

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	)	

**LAKE REGION WATER & SEWER COMPANY'S**  
**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**  
**RESPECTING AVAILABILITY FEES**

**Procedural History and Preliminary Matters<sup>1</sup>**

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**Findings of Fact**

**(Issues other than Availability Fees are covered in the June 24, 2010 proposal)**

**Availability Fees**

1. For purposes of this issue the Commission provides a history of the cases before the Commission involving Lake Region and Ozark Shores.

2. As discussed earlier in these findings, in an order dated December 17, 1973, in Case No. 17,954, the Commission approved the application of Four Seasons Lakesites Water and Sewer Company for a certificate of convenience and necessity to construct, operate and maintain a water system on property located on Horseshoe Bend, Lake of the Ozarks.

3. Under the terms and provisions of a declaration of restrictive covenants, as amended, filed by the developer, Four Seasons Lakesites Inc., ---then owned or controlled by

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<sup>1</sup> See Lake Region's proposed findings filed on June 24, 2010 for this section and for the findings of fact pertaining to issues other than availability fees.

Harold Koppler-- undeveloped lots located in the Horseshoe Bend subdivision that was certificated were subject to an obligation to pay availability fees. Those fees are referred to as “availability contract revenue” in the feasibility study prepared by Mr. Richard French for the application.

4. In Case No. WM-93-59, the Commission granted Ozark Shores Water Company (Ozark Shores) authority to acquire Four Seasons Lakesites Water and Sewer Company’s water system assets and approved Ozark Shores’ application to provide water service in the Horseshoe Bend service area. Ozark Shores owned and still owns the rights to charge and collect the water system availability fees due from owners of the undeveloped lots on the undeveloped lots on Horseshoe Bend.

5. In Case No. WA-95-164, the Commission granted the Company’s application to provide water and sewer service on Shawnee Bend, Lake of the Ozarks. The developer of the area donated the water and sewer system infrastructure to the Company. The property certificated was subject to recorded deed restrictions which obligated the owners of undeveloped lots to pay an availability fee for the *water system*. Payment of the availability fees for water and sewer system availability was also part of the contract obligations of each lot purchaser by virtue of the real estate contract for the lot.

6. The purpose of the availability fees was to recover the investment made by Four Seasons Lakesites, Inc. ---the developer of the project--- in the water and sewer systems, not to subsidize the operations of the systems.

7. In March of 1999, the Company officially changed its name to Lake Region Water & Sewer Co. This was done after the sale of all outstanding stock in the company to Roy and Cindy Slates.

8. Sometime between 1999 and 2001, the Slates transferred all of the outstanding stock of the Company to Mr. Waldo Morris, as well as their rights to any availability fees. The Company's annual report for 2001 shows Mr. Morris as the sole voting shareholder.

9. With respect to his shares in the Company, Mr. Morris entered a Stock Purchase Agreement with Ms. Sally J. Stump and Mr. Robert P. Schwermann on September 10, 2004. As part of that agreement, Mr. Morris agreed to assign to Ms. Stump and Mr. Schwermann all of his rights in availability fees that were acquired from Roy Slates and Cindy Slates. The stock transfer closed and the assignment of the availability fees was effected on October 13, 2004.

10. The entitlement to the availability fees was a matter of dispute between Lake Region, the shareholders of the Company -- Mr. Waldo Morris -- and the developer of the Shawnee Bend area, Four Seasons Lakesites Inc. at the time of the stock transfer in 2004. The dispute formed the basis of a petition filed in Camden County Circuit Court.

11. The matter was settled by agreement in which the Developer retained the rights to a specified amount of the availability fees charged and collected by Ms. Stump and RPS Properties LP payable in installments.

12. Under the business name of "Lake Utility Availability" Ms. Stump and RPS Properties submit bills for and collect the availability fees that were assigned to them. The fictitious name is registered with the Missouri Secretary of State's Office. Billing for the fees is done with the help of Cynthia Goldsby, an employee of Camden County Public Water District No. 4.

