subpoena was not issued in compliance with Missouri Supreme Court Rules 57.09 or 58.01. However, the subpoena and the *Notice of Subpoena for Production of Documents* filed by Staff in the case both state that the subpoena was issued pursuant to Supreme Court Rule 58.02. Therefore, any alleged deficiencies under other rules are irrelevant and not grounds for quashing the subpoena.

RPS argues that the subpoena is overbroad and imposes an undue burden and expense on it. Discovery requests are improper when overbroad, burdensome and oppressive.⁷ The Staff subpoena requires RPS to produce and permit inspection and copying of “all reports, notes, memoranda, receipts, correspondence, or other documentation and records regarding availability fees or charges for the areas known as Shawnee Bend and Horseshoe Bend at or near Lake Ozark, Missouri, including, but not limited to, documents and records regarding the maintenance, collection, billing, administration, disbursement, profits, and dividends relating to availability fees ...” Notably, the subpoena does not include any time limitations. RPS contends that since availability fees have been collected for more than 40 years, compliance with the subpoena will require it to expend enormous amounts of time and resources.

Courts have the authority to quash or modify a subpoena if it is unreasonable or oppressive.⁸ The Commission agrees with RPS that the request as written is overbroad and unduly burdensome. However, Staff alleges in its pre-filed testimony that availability fees should be included as revenue in Lake Region’s cost of service. Revenue received by Lake Region during the test year (the 12 months ending June 30, 2013) is relevant in

⁷ *State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan*, 777 S.W.2d 247, 252 (Mo. Ct. App. 1989); *State ex rel. Horenstein v. Eckelkamp*, 228 S.W.3d 56, 56-58 (Mo. Ct. App. 2007).

⁸ *State ex rel. Pooker ex rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. 2007); *Johnson v. State*, 925 S.W.2d 834, 837 (Mo. 1996).

determining its cost of service. The Commission finds that the information requested by the subpoena for the test year is relevant and production of that limited amount of information would not be unduly burdensome to RPS. The request for information for times other than the test year would be overbroad, burdensome and oppressive to RPS. The Commission concludes that the subpoena should be modified to include only the documents described in the subpoena that pertain to the rate case test year.

Finally, RPS contends that the information sought by the subpoena is irrelevant because availability fees should not be a legitimate issue in this case. RPS alleges in its motion a detailed history of the availability fee issue both in Lake Region's immediately preceding rate case (File Nos. SR-2010-0110 and WR-2010-0111) and during the time after the conclusion of that case and argues that the prior case decision forecloses consideration of the issue in this case. However, the Commission's past decisions do not restrict the Commission's decisions in this case or constitute a body of case law, like appellate court opinions with the weight of stare decisis. Stare decisis does not bind the Commission to past decisions.⁹ Since the issue of availability fees has been raised in the pre-filed testimony and pleadings, it is a legitimate issue in this case at this point in time regardless of RPS's opinion to the contrary. The Commission concludes that the subpoena should not be quashed for that reason.

THE COMMISSION ORDERS THAT:

1. RPS Properties, L.P.'s *Objections to Subpoena(s) and Motion to Quash* filed on January 13, 2014, is granted, in part, and denied, in part, and the Staff subpoena modified, as described in the body of this order.

⁹ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).

2. This order shall become effective immediately upon issuance.



BY THE COMMISSION

Morris L. Woodruff

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.

Bushmann, Regulatory Law Judge