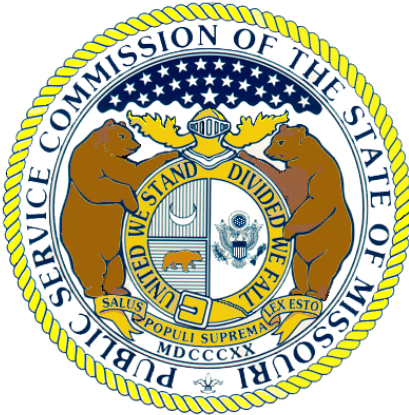


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



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 and 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 and Sewer Service)

REPORT AND ORDER

Issue Date: August 18, 2010

Effective Date: August 28, 2010

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REPORT AND ORDER

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APPEARANCES

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APPEARING FOR THE FOUR SEASON RACQUET AND COUNTRY CLUB CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC.:

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REGULATORY LAW JUDGE: Harold Stearley, Senior Regulatory Law Judge

REPORT AND ORDER

Syllabus:

I. Procedural History

A. Tariff Filings, Notice and Interventions, and Procedural Schedule

On October 7, 2009, Lake Region Water & Sewer Company (“Lake Region” or “LRWS”) filed tariff sheets designed to implement a \$331,223 general rate increase for its water and sewer service. The tariff sheets bear an effective date of November 6, 2009.¹ In order to allow sufficient time to study the effect of the tariff sheets and to determine if the rates established by those sheets was just, reasonable, and in the public interest, the tariff sheets were suspended until September 6, 2010.² On December 7, Lake Region revised its rate increase request down from \$331,223 to \$215,622.

The Commission granted requests for intervention to Four Season Racquet and Country Club Condominium Property Owners Association, Inc. and Four Seasons Lakesites Property Owners Association, Inc., and set a procedural schedule culminating in an evidentiary hearing on March 29 – April 2, 2010.³ The Commission also reserved time for a True-Up hearing on April 26, 2010.

B. Test year and True-Up

The test year is a central component in the ratemaking process. Rates are usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be

¹ Lake Region also filed prepared direct testimony in support of its requested rates.

² See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Suspension Order and Notice*, issued October 8, 2009; *Second Suspension Order and Notice*, issued October 9, 2009. EFIS is the Commission’s Electronic Information and Filing System.

³ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Order Adopting Procedural Schedule* issued November 17, 2009; *Order Setting Start Time, Location and Conditions For Hearings*, issued November 24, 2009.

earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.⁴ From these four factors is calculated the “revenue requirement,” which, in the context of rate setting, is the amount of revenue ratepayers must generate to pay the costs of producing the utility service they receive while yielding a reasonable rate of return to the investors.⁵ A historical test year is used because the past expenses of a utility can be used as a basis for determining what rate is reasonable to be charged in the future.⁶

The parties agreed to, and the Commission adopted, a test year of twelve months ending on December 31, 2008 and further agreed to update this test year to include known and measurable changes through September 30, 2009.⁷ The Commission also established the True-Up period, if one was required, to run through March 31, 2010, to reflect any significant and material impacts on Lake Region’s revenue requirement.⁸

The use of a True-Up audit and hearing in ratemaking is a compromise between the use of a historical test year and the use of a projected or future test year.⁹ It involves adjustment of the historical test year figures for known and measurable subsequent or

⁴ *State ex rel. Union Electric Company v. Public Service Comm’n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

⁵ *State ex rel. Capital City Water Co. v. Public Service Comm’n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

⁶ *See State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Comm’n*, 585 S.W.2d 41, 59 (Mo. banc 1979).

⁷ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Letter and Tariff*, filed on October 7, 2009; *Staff’s Response to Position Regarding Test Year and True-up Period*, filed on November 16, 2009; *The Office of the Public Counsel’s Recommendations Regarding Test Year and True-Up*, filed on November 16, 2009; *Four Seasons Laksites Property Owners Association, Inc. Test Year and True-Up Recommendation*, filed on November 16, 2009; *Four Season Racquet and Club Condo Property Owners Assoc., Inc Test Year and True-Up Recommendation*, filed on November 16, 2009; *Staff’s Response to the Office of Public Counsel’s Recommendations Regarding Test Year and True-up Period*, filed on November 24, 2009; *The Office of the Public Counsel’s Response to Staff’s Objection Regarding Test Year and True-Up*, filed on November 25, 2009; *Order Regarding Test Year and True-Up Period*, issued December 1, 2009.

⁸ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *Order Regarding Test Year and True-Up Period*, issued December 1, 2009.

⁹ *St. ex rel. Missouri Public Service Comm’n v. Fraas*, 627 S.W.2d 882, 887-888 (Mo. App. 1981).

future changes.¹⁰ However, while the “test year as updated” involves all accounts, the True-Up is generally limited to only those accounts necessarily affected by some significant known and measurable change, such as a new labor contract, a new tax rate, or the completion of a new capital asset. Both the “test year as updated” and the True-Up are devices employed to reduce regulatory lag, which is “the lapse of time between a change in revenue requirement and the reflection of that change in rates.”¹¹

C. Local Public Hearing

On November 20, 2009, The Office of the Public Counsel (“Public Counsel”), on behalf of all of the parties, filed recommendations for the time, date and location for a local public hearing to give Lake Region’s customers an opportunity to respond to the requested rate increase.¹² The hearing was held at City Hall, in the City of Osage Beach, on January 26, 2010. At the conclusion of the local public hearing, the Commission had received the sworn testimony of four witnesses.¹³ No exhibits were offered or admitted into the record.¹⁴ All of the parties were given the opportunity to cross-examine the witnesses.

D. Stipulations

On February 22, 2010, Lake Region, Staff and the Four Seasons Racquet and Country Club Condominium Owners Association, Inc. (“Racquet Club”) filed a partial nonunanimous stipulation.¹⁵ This stipulation addressed potential adjustments to sewer

¹⁰ *Id.* at 888.

¹¹ *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Report & Order*, issued December 31, 1996), at p. 8.

¹² See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *The Office of the Public Counsel's Request for Local Public Hearing*, filed on November 20, 2009.

¹³ Transcript, pp. 1-21.

¹⁴ *Id.*

¹⁵ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *Partial Nonunanimous Stipulation Respecting Adjustments to Sewer Charges Applicable to Intervenor Four Seasons Racquet and Country Club Condominium Owners Association, Inc.*, filed February 22, 2010.

charges applicable to the Racquet Club and resolved all issues between it and Lake Region. No other party objected to the stipulation. Because the stipulation was unopposed, the Commission treated the stipulation as though it were unanimous, found it to be reasonable and approved it on April 14, 2010 to become effective on April 24, 2010.¹⁶

On March 16, 2010, the parties jointly filed a Unanimous Stipulation of Undisputed Facts. The Commission, having fully examined this stipulation, will address the specifics of the agreement in its findings of facts and conclusions of law.

E. Issues List

The parties jointly filed the list of issues they believed required decisions from the Commission. Notably, the parties stressed:

The statements of issues in the list of issues below are not necessarily agreed to by all parties as the best or even an appropriate characterization of the issue; therefore, some parties may state the issue differently in their pleadings and briefs. Further, parties may address one or more issues not clearly included in the list of issues, or parties may state they consider an issue listed to not be a contested issue or a proper issue for Commission consideration. Specifically, LRWS, as footnoted, objects to inclusion of the issues pertaining to availability fees. Further, the Commission should not construe the list of issues here to impair any party's ability to argue about any of the listed issues or related matters, or to restrict the scope of any party's response to arguments made by other parties.¹⁷

Although the parties are not in agreement, their list included the following:

1. What is the appropriate level of executive management compensation to be included in LRWS's revenue requirement for setting LRWS's rates?

¹⁶ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: *Order Approving Partial Nonunanimous Stipulation Respecting Adjustments to Sewer Charges Applicable to Intervenor Four Seasons Racquet and Country Club Condominium Owners Association, Inc.* On May 27, 2010, Lake Region and the Racquet Club filed a motion requesting an extension of time to implement part of their agreement, specifically regarding the timeline for installing certain flow meters. The Commission granted that extension on June 1, 2010.

¹⁷ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filing: List of Issues and Order of Opening and Cross-Examination, filed March 23, 2010.

2. Should charges for availability fees collected from owners of undeveloped lots in LRWS's service territory and billed and retained by an affiliate company be classified as LRWS revenue or applied against rate base?

(LRWS objects to the inclusion of this issue on grounds that it is beyond the jurisdiction of the Commission and therefore is irrelevant. Additionally, LRWS objects to the form of the issue in that there is no evidence that "an affiliate company" bills and retains such fees.)

3. If the Commission finds charges for availability fees of undeveloped lots are not to be classified as LRWS revenue, or applied against rate base, then what costs should be identified and excluded from LRWS's cost of service?

(LRWS objects to the inclusion of this issue on grounds that it is beyond the jurisdiction of the Commission and therefore is irrelevant. LRWS objects to this issue additionally on those grounds set forth in its Motion to Strike which was filed with the Commission on March 22, 2010.)

The Commission did not adopt the parties' list of issues, or limit the scope of the issues in this matter.

F. Evidentiary Hearing

The evidentiary hearing was convened on March 29, 2010, and recessed on March 31, 2010.¹⁸ The Commission directed its Staff to conduct further discovery and set a deadline for requesting additional hearing time.¹⁹

On April 26, 2010, the Commission convened the True-Up hearing.²⁰ Testimony was adduced with regard to Lake Region completing and placing into service a new sewer pumping station and sewer force main. The new facilities were placed into service approximately on March 10, 2010.²¹ An additional issue surfaced during the True-Up concerning rate case expense. The parties presented differing positions regarding how much rate case expense should be recovered, and the amortization period.

¹⁸ Transcript, Volumes 3, 4 and 5.

¹⁹ See EFIS docket Entries for *Order Directing Discovery and Directing Filing*, issued April 8, 2010.

²⁰ Transcript, Volume 6.

²¹ Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

On June 24, 2010, the Commission reconvened the evidentiary hearing.²² At the hearing, the Commission received into evidence a number of documents and affidavits related to the additional discovery Staff conducted.