13. Under the set of deed restrictions currently in force and effect for Shawnee Bend, the availability fee for water system availability is \$10.00 per month, and for sewer system availability \$15.00 per month.

14. Additionally, under the set of deed restrictions currently in force and effect for Shawnee Bend, the owners of ninety percent (90%) of the affected lots have the authority to vote out amendments to the modifications to the declarations.

15. The Commission has taken official notice of the annual reports filed with the Commission by Lake Region for the years 1972 to 2008. In the years availability fee revenue was reported by the Company, it was reported as non-regulated income on line F-42. Until 1995, the availability fees reported involved availability fees collected for Horseshoe Bend. Availability fees related to the Shawnee Bend water and/or sewer operations which may have been owned by Lake Region were reported from 1995 to 1998 and totaled \$190,403.

16. In 1998, the stock of Lake Region was sold to Roy and Cindy Slates along with the rights to the availability fees. From 1998 forward, Lake Region's annual reports did not contain reports of availability fee revenue.

17. In four previous cases involving Lake Region or Ozark Shores, its affiliated company, the Commission has considered the issues of how to treat availability fees collected from lot owners in the respective certificated areas of these companies.

18. It appears that the Commission has approved treatment of availability fees in two ways:

- a. In the event availability fees were included as Company revenue, the Company rate base was not decreased by the amount of plant associated with the availability fees. OR
- b. In the event availability fees were not included as Company revenue, the company rate base was set to reflect the exclusion of the plant associated with the availability fees.

19. The Company does not derive any income or revenue from availability fees.
20. The Company has no rights to the availability fees.
21. The availability fees affecting lots in the Company's Shawnee Bend service area are paid to the Company shareholders under a lawful assignment of those fees from the developer.
22. The Company's customers do not pay availability fees to Lake Region.
23. If any Company ratepayer happens to be paying an availability fee it is entirely because the ratepayer has purchased an undeveloped lot subject to the deed restrictions assessing the fee or subject to the contractual obligations the developer imposes at closing, or both.
24. The Company has no power to enforce the payment of the availability fee against the lot owner even if the lot owner is a Company ratepayer.

**(Option 1 –Commission declines jurisdiction)**

**Discussion**

***Commission Jurisdiction***

25. Lake Region has raised throughout this proceeding the question of the Commission's subject matter jurisdiction to hear evidence and rule upon the billing and collection of fees charged for the availability of water system or sewer system infrastructure. If the Commission lacks jurisdiction, any further discussion of availability fees by the Commission is unnecessary.

26. According to case authority,

Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the [Public Service Commission Law], either expressly, or by clear implication as necessary to carry out the powers specifically granted, *State ex rel. City of West Plains v. Public Service Comm'n*, 310 S.W.2d

925, 928 (Mo. banc 1958). Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, “neither convenience, expediency or necessity are proper matters for consideration in the determination of” whether or not an act of the commission is authorized by the statute, *State ex rel. Kansas City v. Public Service Comm'n*, 301 Mo. 179, 257 S.W. 462 (banc 1923).

*State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. 1979); *see also, State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544, 547-548 (Mo.App. W.D. 2008).

27. If the Commission lacks statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties. *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, 207 (Mo. App. W.D. 2001); *Livingston Manor, Inc. v. Dept. of Social Services, Div. of Family Services*, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991).

28. The Commission’s jurisdiction is set out in Section 386.215 RSMo 2000, and in particular,

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

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

The term “service” is also statutorily defined.

“**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 purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons;

Section 386.020 (48) RSMo Cum. Supp. 2009.