G. Case Submission

The evidentiary hearing concluded on June 24, 2010, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of 10 witnesses and received some 71 exhibits into evidence. Post-hearing briefs and proposed findings of fact and conclusions of law were filed in stages according to the post-hearing procedural schedule, as modified and revised. The final post-hearing briefs, addressing the issue of availability fees, were filed on July 16, 2010. The case was deemed submitted for the Commission's decision on that date.²³

II. Findings of Fact

A. The Parties

1. Lake Region Water & Sewer Company ("Lake Region") is a Missouri corporation with its principal office and place of business located at 62 Bittersweet Road, Four Seasons, Missouri and/or P.O. Box 9, Lake Ozark, Missouri 65049. Lake Region provides water and sewer sever to approximately 1400 customers²⁴ in Camden and Miller Counties and the community of The Village of Four Seasons, all within its Missouri service

²² Transcript, Volume 8.

²³ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

²⁴ Lake Region Exh. #4, Summers Direct, p. 3; Transcript, Volume 3, p. 175; Staff Exh. 4, Prenger Surrebuttal, p. 4; Staff Exh. 5, Unanimous Stipulation of Undisputed Facts, paragraph 16; Staff Exh. 7, Cost of Service Report, p. 6; Staff Exh. 9, Harris Surrebuttal, pp. 14-15 Staff Exh. 13, Featherstone Direct, p 8; Staff Exh. 18, Staff Accounting Schedules True-Up Direct, Accounting Schedules 4-1.

territory.²⁵ Lake Region's customer count is composed of: (1) 638 water customers on Shawnee Bend, (2) 615 sewer customers on Shawnee Bend, and (3) 147 sewer customers on Horseshoe Bend.²⁶ Lake Region estimates that approximately 70% of its customers are seasonal and 30% are full-time residents.²⁷ While the majority of Lake Region's customers are single family residential, approximately 40% of the company's revenues are derived from commercial sewer customers located in the Horseshoe Bend area.²⁸

2. Four Season Racquet and Country Club Condominium Property Owners Association, Inc. ("Racquet Club") is a Missouri not-for-profit corporation organized and operating under Missouri law with its principal office and place of business located at 251 Racquet Club Drive, Box 2370, Lake Ozark, Missouri, 65049. The Racquet Club provides condominium association services, including the purchase of water and sewer services, on behalf of its members and has purchased water and sewer services from Lake Region, or its affiliates, on behalf of over 500 condominium property owners. The Racquet Club interfaces with Lake Region on behalf of the condominium property owners with respect to service installation, service maintenance, service repair, and the propriety of Lake Region charges.²⁹

3. Four Seasons Lakesites Property Owners Association, Inc. ("Lakesites POA") is a nonprofit corporation organized under the laws of the state of Missouri with its principal office and place of business located at 36 Vintage Landing, Four Seasons,

²⁵ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Letter and Tariffs*, filed October 7, 2009; Lake Region Exh. #4, Summers Direct, pp. 1-5.

²⁶ See Footnote Number 25, *supra*.

²⁷ Staff Exh. 7, Cost of Service Report, p. 6.

²⁸ Lake Region Exh. #4, Summers Direct, pp. 1-5.

²⁹ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Application to Intervene in Opposition to Rate Increase*, filed October 26, 2009.

Missouri 65049. Lakesites POA represents approximately 7100 property owners on the Shawnee Bend and Horseshoe Bend peninsulas with the mission "to act as an objective body while maintaining and enhancing property values, representing property owners by enforcing the Declaration of Restrictive Covenants and being financially responsible, all in the best interest of the community." Approximately one quarter of the members of the Lakesites POA have properties that are served by Lake Region and Lakesites POA 's members have purchased significant amounts of water and sewer services from Lake Region for those properties.³⁰

4. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."³¹ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."³²

5. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.³³ Staff is represented by **The General Counsel of the Missouri Public Service Commission** who "represent[s] and appear[s] for the commission in all actions

³⁰ See EFIS Docket Entries for file numbers SR-2010-0110 and WR-2010-0111 for the following filings: *Application to Intervene of the Four Seasons Lakesites Property Owners Association, Inc.*, filed October 28, 2009.

³¹ Section 386.710(2); Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

³² Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id.*

³³ Commission Rules 4 CSR 240-2.010(11) and 2.040(1).

and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . . ”³⁴

B. Witnesses

6. The Commission finds that the following witnesses are subject matter experts for their individual fields of expertise as identified in their testimony and their associated exhibits admitted into the record:³⁵

a. **John R. Summers** is the General Manager of Public Water Supply District Number Four of Camden County. In this capacity he serves as the de facto General Manager for Ozark Shores Water Company, The Meadows Water Company and Lake Region Water & Sewer Company in Missouri as well as Northern Illinois Investment Group which operates a small water system in Illinois. He has earned a Bachelor of Science Degree in Accounting from Missouri Valley College and a Masters of Business Administration from Rockhurst University. He currently holds a Class D Wastewater Treatment license and a DS I Water Distribution license issued by the Missouri Department of Natural Resources.

Mr. Summers is a subject matter expert in the fields of accounting, business management and public utilities operation and management because he

³⁴ Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

³⁵ The qualification of a witness as an expert rests within the factfinder's discretion. *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with **any** scientific, technical or other specialized knowledge. (Emphasis added). The standard established in Section 490.065 applies to administrative contested cases. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. The extent of an expert's experience or training in a particular field goes to the weight rather than the admissibility of the testimony.” *In re Interest of C.L.M.*, 625 S.E.2d 613, 615 (Mo. banc 1981). An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 267 S.W.3d 700, 710 (Mo. App. 2008). The expert is not required to be an expert in all subject matters in order to assist the finder of fact. As with all witnesses and all subject matter expert witnesses, any proven deficiencies in any specific testimony are evaluated in terms of the weight and credibility to be given to that specific testimony. Witness credibility is a matter for the factfinder, “which is free to believe none, part, or all of the testimony.” *In re C.W.*, 211 S.W.3d 93, 99 (Mo. banc 2007).

possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.³⁶

b. **Vernon Stump** is the President of Lake Region. He has earned a Bachelor in Science Degree in Civil Engineering from the University of Missouri, a Masters Degree in Civil Engineering from the University of California and a Doctor of Philosophy Degree in Sanitary Engineering from the University of Missouri. He has over 40 years of experience in the water and sewer industry.

Mr. Stump is a subject matter expert in the field of engineering specifically in regard to water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.³⁷

c. **Martin Hummel** is employed by the Commission as a Utility Engineering Specialist III in the Water and Sewer Department. He has earned a Bachelor of Science Degree in Engineering and a Bachelor of Science Degree in Education Science from the University of Missouri.

Mr. Hummel is a subject matter expert in the field of engineering specifically in regard to water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.³⁸

d. **James M. Russo** is employed by the Commission as a Rate and Tariff Examination Supervisor in the Water and Sewer Department. He has earned a Bachelor of Science Degree in Accounting from California State University. Witness Russo is the case coordinator for the Utility Operations Division.

Mr. Russo is a subject matter expert in the fields of accounting, auditing and regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with

³⁶ Lake Region Exh. 4, Summers Direct, pp. 1-2; Transcript pp. 216-366, 689-715.

³⁷ Lake Region Exh. 2, Stump Rebuttal, p. 1 and Attached Exhibit 1; Transcript pp. 118-144, 559-654.

³⁸ Staff Exh. 1, Hummel Direct, pp. 1-9, and Schedule 1.

understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.³⁹

e. **Bret G. Prenger** is employed by the Commission as a Regulatory Auditor. He holds a Bachelor of Science Degree in Accounting from Missouri State University.

Mr. Prenger is a subject matter expert with regard to auditing and accounting because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.⁴⁰

f. **V. William Harris** is employed by the Commission as a Regulatory Auditor. He holds a Bachelor of Science Degree in Business Administration with a major in Accounting from Missouri Western State College. He is a Certified Public Accountant.

Mr. Harris is a subject matter expert with regard to auditing and accounting because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.⁴¹

g. **Cary G. Featherstone** is employed by the Commission as a Utility Regulatory Auditor. He holds a Bachelor of Science Degree in Economics from the University of Missouri. Witness Featherstone is sponsoring Staff's Cost of Service Report and is case coordinator for the Utility Services Division.

Mr. Featherstone is a subject matter expert with regard to auditing, accounting and regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.⁴²

³⁹ Staff Exh. 2, Russo Direct, pp. 1-4, and Schedule 1.

⁴⁰ Staff Exh. 7, Cost of Service Report, Appendices, p. 25; Staff Exh. 4, Prenger Surrebuttal, pp. 1-7.

⁴¹ Staff Exh. 7, Cost of Service Report, Appendices, p. 18; Staff Exh. 9; Harris Surrebuttal, pp. 1-16; Transcript pp. 144-164.

⁴² Staff Exh. 13, Featherstone Direct, pp. 1-3, and Schedule CGF 1; Transcript pp. 411-479, 718-752.

h. **James A. Merciel, Jr.** is employed by the Commission as Utility Regulatory Engineering Supervisor in the Water and Sewer Department. He holds a Bachelor of Science Degree in Civil Engineering from the University of Missouri. He is a Registered Professional Engineer.

Mr. Merciel is a subject matter expert with regard to operation and engineering and maintenance of water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.⁴³

i. **Ted Robertson** is employed by the Office of the Public counsel as a Public Utility Accountant. He holds a Bachelor of Science Degree in Accounting from Southwest Missouri State University. He is a Certified Public Accountant.

Mr. Robertson is a subject matter expert with regard to auditing, accounting and the regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determine facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Robertson is not a subject matter expert in the field of engineering.⁴⁴

7. Witness **Nancy Cason**, called by Lakesites POA, is the President of the Association.⁴⁵

8. Witness Cason did not provide testimony involving scientific, technical and other specialized knowledge, but rather provided testimony regarding her personal knowledge on the issue of availability fees.⁴⁶ Witness Cason is not a subject matter expert.⁴⁷

9. The following additional members of the Commission's Staff participated with auditing Lake Region and produced numerous accounting schedules that were admitted into evidence: Shana Atkinson, Nila Hagemeyer, and Karen Herrington. These Staff

⁴³ Staff Exh. 15, Merciel Direct, pp. 1-2 and Attachment 1; Transcript pp. 479-547.

⁴⁴ OPC Exh. 2, Robertson Direct, pp. 1-2, and Schedule TJR-1; Transcript pp. 164-216, 556-559 752-755.

⁴⁵ Lakesites POA Exh. 2, Cason Surrebuttal, pp. 1-6; Transcript, pp. 366-411, 654-658, 755-759.

⁴⁶ *Id.*

⁴⁷ Transcript, pp. 22-23.

members also submitted pre-filed testimony as part of Staff's Cost of Service Report, but they were not called to the stand by any party to give live testimony. The components of their accounting schedules and cost of service report are verified by affidavit.⁴⁸

10. The Commission finds that any given witness's qualifications and overall credibility are not dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.⁴⁹

11. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.⁵⁰

C. Lake Region's Water and Sewer System

12. Lake Region's water system is comprised of: (1) two deep wells, each with a pumping capacity of 360,000 gallons per day; (2) a 200,000 gallon elevated water storage tank; and, (3) a total of approximately 96,832 feet of water mains.⁵¹

⁴⁸ Staff Exh. 7, Cost of Service Report, and Appendix 1. See all accounting schedules. Witness Featherstone is sponsoring Staff's Cost of Service Report. *Id.* at p. 7.

⁴⁹ Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

⁵⁰ An Administrative Agency, as factfinder, also receives deference when choosing between conflicting evidence. *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

⁵¹ Lake Region Exh. 4, Summers Direct, pp. 3-4; Staff Exh. 7, Cost of Service Report, pp. 42-44; Staff Exh. 9, Harris Surrebuttal, pp. 14-16; Staff Exh. 13, Featherstone Direct, pp. 7-8; Lake Region Water and Sewer Company, Inc. Annual Report for the calendar year of January 1-December 31, 2008, pp. W-7 – W-9 & S-6.

13. Lake Region's sewer system is comprised of: (1) four sewage treatment plants: (a) Lodge, with a 326,500 gallon daily capacity, (b) Racquet Club, with a 292,500 gallon daily capacity, (c) Charleston Condominiums, with a 24,000 gallon daily capacity, and (d) Shawnee Bend, with a 100,000 gallon daily capacity; (2) multiple lift stations; and, (3) a total of approximately 8,924 feet of collecting sewers.⁵²

14. Included with Lake Region's 100,000 gallons-per-day wastewater treatment plant on Shawnee Bend is an expansion project that increased capacity when the daily flow of this plant reached 75,000 gallons-per-day in July 2009.⁵³

15. Lake Region completed building an additional lift station and collection line on Horseshoe Bend to service the Duckhead Road area. The lift station and collection line run from the Duckhead Road area to the Company's Racquet Club Treatment Plant. The in-service date for this addition was March 10, 2010.⁵⁴

16. Lake Region also plans to rehabilitate lift stations on Shawnee Bend.⁵⁵

D. Lake Region's Ownership and Certificate History

17. On August 10, 1971, Four Seasons Lakesites Water & Sewer Company ("Lakesites W&S") was incorporated to provide water and sewer service for the development.⁵⁶

18. On February 27, 1973, Four Seasons Lakesites Water & Sewer Company was issued a Permit of Approval from the Division of Health to supply water to the public.⁵⁷

⁵² *Id.*

⁵³ Staff Exh. 7, Cost of Service Report, pp. 43-44.

⁵⁴ *Id.*; Lake Region Exhibit 11, Summers True-Up Direct, p. 1.

⁵⁵ Staff Exh. 7, Cost of Service Report, pp. 43-44.

⁵⁶ Certificate of Incorporation, dated August 10, 1971

⁵⁷ Lake Region Exhibit 13, Engineering Report in Case No. 17,954.

19. The Commission granted Lakesites W&S its certificate of convenience and necessity ("CCN") to provide water service effective December 27, 1973 in Case No. 17,954. The Commission amended the company's certificate in Case No. 18,002 effective May 16, 1974, to expand its water service to areas immediately adjacent to the previously authorized certificated area.⁵⁸

20. Ultimately, Lakesites W&S, or its successors-in-interest,⁵⁹ received Commission approval for providing sewer service and to expand its certificated water and sewer service areas as follows:

- a. December 16, 1975: Effective date of Commission Order granting an expansion to Lakesites W&S's CCN. Case No. 18,416.⁶⁰
- b. March 14, 1980: Additional authority granted to Lakesites W&S in an unreported order. Case No. WA-79-266.⁶¹
- c. February 16, 1990: Additional authority granted to Lakesites W&S to provide sewer service in an unreported order. Case No. SA-89-135.⁶²
- d. July 11, 1997: Effective date for Commission order approving a Unanimous Stipulation to grant Lakesites W&S Company a CCN to extend its sewer operation to areas in Shawnee Bend and Horseshoe Bend and adjust water tariffs (depreciation schedules). The Company already had a CCN to provide sewer service in part of Horseshoe Bend. Case No. WA-95-164.⁶³

⁵⁸ *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience and Necessity to Construct, Operate and Maintain an Intrastate Water System*, Case No. 17,954, Report and Order, Issued December 17, 1973, Effective December 27, 1973; Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8; Lake Region Exh. 15, Report and Order in Case No. 17,954.

⁵⁹ Lakesites W&S's successors-in-interest are Four Seasons Water and Sewer Company and Lake Region Water and Sewer Company.

⁶⁰ *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for an Amendment to Their Certificate of Public Convenience and Necessity to Construct, Operate and Maintain an Intrastate Water System*, Case No. 18,416, Report and Order, Issued December 4, 1975, Effective December 16, 1975.

⁶¹ Formal case caption not listed in Mo.P.S.C. Reports, Volume 23, p. xv.

⁶² *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience and Necessity to Own, Operate and Maintain Sewer System*, Case No. SA-89-135, Report and Order Adopted, February 16, 1990; Staff Exh. 13, Featherstone Direct, p. 8.

⁶³ Transcript, pp. 486-487; *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate,*

- e. October 9, 1998: Effective date for Commission order extending Four Seasons Water & Sewer Company's ("Four Seasons W&S") CCN for its sewer operations. Case No. SA-98-248.⁶⁴
- f. September 1, 2000: Effective date for Commission order granting Lake Region an extension of its CCN to provide water and sewer service in the Shawnee Bend area. Case No. SA-2000-295.⁶⁵
- g. November 5, 2006: Effective date of Commission order approving expansion of Lake Region's CCN. WA-2005-0463 and WA-2005-0464.⁶⁶

21. In March of 2004, the Commission denied Lake Region's requests for CCNs in Case Number SA-2004-0182.⁶⁷

22. In addition to the many certificate cases, Lakesites W&S, or its successors-in-interest, appeared before the Commission seeking rate increases in the following cases:

- a. April 16, 1975: Effective date for Commission order denying Lakesites W&S's tariff for an imposition of rates for unmetered service. Case No. 18,081.⁶⁸

Control, Manage and Maintain Water and Sewer Utility Properties for the Public, Located in an Unincorporated Area in Camden County and Miller County, Missouri Generally Comprising the Eastern Half of the Area Known as "Shawnee Bend," Case No. WA-95-164, Order Approving Unanimous Stipulation and Agreement, Granting Certificate of Convenience and Necessity, Approving Tariffs, and Denying Application to Intervene, Issued July 1, 1997, Effective July 11, 1997.

⁶⁴ *In the Matter of the Application of Four Seasons Water and Sewer Company for a Certificate of Convenience and necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain Sewer Utility Properties for the Public, Located in an Unincorporated Area In Camden County, Missouri by Expansion of its Existing Certificated Area in a Westward Direction Along the Shore of the Lake of the Ozarks,* Case No. SA-98-248, Order Granting Certificate of Convenience and Necessity, Issued September 29, 1998, Effective October 9, 1998.

⁶⁵ *In the Matter of the Application of Lake Region Water and Sewer Company for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Centralized Sewage Collection and Treatment System in an Area in an Unincorporated Area of Camden County, Missouri , as an Expansion of its Existing Certificated Area,* Order Granting Certificate of Public Convenience and Necessity, Issued August 22, 2000, Effective September 1, 2000; Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8.

⁶⁶ *In the Matter of the Application of Lake Region Water and Sewer Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Water and Sewer System for the Public Located in an Unincorporated Area in Camden County, Missouri, Order Approving Application for Certificate of Convenience and Necessity, Issued October 26, 2006, Effective November 5, 2006.*

⁶⁷ *In the Matter of the Applications of Lake Region Water and Sewer Company for Certificates of Convenience and Necessity,* Order Denying Motion to Reconsider Order Dismissing Applications, Issued March 18, 2004, Effective March 28, 2004. This order covered application filed in Case Nos. SA-2004-0182, SA-2004-0183, WA-2004-0184, WA, 2004-0201 and SA-2004-0202.

- b. December 5, 1991: Effective date for Commission order granting Lakesites W&S a rate increase request pursuant to a unanimous agreement. Case No. WR-92-59.⁶⁹
- c. August 2, 1998: Effective date for Commission order granting Four Seasons W&S an increase in rates for its sewer service after the filing of a unanimous disposition agreement. This increase in rates involved the completed expansion at the Racquet Club wastewater treatment plant; Case No. SR-98-564.⁷⁰

23. With regard to ownership of the company:

- a. December 29, 1992: The Commission approved Lakesites W&S application to sell its water system on Horseshoe Bend to the Ozark Shores Water Company ("Ozark Shores"), but continued to provide sewer service to the Horseshoe Bend area.⁷¹ Unreported Case No. WM-93-24.⁷²
- b. October 9, 1998: Lakesites W&S changed its name to Four Seasons Water and Sewer Company ("Four Seasons W&S") in Case No. SA-98-248.⁷³
- c. May 16, 1999: The Commission recognized Four Seasons W&S's change of name to Lake Region Water & Sewer Company (Lake Region) in case No. WO-99-469.⁷⁴

⁶⁸ *In the Matter of Four Seasons Lakesites Water and Sewer Company of St. Louis, Missouri, for Authority to file a Water Rate for General Service Unmetered in its Certificated Area in the State of Missouri*, Report and Order, Issued March 17, 1975, Effective April 16, 1975.

⁶⁹ *In the Matter of Four Seasons Lakesites Water and Sewer Company's Tariff to Increase Rates Pursuant to Their Informal Rate Procedure*, Case No. WR-92-59, Report and Order, Issued November 27, 1991, Effective December 5, 1991.

⁷⁰ *In the Matter of Four Seasons Water and Sewer Company's Tariff for Rate Increase Pursuant to Small Company Rate Increase*, Order Approving Tariff, Issue July 30, 1998, Effective August 2, 1998.