29. The issue of Commission jurisdiction concerning availability fees, or fees like availability fees such as connection fees, tap on or reservation fees, all of which are used by developers to recover the costs of donated plant, is not new to the Commission. On two recent occasions it has ruled that they are beyond the scope of Commission statutory authority. See, Report and Order in consolidated Case Nos. WC-2006-0082 and WO-2007-0277<sup>2</sup> and Report and Order in Case No. SO-2007-0071.<sup>3</sup>

30. Based upon the evidence submitted, and in consideration of the case authorities and statutes cited above, as well as the Commission's previous orders declining jurisdiction, it is the Commission's finding and conclusion that it is without subject matter jurisdiction over the billing and collection of availability fees.

31. Having water or sewer system facilities available to an undeveloped subdivision lot does not constitute a "service" as defined in Section 386.020. This is certain particularly in this matter in which availability fees are charged to owners of undeveloped or vacant properties. An owner of an undeveloped property consumes no service from a water or sewer company. Staff witness James Merciel has testified on more than one occasion that availability of utility infrastructure is not, in his opinion, (if not in fact) a utility "service."

## **(Option 2 –Commission accepts jurisdiction)**

### **Discussion**

#### ***Staff's Proposals***

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<sup>2</sup> *Cathy Orler et al. v. Folsom Ridge LLC consolidated with In the matter of the Application of Folsom Ridge LLC and Big Island Water and Sewer Association, Inc. for an Order Authorizing the Transfer of Certain Water and Sewer Assets to Big Island Water Company and Big Island Sewer Company, and in Connection Therewith Certain Other Related Transactions.*

<sup>3</sup> *In the Matter of the Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions.*

32. In this case Staff has presented two recommendations concerning the treatment of availability fees.

33. Staff first recommends that the Commission “offset Lake Region’s operating system revenue requirements by the Availability Charges collected, calculated in this case” and further recommends that if availability fee revenue were offset as Staff suggests then the Company would not be entitled to a rate increase.” Staff did not recommend an offset to costs such as increasing the Company rate base by the amount of donated plant associated with the availability fees.

34. Staff’s second recommendation is an alternative to the first. Staff suggests that if the Commission does not classify availability fee revenues as revenues of the Company then all costs relating to the administration of the availability charges should be assigned in some way to that activity. Staff recommended that \$18,600 of expense be allocated to Lake Region for administration of the billing and collection of availability charges.

35. Regarding Staff’s first recommendation, Lake Region has argued among other things that since the availability fee revenue is not revenue of the Company, Staff’s approach of imputing that revenue to Company operations, if accepted by the Commission, would render its rates confiscatory and unjust and violate the Company’s constitutional rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the US Constitution and under the same protections set out in the Missouri Constitution. The Company also has directed the Commission’s attention to its previous orders involving the Company and its affiliates in which cases these availability fees have been considered. Lake Region correctly observes that Staff’s recommendation is incongruent with those cases which represent almost 40 years of guidance to Staff and the Company on the Commission’s preferences for this topic.



36. The Commission has concluded that Staff's recommendation to classify availability fees as Company revenue without a corresponding offset to the Company rate base cannot be accepted. If this recommendation were implemented the rates resulting from the calculations would not provide the Company with a fair return on investment and would be confiscatory and unreasonable.

37. The Commission further concludes that in this case availability fees and charges will be accounted for in the following manner: Availability fee revenue shall be included as revenue of the Company but the Company rate base shall be adjusted to include all plant associated with that availability fee revenue. Additionally, the availability fees shall be tarified.

38. Because of the disposition given by the Commission to Staff's first recommendation, consideration of Staff's alternative recommendation is not required.

### **Decision**

(To be added to previously filed findings of fact and conclusions)

#### **Availability Fees *(If the Commission does not adopt Option 1)***

Availability fee revenue shall be included as revenue of the Company but the Company rate base shall be adjusted to include all plant associated with that availability fee revenue. Additionally, the availability fees shall be tarified. Recalculations of the Company's revenue requirement shall be made accordingly.

Respectfully submitted,

/s/ Mark W. Comley

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via email, on this 16<sup>th</sup> day of July, 2010, to:

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/s/ Mark W. Comley