⁷¹ Transcript, pp. 484-486; Staff Exh. 7, Cost of Service Report, pp. 1-7. Ozark Shores was granted a subsequent increase in rates in Case No. WR-99-183.

⁷² *Four Seasons Lakesites Application to Sell Water Assets to Ozark Shores Company*, Case No WM-93-24. The order approving the sale was issued on December 29, 1992.

⁷³ Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8. Note: Staff reports the name change occurring in this case; however, the docket entries do not reflect a name change application.

⁷⁴ *In the Matter of Four Seasons Water and Sewer Company for Name Change to Lake Region Water and Sewer Company*, Case No. WO-99-0469, Order Recognizing Change of Corporate Name and Filing of Adoption Notice, Effective May 16, 1999. Note: The Commission was unable to locate the specific case where it approved the transfer of assets that is more fully described in the section of this order addressing the issue of availability fees.

24. Lake Region is currently owned equally by RPS Properties, Inc. ("RPS Properties") and Sally Stump, wife of Vernon Stump, the current President of the Company.⁷⁵

25. RPS Properties and Sally Stump paid \$3,000,000 to purchase the stock of Lake Region.⁷⁶

26. RPS Properties is a partnership for the Schwermann family, with Robert Schwermann being the General Partner.⁷⁷

27. Mr. Schwermann was president of Lake Region until September 2009 when one of the other owners, Vernon Stump, took over as president.⁷⁸

28. These same owners also own and operate Ozark Shores, also regulated by the Commission. Ozark Shores is wholly owned by North Suburban Public Utilities, Inc. which is owned 51.76% by RPS Properties and 48.24% by Sally Stump.⁷⁹

29. The partnership of Robert Schwermann through RPS Properties and the Stump family also own equally a company called Northern Illinois Investment Group, Inc. (also referred to as "Fairhaven").⁸⁰

30. Lake Region's service territory is located in Camden County, with the exception of the eastern tip of Shawnee Bend, which is in Miller County. The number of customers increased significantly, approximately 70 customers yearly between 2004 and 2006, after

⁷⁵ Transcript, pp. 166-167; Staff Exh. 7, Cost of Service Report, pp. 1-7.

⁷⁶ Transcript, pp. 243, 612-613.

⁷⁷ Transcript pp. 328, 626-627; Staff Exh. 7, Cost of Service Report, pp. 1-7.

⁷⁸ Transcript pp. 141, 194; Staff Exh. 7, Cost of Service Report, pp. 1-7.

⁷⁹ Transcript p. 269, 327-328, 339, 579; Staff Exh. 7, Cost of Service Report, pp. 1-7. North Suburban also owns a small water system in northern Illinois, outside of Chicago.

⁸⁰ Staff Exh. 7, Cost of Service Report, pp. 1-7.

completion of the toll bridge connecting the Horseshoe Bend area to the Shawnee Bend area. However, since 2007 new customer additions have slowed dramatically.⁸¹

31. Subdivisions serviced by Lake Region on Horseshoe Bend include Seasons Ridge, Country Club Estates 1 and 2, Black Hawk Estates, Country Club Cove, and other customers in unincorporated areas not located within a named subdivision.⁸²

32. Large commercial accounts serviced by Lake Region include the Lodge of the Four Seasons, the Country Club Hotel, the Racquet Club, and several condominium complexes.⁸³

33. Subdivisions serviced by Lake Region on Shawnee Bend include Porto Cima (Grand Point, Champion's Run, La Riva Estates, Eagles Cove, Fox Run Town Homes, and Heritage Isle), Thornwood, Magnolia Point, Bello Point, The Villages (Stone Bridge, Forest Ridge, and Sycamore Point), and Shawnee Bend 2, 3, and 4.⁸⁴

34. Commercial accounts serviced by Lake Region include two convenience stores, a bank, and Majestic Point Condominiums.⁸⁵

35. The subdivisions served by Lake Region have experienced an approximate build out of 20-30 percent, leaving approximately 70 to 80 percent of the lots undeveloped.⁸⁶

36. Currently, there are 1285 undeveloped lots and 332 improved lots in the Porto Cima subdivision of the Shawnee Bend Peninsula.⁸⁷

⁸¹ *Id.*

⁸² *Id.*; Transcript, pp. 292-293.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Staff Exh. 7, Cost of Service Report, pp. 1-7.

⁸⁶ Transcript, pp. 332-333, 431, 495-496, 603-604, 649-650, 734-735.

⁸⁷ Lakesites POA Exh. 4, Update to Lakes POA Exhibit 3.

E. Lake Region's Proposed General Rate Increase

37. As originally filed, Lake Region's proposed tariffs seek to establish a rate increase of approximately 50% based on test year revenue of approximately \$658,935; i.e., water revenue of \$167,144 from Shawnee Bend, sewer revenue from Horseshoe Bend of \$314,902, and sewer revenue from Shawnee Bend of \$176,889.⁸⁸

38. The originally requested rate increase was predicated upon Lake Region's calculation of a gross revenue deficiency of approximately \$331,223, based upon normalized operating results for the 12 months ending December 31, 2008, exclusive of applicable gross receipts, sales or franchise fees.⁸⁹

39. The Company originally proposed a rate of return on equity of 10.51% applied to a 60% equity capital structure.⁹⁰

40. On December 7, 2009, Lake Region's total revenue request dropped to \$215,622 based upon an update for known and measureable changes through September 30, 2009; i.e., water revenue of \$28,182 from Shawnee Bend, sewer revenue from Horseshoe Bend of \$78,307, and sewer revenue from Shawnee Bend of \$109,133.⁹¹

41. The revised request from December 7, 2009, if granted, would establish a total rate increase of approximately 32%.⁹²

F. General Rate Making Principals

42. In order to determine the appropriate level of utility rates, the Commission examines the major elements of the utility's operations, including: rate base items such as

⁸⁸ EFIS Docket Entry Number 1, *Letter and Tariffs*, filed October 7, 2009; Lake Region Exh. # 4, Summers Direct, pp. 1-5.

⁸⁹ *Id.*

⁹⁰ Staff Exh. 7, Cost of Service Report, pp. 3-4.

⁹¹ *Id.*; See also letter and worksheets filed on December 7, 2009 by Lake Region.

⁹² *Id.*

plant-in-service and accumulated depreciation and deferred income tax reserves, material and supplies and other investment items.⁹³

43. Essential in this process is a review of the revenues and expenses, making adjustments through the annualization and normalization processes. These items include: payroll, payroll related benefits, payroll taxes, office rent including utility (electricity) costs, chemical costs, operation and maintenance costs for non-payroll related costs such as material and equipment costs, small tool costs, and outside vendor costs for equipment repairs.⁹⁴

44. Depreciation expense and taxes, including federal, state, and property taxes, are all considered when setting rates.⁹⁵

45. The Commission maintains a representative relationship between rate base, revenues and expenses in order for a public utility to have an opportunity to earn a fair and reasonable return.⁹⁶

46. The Commission sets rates to properly reflect the levels of investment and expenses necessary to serve a customer base which provides revenues to the utility.⁹⁷

47. The Commission identifies a utility's ongoing costs to provide utility service in the future and what rates will need to be set to collect those ongoing costs in the future.⁹⁸

48. A test year is a historical year used as the starting point for determining the basis for adjustments that are necessary to reflect annual revenues and operating costs in calculating any shortfall or excess of earnings by the utility.⁹⁹

⁹³ Staff Exh. 13, Featherstone Direct, pp. 13-23.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

49. The purpose of a test year is to develop a relationship between the various components of the ratemaking process and keep those relationships in synchronization.¹⁰⁰

50. All of the aspects of the test year operations may be adjusted upward or downward to exclude unusual or unreasonable items, or include unusual items, by amortization or otherwise, in order to arrive at a proper allowable level of all of the elements of the Company's operations.¹⁰¹

51. Annualization and normalization adjustments are made to the test year results when the unadjusted results do not fairly represent the utility's most current annual level of existing revenue and operating costs.¹⁰²

52. The test year selected for both of these cases is the year ended December 31, 2008.¹⁰³

53. A proper determination of revenue requirement is dependent upon considering all material components of the rate base, return on investment, current level of revenues, along with operating costs, all at the same point in time. This ratemaking principle is commonly referred to as the "matching" principle.¹⁰⁴

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* The December 31, 2008 test year was chosen by the Company, agreed to by Staff, Office of the Public Counsel and both Intervenor, and approved by the Commission in its December 1, 2009 *Order Regarding Test Year and True-up Period*. In that same Order the Commission also approved the use of an update to the test year for known and measurable changes through September 30, 2009. *Id.*

¹⁰⁴ *Id.*

54. Selecting a “known and measurable date” or “known and measurable period” is important to synchronize and capture all revenues and expenses to satisfy the matching principle.¹⁰⁵

55. The known and measurable dates established for these cases are December 31, 2008 (test year), September 30, 2009 (update period) and March 31, 2010 (true-up period).¹⁰⁶

56. The September 30, 2009 date for the known and measurable period was chosen to enable the parties and Staff an update period that provides time to obtain actual information obtained from the Company upon which to perform analyses and make calculations regarding various components to the revenue requirement.¹⁰⁷

57. Since Lake Region completed a construction project on the Horseshoe Bend sewer system to enhance its sewer system within the confines of this rate case, it is also necessary to have a true-up for that part of the rate request.¹⁰⁸

58. Because the Horseshoe Bend operating system is being trued-up, the Shawnee Bend water and sewer operating systems will be trued-up to reflect any increases or decrease to the overall revenue requirement calculation using the most current information available to these cases.¹⁰⁹

59. The Commission determined that the true-up period should be through March 31, 2010.¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

60. True-ups are used in cases where cost increases or decreases are expected to occur during the period subsequent to the known and measurable period, in this case September 30, 2009.¹¹¹

61. True-ups ensure that all material components of the revenue requirement are examined so that rates are based on the most current information.¹¹²

62. The true-up process looks at the changes in the revenue requirement to reduce regulatory lag.¹¹³

63. Regulatory lag is that time that passes between a utility's request for new rates and the granting of the new rates by utility commissions. Revenue requirement changes continually take place during this time period.¹¹⁴

64. True-ups are designed to reduce or eliminate as much as possible the events that cause changes in the rate structure. Because of the requirement to base rates using actual or historical information, the true-up procedure is used to obtain the latest information available to develop the revenue requirement allowing for sufficient time for the Commission to consider in its decisions.¹¹⁵

65. The ratemaking process includes making adjustments to reflect normal, on-going operations of a utility. This process generally uses four approaches to reflect changes determined to be reasonable and appropriate. These are commonly referred to as annualization adjustments, normalization adjustments, disallowances, and pro forma

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*; See also *State ex rel. Laclede Gas Co. v. Public Service Comm'n*, 535 S.W.2d 561, 570 (Mo. App. 1976).

¹¹⁵ Staff Exh. 13, Featherstone Direct, pp. 13-23.

adjustments.¹¹⁶

66. An annualization adjustment is made when costs or revenues change during the audit period that will be ongoing at a level different than they existed during the audit period.¹¹⁷

67. A normalization adjustment is an adjustment made to reflect normal, on-going operations of the utility. Revenues or costs that were incurred in the test year that are determined to be untypical or abnormal will get specific rate treatment and generally require some type of adjustment to reflect normal or typical operations. The ratemaking process removes abnormal or unusual events from the cost of service calculations and replaces those events with normal levels of revenues or costs.¹¹⁸

68. A disallowance adjustment results in removing cost elements from the cost of service for test-year results because the items are either non-recurring, not necessary to the provision of utility service, or the expenditures were imprudent.¹¹⁹

69. A pro forma adjustment is made to reflect increases and decreases to revenue requirement because of a rate increase or decrease. Pro forma adjustments are made because of the need to reflect the impact of items and events that occur subsequent to the

¹¹⁶ *Id.*

¹¹⁷ *Id.* Typical examples are payroll increases granted to employees or employees starting employment mid-year which would require an annualization adjustment to reflect a full annual period of payroll costs-- without such an adjustment payroll would be understated. Reflecting new customers that start taking service at the end of the test year or update period would also require an annualization to properly reflect a full 12-month of revenues. *Id.*

¹¹⁸ *Id.* An example of an abnormal event is the impact that unusually dry or rainy weather has on revenues for those customers that are weather sensitive. The impact of extreme temperatures on customer usage for natural gas and electrical companies can result in a distortion to test-year revenues. Since utility rates are set using normalized processes, adjustments to test-year levels must be made when it is determined that unusual or abnormal events cause unusually high or low results. *Id.*

¹¹⁹ *Id.* A disallowance adjustment results when the cost recovery in rates is considered inappropriate. Disallowances are made to eliminate costs from test year results either entirely or on a partial basis. One example is the removal from test year results of certain advertising costs. While some advertising costs should be included in rates, others should be eliminated because they are not necessary to the provision of utility service. In this case Staff disallowed the costs charged to the test year for certain medical insurance premiums incurred for one of the owners of Company as unnecessary for the provision of utility service. *Id.*

test year. These items or events significantly impact revenue, expense and the rate base relationship and should be recognized to address the forward-looking objective of the test year.¹²⁰

70. The term revenue requirement is used to identify the incremental differences that result from a comparison of the utility's rate of return and capital structure on the investment with the revenues and costs to provide a particular utility service. This difference occurs when the results of a cost of service calculation is compared to existing rates which identifies any revenue shortfall (positive revenue requirement) or excess (negative revenue requirement).¹²¹

71. The revenue requirement calculation can be identified by a formula as follows:¹²² $RR = O + (V - D) R$ where,

RR	=	Revenue Requirement;
O	=	Operating Costs; (such as fuel, payroll, maintenance, etc., Depreciation and Taxes);
V	=	Gross Valuation of Property Used for Providing Service;
D	=	Accumulated Depreciation Representing the Capital Recovery of Gross Property Investment.
(V – D)	=	Rate Base (Gross Property Investment less Accumulated Depreciation = Net Property Investment)
R	=	Overall Rate of Return or Weighted Cost of Capital
(V - D) R	=	Return Allowed on Net Property Investment

72. This formula provides the traditional rate of return calculation the Commission uses to set just and reasonable rates. The result provides a total revenue requirement amount. That amount represents the incremental change in revenues over existing rates for the test year necessary to allow the utility the opportunity to earn the Commission's

¹²⁰ *Id.* The most common example of a pro forma adjustment is the grossing up of net income deficiency for income tax purposes. *Id.*

¹²¹ *Id.*

¹²² *Id.*

authorized return. That return is collected on the appropriate level of rate base investment. The revenue requirement calculation also allows for the recovery of the proper level of utility costs, including income taxes.¹²³

G. Stipulated Facts

73. The Parties adopt, without exception, Staff's methodology used in the design of rates, as found within the direct testimony of James M. Russo filed on January 21, 2010.¹²⁴

74. Having fully reviewed the methodology used in the design of rates accepted by the parties after review by their subject matter experts, the Commission adopts Staff's methodology, as described in the direct testimony of James M. Russo, as the correct methodology for the design of rates.¹²⁵

75. The Parties do not dispute the information contained within the Staff Accounting Schedules-Utility Service, filed on January 14, 2010, and subsequently updated as of February 8, 2010, to correct a revenue calculation error and a miscommunication between Lake Region and Staff regarding payroll resulting in adjusted increased revenue requirements of \$18,125 for Horseshoe Bend Sewer, \$108,076 for Shawnee Bend Sewer and \$20,549 for Shawnee Bend Water, subject however to the following exceptions: specific information on the topics of Management Fees and Availability Fees.¹²⁶

¹²³ *Id.*

¹²⁴ Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 2, Russo Direct, pp. 1-4; Staff Exh. 3, Staff Rate Design Report, dated January 21, 2010.

¹²⁵ *Id.* Staff Exh. 2, Russo Direct, pp. 1-4; Staff Exh. 3, Staff Rate Design Report, dated January 21, 2010.

¹²⁶ Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 7, Cost of Service Report, dated January 2010; Staff Exh. 8 Staff Accounting Schedules, dated January 2010.

76. Having fully reviewed the information contained within the Staff Accounting Schedules-Utility Service, filed on January 14, 2010, and subsequently updated as of February 8, 2010, accepted by the parties after review by their subject matter experts, the Commission adopts, as findings of fact, the information contained within the Staff Accounting Schedules-Utility Service, filed on January 14, 2010, and subsequently updated as of February 8, 2010, to correct a revenue calculation error and a miscommunication between Lake Region and Staff regarding payroll resulting in adjusted increased revenue requirements of \$18,125 for Horseshoe Bend Sewer, \$108,076 for Shawnee Bend Sewer and \$20,549 for Shawnee Bend Water with the exception of all information on the disputed issues concerning Management Fees and Availability Fees.¹²⁷

77. The Parties stipulate and agree that the information contained within the Staff's Cost of Service Report—Utility Services, filed on January 14, 2010 and updated and adjusted on February 8, 2010, is the cost of service of Lake Region subject to the following exceptions: specific information on the topics of Management Fees, and Availability Fees.¹²⁸

78. Having fully reviewed the information contained within the Staff's Cost of Service Report—Utility Services, filed on January 14, 2010 and updated and adjusted on February 8, 2010, the Commission adopts, as findings of fact, the information contained within the Staff's Cost of Service Report—Utility Services, filed on January 14, 2010 and updated and adjusted on February 8, 2010, as being the cost of service of Lake Region; except for all information on the topics of Management Fees, and Availability Fees.¹²⁹

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

79. The Stipulation does not include any adjustments that will result from the True-Up proceeding.¹³⁰

H. Capital Structure, Return on Equity, Rate of Return, Revenue, Expenses and Revenue Requirement

80. According to Staff's Accounting Schedules (True-Up Direct) Lake Region's revenue for the Test Year ending December 31, 2008, updated for known and measurable changes through September 30, 2009 and Trued-Up through March 31, 2010 is as follows:¹³¹

Horseshoe Bend Sewer Adjusted Jurisdictional Revenue	= \$327,158
Shawnee Bend Sewer Adjusted Jurisdictional Revenue	= \$179,089
Shawnee Bend Water Adjusted Jurisdictional Revenue	= \$171,769
TOTAL REVENUE	= \$678,016

81. This revenue calculation for Lake Region is not in dispute.

82. According to Staff's Accounting Schedules (True-Up Direct) Lake Region's operating expenses for the Test Year ending December 31, 2008, updated for known and measurable changes through September 30, 2009 and Trued-Up through March 31, 2010 is as follows:¹³²

Horseshoe Bend Sewer Adjusted Jurisdictional Expenses	= \$334,550
Shawnee Bend Sewer Adjusted Jurisdictional Expenses	= \$203,294
Shawnee Bend Water Adjusted Jurisdictional Expenses	= \$142,200
TOTAL EXPENSES	= \$680,044

¹³⁰ See Transcript, Vol. 6 and Staff's Late-Filed Exhibit, filed on June 21, 2010; reflecting correct amounts for plant additions and other corrections to other plant accounts.

¹³¹ Staff Exh. 18, Staff Accounting Schedule, True-Up Direct, Schedule 3 for each water and sewer division.

¹³² Staff Exh. 18, Staff Accounting Schedule, True-Up Direct, Schedule 1 for each water and sewer division.

83. To the extent that Staff's calculation includes expenses for executive management fees and rate case expense, the operating expenses are disputed.

84. According to the Jointly Filed Accounting Schedules, in relation to two of the Commission's ordered revenue requirement scenarios, as of July 23, 2010, there had been a small adjustment to Lake Region's operating expenses as follows:¹³³

Horseshoe Bend Sewer Adjusted Jurisdictional Expenses = \$337,506

Shawnee Bend Sewer Adjusted Jurisdictional Expenses = \$203,713

Shawnee Bend Water Adjusted Jurisdictional Expenses = \$142,619

TOTAL EXPENSES = \$683,838

85. To the extent that these accounting schedules include expenses for executive management fees and rate case expense, the operating expenses are disputed.

Additions to Plant from Horseshoe Bend Construction Project

86. Lake Region completed construction of a sewer pumping station and sewer force main and placed them into service on March 10, 2010.¹³⁴ Staff engineer Martin Hummel inspected the project and confirmed the new facilities are in operation and in service.¹³⁵ The correct amount for plant additions for this project is \$242,604¹³⁶

87. No party is contesting the amount for plant additions related to the completed construction project on the Horseshoe Bend sewer system.

¹³³ Staff Accounting Schedules, Report Volumes 1 & 2 for Revised Scenarios 1 & 2, Schedule 1 for each water and sewer division, filed July 23, 2010 by Staff and Lake Region.

¹³⁴ Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

¹³⁵ *Id.*

¹³⁶ Transcript, Vol. 6; Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3; Staff's Late-Filed Exhibit, filed June 21, 2010, p. 1; Staff's Late-Filed Exhibit, filed June 23, 2010, p.4. Lake Region has reviewed and accepted the work of Staff accounting witness Herrington on the other plant and depreciation issues in this case and accepts her work on this issue as well. Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

Rate Base

88. The parties concede that the correct rate base for Lake Region as of June 24, 2010, following the True-Up for the new additions to plant at Horseshoe Bend sewer operation, is: Shawnee Bend Water = \$874,282; Shawnee Bend Sewer = \$1,486,680; Horseshoe Bend Sewer = \$584,138 for a total rate base of \$2,945,100.¹³⁷

89. Not included in this rate base is a total of \$6,231,652 in Contributions In Aid of Construction ("CIAC"). Of that total amount, \$5,273,850 applies to the infrastructure, the plant in service, on the two Shawnee Bend systems, the area in which availability fees are in force. This \$5,273,850 was recorded from Four Seasons Lakesites in 2002. The remaining \$957,802 in CIAC is for other service areas on Shawnee Bend. None of this CIAC is applicable to the Horseshoe Bend operation. The remaining \$957,802 in CIAC is composed of other contributions that include service connection fees.¹³⁸

90. CIAC is a negative offset to rate base.¹³⁹

¹³⁷ Transcript, pp. 854-855; where parties' counsels concede to this amount. "A true judicial admission is one made in court or preparatory to trial by a party or his attorney that concedes, for the purposes of that particular trial, the truth of some alleged fact so that one party need offer no evidence to prove it, and the other party ordinarily is not allowed to disprove it." *Owens v. Dougherty*, 84 S.W.3d 542, 547 (Mo. App. 2002); "It removes the proposition in question from the field of disputed issues in the case in which it is made, and is a substitute for evidence in the sense that it does away with the need for evidence on that subject in that cause." *Id.* See also June 23, 2010 "Refiling of Staff's June 21, 2010 Response to Missouri Public Service Commission June 16, 2010 Order Regarding Clarification to Plant Additions," p. 5, filed June 23, 2010.

¹³⁸ Transcript, pp. 47-48, 281-282, 335-338, 343-348, 421, 459, 468, 484, 589-590, 630-631, 729-730; Lake Region Exh. 12, Summers True-Up Rebuttal, pp. 12-13. Staff Exh. 17, Featherstone True-Up Direct, pp. 29-30. The \$5,273,850 amount was frequently referenced throughout the testimony as being approximately \$5.3 million, but the exact amount was utilized for revenue requirement scenarios ordered by the Commission. See EFIS Docket Entries for: (1) Order Directing Discovery and Directing Filing, issued April 8, 2010; (2) Lake Region Water & Sewer Company's Response to April 8, 2010 Order of the Commission, filed on April 30, 2010; (3) Staff's Status Report and Accounting Schedules filed on May 18, 2010; (4) Staff's Reply to Lake Region's May 19, 2010 Filing, filed on June 7, 2010; (5) Staff's Late-Filed Exhibit and Accounting Schedules, filed on June 21, 2010; (6) Staff's Late-filed Exhibit, filed on June 23, 2010; (7) Lake Region Water & Sewer Company and Staff's Joint Revenue Requirement Scenario, filed on July 16, 2010; (8) Lake Region Water & Sewer Company and Staff's Joint Revenue Requirement Scenario filed on July 20, 2010; and (9) Lake Region Water & Sewer Company and Staff's Updated Joint Revenue Requirement Scenario, filed on July 23, 2010.

¹³⁹ See Lake Region Water & Sewer Company and Staff's Updated Joint Revenue Requirement Scenario for an explanation of rate base treatment of Contributions in Aid of Construction filed on July 23, 2010.

Capital Structure

91. Staff's proposed capital structure most accurately reflects the costs of capital employed in Lake Region's operation.¹⁴⁰

92. Staff proposed capital structure and weighted cost of capital through the date of September 30, 2009 for Lake Region is as follows:¹⁴¹

Capital Component Description	Dollar Amount	Percentage of Total Capital Structure	Embedded Cost of Capital	Weighted Cost of Capital		
				8.00%	8.50%	9.00%
Common Stock Equity	\$514,404.60	16.36%	-----	1.31%	1.39%	1.47%
Other Security Non-Tax Deductible	\$0	0.00%	0.00%	0.00%	0.00%	0.00%
Preferred Stock	\$0	0.00%	0.00%	0.00%	0.00%	0.00%
Long-Term Debt	\$2,629,091.40	83.64%	5.01%	4.19%	4.19%	4.19%
Short-Term Debt	\$0	0.00%	3.38%	0.00%	0.00%	0.00%
Other Security Tax Deductible	\$0	0.00%	0.00%	0.00%	0.00%	0.00%
Total Capitalization	\$3,143,496.00	100.00%		5.50%	5.58%	5.66%

93. Lake Region is financed by 83.64 percent debt and 16.36 percent equity.¹⁴²

94. The equity ratio is correctly determined by subtracting the long-term debt amount from the total capital amount and then dividing that equity amount by the total capital.¹⁴³

¹⁴⁰ Lake Region Exh. 5, Summers Rebuttal, pp. 8-9. Public Counsel's subject matter expert, Ted Robertson, testified that while there were some concerns with the manner in which debt and the value of equity were determined, since Lake Region believed that Staff's proposed capital structure was most accurate that it would not oppose Staff's recommended capital structure. OPC Exh. 4, Robertson Surrebuttal, pp. 2-3.

¹⁴¹ Staff Exh. 8, Staff Accounting Schedules – Accounting Schedule 8. The capital structures listed for Horseshoe Bend Sewer and Shawnee Bend Water and Sewer are all identical. *Id.* Staff Exh. 7, Cost of Service Report, pp. 12-13, and Cost of Service Appendices, Appendix 2, Schedule 1.

¹⁴² *Id.*; Staff Exh. 7, Cost of Service Report, pp. 9-10.

95. The correct embedded cost of debt is 5.01 percent for debt associated with Lake Region, as of September 30, 2009. This cost of debt is based on the cost of the acquisition debt and a small amount of debt held at Lake Region. Staff calculated the 5.01 percent by dividing the total annual cost of the loans by the total outstanding balance of the loans as of September 30, 2009. The annual cost was determined by multiplying the 12-month ended weighted average interest rates as of September 30, 2009 for the outstanding loans by the amount outstanding for each of these loans as of September 30, 2009.¹⁴⁴

96. The cost of common equity is correctly determined by adding a risk premium to the cost of debt given the fact that this cost of debt is based on a current cost rate.¹⁴⁵ Because utility stocks behave much like bonds, a 3 percent risk premium is appropriate to arrive at an estimated cost of common equity. Adding a 3 percent risk premium to the current cost of debt of 5 percent indicates a cost of common equity of 8.00 percent. Considering this is a relatively low estimated cost of common equity compared to estimates in other pending rate cases, it is appropriate to add 100 basis points to this point estimate for a total estimated cost of common equity of 8.00 percent to 9.00 percent with a midpoint of 8.50 percent.¹⁴⁶

97. For purposes of determining Lake Region's baseline revenue requirement, as reflected in Staff's accounting schedules in January of 2010, the True-Up Schedules in

¹⁴³ Staff Exh. 7, Cost of Service Report, p. 12. The owner's of Lake Region decided to issue debt at the partnership level rather than at the Lake Region level. If the owners had issued this debt at Lake Region, then this debt would be more clearly identifiable. However, if this debt had been issued by Lake Region, then this would cause the balance sheet to show a negative amount of equity. *Id.* at pp. 12-13.

¹⁴⁴ Staff Exh. 7, Cost of Service Report, pp. 12-14.

¹⁴⁵ Staff Exh. 7, Cost of Service Report, pp. 12-14. According to the textbook, Analysis of Equity Investments: Valuation (2002) by John D. Stowe, Thomas R. Robinson, Jerald E. Pinto and Dennis W. McLeavey (used as part of the curriculum in the Chartered Financial Analyst Program), a typical risk premium added to the yield-to-maturity (MM) of a company's long-term debt is in the 3 to 4 percent range. *Id.*

¹⁴⁶ Staff Exh. 7, Cost of Service Report, pp. 14-15.

April, and as is reflected in the various revenue requirement scenarios that have been filed throughout this matter, the parties accepted Staff's midpoint weighted cost of capital of 8.50%. Consequently, the parties utilized the recommended weighted rate of return on debt of 4.19% plus the recommended weighted rate of return on equity including income tax of 1.74% (equity tax factor of 1.2490 times recommended weighted return on equity of 1.39%) for a total weighted rate of return including income tax of 5.93%.¹⁴⁷

Baseline Revenue Requirement

98. The parties filed multiple reconciliations as the case progressed.¹⁴⁸

99. Based upon the agreed to calculations on current earnings, expenses, rate base, capital structure, return on equity and rate of return, the parties agreed and conceded that Lake Region's increased revenue requirement, at the time of the True-Up hearing (April 26, 2010), was as follows:

Horseshoe Bend Sewer	\$ 44,552;
Shawnee Bend Sewer	\$112,327;
Shawnee Bend Water	\$ 22,252;

with the exception of disputed issues and amounts associated with management fees, rate case expense and availability fees.¹⁴⁹

¹⁴⁷ See all accounting schedules.

¹⁴⁸ Staff Exh. 6, Reconciliation, filed March 19, 2010; Staff Exh. 19, [Updated] Reconciliation, filed April 23, 2010; Staff Exh. 50, [Updated] Reconciliation, filed June 23, 2010; See EFIS Docket Entries Numbers 252 for File Number SR-2010-0110 and Number 251 for File Number WR-2010-0111, [Updated] Reconciliation, filed July 16, 2010.

¹⁴⁹ Transcript, pp. 855-856; Staff Exh. 50, [Updated] Reconciliation, filed June 23, 2010. On July 21, 2010, during a conference between Staff, Public Counsel, Lake Region, and the Regulatory Law Judge, it became apparent that there was disagreement as to the concession made during the final day of the evidentiary hearing with regard to the revenue requirements in terms of whether rate case expense had been factored in or out. The parties present were able to agree as to what the baseline revenue requirement should be exclusive of all disputed issues. The Commission issued an order on July 26, 2010 setting a deadline for any party to object to, challenge or seek clarification regarding the July 16, 2010 Reconciliation and the agreed upon baseline revenue requirement. None of the parties objected or contested this revenue requirement.

100. On July 16, 2010, the Commission's Staff filed the final updated reconciliation where it reflects corrected cost of service or slightly increased revenue requirements for each water and sewer division.¹⁵⁰ Based upon the agreed to calculations on current earnings, expenses, rate base, capital structure, return on equity and rate of return, the parties agreed and conceded that Lake Region's increased revenue requirement was as follows:

Horseshoe Bend Sewer \$ 44,971;

Shawnee Bend Sewer \$112,746;

Shawnee Bend Water \$ 22,671;

with the exception of the disputed issues and amounts associated with management fees, rate case expense and availability fees.¹⁵¹

101. The revenue requirement in Finding of Fact Number 100, is inclusive of Staff's recommendations for executive management fees and rate case expense and those amounts must be subtracted to reveal the agreed upon baseline revenue requirement exclusive of the disputed issues.¹⁵²

See EFIS Docket Entries for *Order Regarding July 16, 2010 Reconciliation and Baseline Revenue Requirement*, issued July 26, 2010 – response deadline set for August 2, 2010.

¹⁵⁰ Staff Exh. 6, Reconciliation, filed March 19, 2010; Staff Exh. 19, [Updated] Reconciliation, filed April 23, 2010; Staff Exh. 50, [Updated] Reconciliation, filed June 23, 2010; See EFIS Docket Entries Numbers 252 for File Number SR-2010-0110 and Number 251 for File Number WR-2010-0111, [Updated] Reconciliation, filed July 16, 2010. See in particular [Updated] Reconciliation, filed July 16, 2010.

¹⁵¹ [Updated] Reconciliation, filed July 16, 2010. The Commission issued an order on July 26, 2010 setting a deadline for any party to object to, challenge or seek clarification regarding the July 16, 2010 Reconciliation and the agreed upon baseline revenue requirement. None of the parties objected or contested this revenue requirement. See EFIS Docket Entries for *Order Regarding July 16, 2010 Reconciliation and Baseline Revenue Requirement*, issued July 26, 2010 – response deadline set for August 2, 2010.

¹⁵² [Updated] Reconciliation, filed July 16, 2010.

102. Based upon the parties' unanimous stipulation, their subsequent agreements and concessions and the Commission's independent review of the evidence, Lake Region's baseline revenue requirement, exclusive of all disputed issues, is:¹⁵³

Utility Division	Horseshoe Bend Sewer	Shawnee Bend Sewer	Shawnee Bend Water	TOTAL
Revenue Requirement Inclusive of Staff's Recommendations for Management Fees and Rate Case Expense	44,971	112,746	22,671	180,388
Staff's Management Fees Recommendation	(13,309)	(7,477)	(7,115)	(27,901)
Staff's Recommendation on Rate Case Expense	(2,919)	(2,919)	(2,919)	(8,757)
Revenue Requirement Exclusive of Staff's Recommendations and Exclusive of all Disputed Revenue Issues	28,743	102,350	12,637	143,730

103. The parties still dispute: (1) the amount and proper treatment availability fees; (2) the amount of executive management fees; and (3) the amount and proper treatment of rate case expense.

I. Rate Design

104. Based upon the parties' unanimous stipulation and the Commission's independent review, the Commission finds that the proper method to implement any over-all revenue increase is the Water and Sewer Department's small company rate design methodology.¹⁵⁴

¹⁵³ *Id.* Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7. See also Footnotes 149-151, *supra*. On July 29, 2010, Public Counsel filed a statement of concurrence with the baseline revenue requirement.

¹⁵⁴ Transcript, pp. 13, 88, 143, 751; Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

105. Lake Region's Shawnee Bend water customers consist primarily of residential customers, but there are also 33 commercial customers.¹⁵⁵

106. The current rates consist of a fixed monthly customer charge and a usage or commodity charge.¹⁵⁶

107. Based upon the parties' unanimous stipulation and the Commission's independent review, the proper rate design for any over-all rate increase in water rates is to implement an equal percentage increase for the customer and commodity charges.¹⁵⁷

108. Lake Region's Shawnee Bend sewer customers consist primarily of residential customers, but there are also 11 commercial customers.¹⁵⁸

109. Lake Regions' Horseshoe Bend sewer customers consist of primarily of residential customers, but there are also 2 multi-unit customers and 17 commercial customers.¹⁵⁹

110. The commercial sewer customers in Shawnee Bend and Horseshoe Bend are primarily restaurants, hotels and condominium units.¹⁶⁰

111. The usage for the majority of the commercial sewer customers is similar to residential customers.¹⁶¹

112. The residential sewer customers of the Shawnee Bend and Horseshoe Bend service areas are based on a flat rate.¹⁶²

¹⁵⁵ Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁵⁶ *Id.*

¹⁵⁷ Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁵⁸ Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁵⁹ *Id.*

¹⁶⁰ Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁶¹ Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

113. The multi-unit and commercial sewer customers of the Shawnee Bend service area have a customer charge and commodity charge for any usage above 6,000 gallons.¹⁶³

114. The commercial sewer customers of the Horseshoe Bend service area have a base charge calculated on the highest month's sewer or water usage during the previous calendar year with the base charge adjusted in January and a commodity charge.¹⁶⁴

115. The design of commercial sewer customer's charge of the Horseshoe Bend service area should be similar to the design of the customer charge for the Shawnee Bend sewer operations.¹⁶⁵

116. Based upon the parties' unanimous stipulation and the Commission's independent review, the proper rate design for any over-all rate increase in sewer rates for the Shawnee Bend sewer operations and for the residential sewer customers on Horseshoe Bend is to implement an equal percentage increase for the customer and commodity charges.¹⁶⁶

117. Based upon the parties' unanimous stipulation and the Commission's independent review, the proper rate design for the Horseshoe Bend commercial sewer operations includes changing the commercial sewer customer charge to a traditional customer charge similar to the customer charge for the Shawnee Bend sewer operations to result in a consistent rate design for all of Lake Region's customers.¹⁶⁷ Following this

¹⁶² Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Staff Exhibit 5, Unanimous Stipulation of Undisputed Facts, filed March 16, 2010 (EFIS Docket Entry Number 58 in SR-2010-0110 and EFIS Docket Entry Number 54 in WR-2010-0111) admitted into evidence on March 29, 2010; Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁶⁷ *Id.*

change, the proper application for any over-all rate increase is to implement an equal percentage increase for the customer and commodity charges.¹⁶⁸

118. Any increase in commodity charge provides an added economic incentive to customers with high inflow and infiltration to make necessary repairs and improvement to the collection systems.¹⁶⁹

J. Miscellaneous Tariff Issues

119. Lake Region's current returned check charge of \$15.00 is less than the actual cost incurred by Lake Region related to bank charges, account, tracking, monitoring and additional notices. The proper return check charge for Lake Region is \$25.00.¹⁷⁰

120. Lake Region's current tariff language does not include a method to allow Lake Region to disconnect a customer for any reason except upon the request of the customer. Lake Region's tariff lacks legally required language to allow the company to disconnect a customer for non-payment pursuant to Commission Rule 4 CSR 240-13.050.¹⁷¹

K. Availability Fees

The Creation of the Availability Fees

121. On December 2, 1969, Harold Koplar, the original developer of Four Seasons Lakesites, Inc., executed the original Declaration of Restrictive Covenants for the development that would eventually encompass Lake Region's service area.¹⁷² No copy of

¹⁶⁸ *Id.*

¹⁶⁹ Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁷⁰ *Id.* at pp.6-7.

¹⁷¹ *Id.*

¹⁷² Transcript pp. 640-641; Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants. Transcript citations related to the restrictive covenants are found at pp. 219-227, 241, 275-277, 335-336, 380-396, 400-403, 461-462, 504-519, 532-532, 590-592, 637-643, 705-706.

the original Declaration of Restrictive Covenants was submitted to the Commission or admitted into the record.

122. On March 10, 1971, Harold Koplar, the original developer of Four Seasons Lakesites, Inc., executed the [First] Amended Declaration of Restrictive Covenants (“1st Covenants”) for the development that would eventually encompass Lake Region’s service area.¹⁷³

123. Article VI of the 1st Covenants establishes Lakesites POA, and the all property owners in the development automatically become a member in the Association when they purchase property.¹⁷⁴

124. Article VII of the 1st Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards.¹⁷⁵

125. Articles VII and VIII of the 1st Covenants pertain to the central sewage disposal system and water works.¹⁷⁶ These sections:

- a.) establish a “minimum monthly availability charge for water, water service and the accommodations afforded the owners of said lots by said water works systems” that would commence when water service was available and continue regardless whether the property owner takes water service from the central system to be constructed within the development;
- b.) allow for the construction of individual wells until such time as the central water system is constructed, after which the property owner must connect to the central system;

¹⁷³ Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

¹⁷⁴ Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

- c.) establish “a minimum monthly availability charge for sewage disposal and treatment and the accommodations afforded the owners of said lots by said sewage disposal system” that would commence upon the availability for use of a sewage collection main that leads to an operating sewage treatment facility and continue regardless whether the property owner connects to the central sewage to be constructed within the development;
- d.) allow for the construction of individual sewer systems, i.e. septic tanks and tile fields, until completion of the central sewer system, after which the property owner must connect to the central system;
- e.) provide that no charge will be made to the lot owners for the right to connect to the water and/or sewer systems; and,
- f.) provide that the owner or owners of the water works system and sewage disposal system will be a privately owned utility authorized by a CCN issued by the MoPSC and all availability charges, and times and methods of payment, shall be provided in schedules or rates and rules to be approved by the MoPSC.

126. Article VIII of the 1st Covenants further provides that the availability fees are to be paid to the owner or owners of the sewage disposal system and water works system and that any “unpaid [availability] charges shall become a lien on the lot or lots to which they are applicable as the date the same became due.”¹⁷⁷

127. The 1st Covenants constitute an agreement between the developer and the property owner. It also creates contractual duties that flow between the property owner and Lakesites POA. The 1st Covenants are not a contract or agreement between Lake Region and the property owner.¹⁷⁸

128. In addition to agreeing to the restrictive covenants upon the purchase of an undeveloped lot, the owner of each lot executed a separate water and sewer agreement,

¹⁷⁷ *Id.*

¹⁷⁸ While the 1st Covenants direct that payment of the availability fees will be made to the owners of the sewage disposal system and water works system, the owners of the sewage disposal system and water works system have no enforcement rights as they are not parties to the contract. In this instance, the developer and owner of the utilities were the same, but standing for enforcement of the contractual rights stems from the developer being the party to the contract, not the owner of the utility.

the provisions of which mirrored those in the 1st Covenants.¹⁷⁹

129. On January 14, 1986, the Second Amended and Restated Declaration of Restrictive Covenants was executed by the developer.¹⁸⁰ No copy of the Second Amended and Restated Declaration of Restrictive Covenants was submitted to the Commission or admitted into the record.

130. On July 2, 1996, Peter N. Brown, successive developer for Four Seasons Lakesites, Inc., executed the Third Amended and Restated Declaration of Restrictive Covenants (3rd Covenants).¹⁸¹

131. Article VII of the 3rd Covenants pertain to Lakesites POA, and the all property owners in the development automatically become a member in the Association when they purchase property.¹⁸²

132. Article VIII of the 3rd Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards and DNR.¹⁸³

133. Article IX(A) of the 3rd Covenants duplicates the provisions from prior declarations relating to the water system, but the water system only.¹⁸⁴ This duplication

¹⁷⁹ Lake Region Exhibit 13, Engineering Report in Case No. 17,954.

¹⁸⁰ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

¹⁸¹ Transcript, pp. 618-619, 639-642, 709, 714; Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4. The 3rd Covenants were attested to by Susan Koplar Brown, Secretary of Four Seasons Lakesites, Inc. Mr. Brown is the son-in-law of the original developer, Harold Koplar.

¹⁸² Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants.

¹⁸³ Staff Exh. 15, Merciel Rebuttal, Attachment 3, Third Amended and Restated Declaration of Restrictive Covenants.

¹⁸⁴ Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4.

includes the provisions concerning availability fees.¹⁸⁵ This article includes the provision that owners of the water works system will be a privately owned utility authorized by a CCN issued by the MoPSC and all availability charges, and times and methods of payment thereof, shall be provided in schedules or rates and rules to be approved by the MoPSC, or if not so provided, as determined by the Owner of the water works system.¹⁸⁶

134. Article IX(C) of the 3rd Covenants provides for a plan for sewage treatment by individual treatment facilities, which must meet the specifications of Lakesites POA's DNR-approved plan or by "other methods of sewage treatment by the Development." It also provides that Lakesites POA will periodically maintain each individual treatment facility and each lot owner is required to pay a monthly maintenance fee to the POA for administering the plan. The 3rd Covenants do not mention or require any availability fees for sewer service to be paid to the developer or to Four Seasons Lakesites Water & Sewer Company.¹⁸⁷

135. The "Development," for purposes of Article IX(C) of the 3rd Covenants, refers to the Horseshoe Bend lots.¹⁸⁸

136. Article IX(E) of the 3rd Covenants provides that, barring certain exceptions, "all homes and other structures requiring sewage or waste water disposal facilities, shall conform to the plan for sewage treatment; no such home or structure may be occupied unless so connected to the sewage treatment facility and no septic tank, cesspool or other means of disposal of sewage on an individual lot may be used in the subdivisions."

137. There are multiple amendments to the 3rd Covenants.¹⁸⁹

¹⁸⁵ *Id.*

¹⁸⁶ Staff Exh. 15, Merciel Rebuttal, Attachment 3, Third Amended and Restated Declaration of Restrictive Covenants.

¹⁸⁷ Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4.

¹⁸⁸ *Id.* See in particular the definitions section and the Amendment to the 3rd Covenants dated July 23, 2009.

138. The amendment to the 3rd Covenants executed on July 23, 2009 contains specific provisions regarding the water and sewer systems.¹⁹⁰

139. Article IX in July 23, 2009 amendment removes and replaces the entire Article IX from the 3rd Covenants, and provides, *inter alia*.¹⁹¹

a.) **Shawnee Bend Lot Owners must “pay the owner of the central water system, or its assigns or designees,** a monthly availability charge of Ten Dollars (\$10.00), unless the Owner of the Lot is contractually obligated to Developer, or Developer’s assign to pay a different amount;”

b.) The **water availability fee for Shawnee Bend Lot Owners**¹⁹² commences upon the availability of water in a water system distribution main provided for the Lot and terminates when the Owner of the Lot connects his Lot to the water distribution main.

c.) Unpaid water availability fees become a lien on the Lot the date they become due.

d.) **Shawnee Bend Lot Owners** must “pay the owner of the central **sewer system, or its assigns or designees,** a monthly availability charge of Fifteen Dollars (\$15.00), unless the Owner of the Lot is contractually obligated to Developer, or Developer’s assign to pay a different amount.”

e.) **Horseshoe Bend Lot Owners** must pay the owner of the **water works** system a minimum monthly availability charge (amount not specified).

f.) The **Owner of the Horseshoe Bend water works system** will be a privately owned public utility authorized by a certificate of public convenience and necessity issued by the MoPSC to operate the water works system.

g.) The availability fees charged for the **Horseshoe Bend Water System** shall be provided in the Schedules of Rate and Rules. And, regulations and conditions for water services shall be approved by the MoPSC (or any successor) **and if not so provided will be determined by the owner of the water works.**

¹⁸⁹ Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4. See in particular the definitions section and the Amendment to the 3rd Covenants dated July 23, 2009.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Similar water provisions apply to Horseshoe Bend Lot Owners; however, Horseshoe Bend water service is provided by a different corporate entity (Ozark Shores) and water service to Horseshoe Bend is not at issue in this case.

h.) The **Horseshoe Bend sewer treatment** plan has essentially the same terms as outlined in Finding of Fact Number 136.

i.) Unpaid sewer fees for maintenance, owed to Lakesites POA, become a lien on the Lot and may be enforced by the Association.

j.) The water and sewer amendment shall survive the execution and recording of the Fourth Amended and Restated Declaration and shall remain in full force and effect and be incorporated into the Fourth Amended and Restated Declaration.

140. All references to regulation by the Commission in the 3rd Covenants apply to the Horseshoe Bend Water System, which is not at issue in this case since this system was sold and became Ozark Shores Water Company in 1992.¹⁹³

141. The 3rd Covenants constitute an agreement between the developer and the property owner. They also create obligations that flow between the property owner and Lakesites POA. The 3rd Covenants are not a contract or agreement between Lake Region and the property owner.

142. On October 1, 2009, the Fourth Amended and Restated Declaration of Restrictive Covenants (“4th Covenants”) was executed by Peter Brown, Vice-President of Four Seasons Lakesites, Inc.¹⁹⁴

143. Article 9 of the 4th Covenants states that all provisions relating to the water and sewer systems and treatment are set forth in the Amendment to the 3rd Covenants dated July 22, 2009 (executed July 23, 2009).¹⁹⁵ See Finding of Fact Numbers 138-140.

¹⁹³ See Finding of Fact Number 23.

¹⁹⁴ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. The 2009 Annual Registration Report from Four Seasons Lakesites, Inc., dated June 11, 2009, lists Peter Brown as being the president. His wife, Susan, is Vice-President.¹⁹⁴

¹⁹⁵ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

144. Recital E in the 4th Covenants indicates the Declarant may amend the Declaration at any time until all the lots in development have been sold.¹⁹⁶

145. All of the lots developed by Four Seasons Lakesites, Inc. on Shawnee Bend have been sold.¹⁹⁷

146. Section 19.3 of the 4th Covenants allows the property owners to seek amendment of the Declaration subject to certain conditions.¹⁹⁸ Those conditions include:¹⁹⁹

a.) The Declaration is binding until January 15, 2015, after which it is automatically renewed unless the owners of 90% of the lots vote to terminate the Declaration.

b.) The Declaration may be amended at any time by the Developer at the request or with the consent of the Board until such time as all lots are sold, at which such time the Declaration may be amended by the affirmative vote of two-thirds of the owners of all of the lots entitled to vote.

c.) In the case of amendment by two-thirds of the property owners the amendment shall be executed by the requisite lot owners or the POA.

147. The current owners of Lake Region have no control over the provisions in the Declaration of Restrictive Covenants executed by the property developer or any amendments to the Covenants.

148. The 4th Covenants constitute an agreement between the developer and the property owner. It also creates obligations between the property owner and Lakesites

¹⁹⁶ *Id.*

¹⁹⁷ Recital F (October 1, 2010) indicates that not all lots have been sold. Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. However, Peter N. Brown, by an affidavit dated April 29, 2010, states that all of the lots developed by Four Seasons Lakesites, Inc. on Shawnee Bend have been sold. Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

¹⁹⁸ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. The covenants have been amended or supplemented a minimum of 47 times. Also, additional covenants and restrictions apply to specific subdivisions of the development. *Id.*

¹⁹⁹ *Id.*

POA. The 4th Covenants are not a contract or agreement between Lake Region and the property owner.

149. The 3rd and 4th Covenants do not represent that the Commission would determine or tariff rates for availability fees.

150. With respect to the water systems, the 3rd and 4th Covenants provide that if the Commission does not provide or approve regulations and conditions for services, they will be determined by the owner of the system.

151. There is no provision or language in the 1st, 3rd or 4th Covenants that identifies an intent or purpose for charging or collecting availability fees.²⁰⁰

152. The specimen land sales contract utilized by Four Seasons Lakesites, Inc. also contains provisions regarding the charging of availability fees. Paragraph 9 (B) and (C) provide:

- a.) all lots in the development will be served by a central water system;
- b.) the buyer agrees to pay availability fees until the central water system is completed to the point that a main water line runs in front of the buyer's property;
- c.) the availability fee for water is \$10.00 per month;
- d.) the availability fee for water shall be paid to the seller of the seller's assignee, Lake Region Water & Sewer Co.;
- e.) the buyer agrees to pay all cost for connecting buyer's home to the central water system;
- f.) all lots in the development will be served by a central sewer system;
- g.) the buyer agrees to pay a monthly availability fee to the seller or seller's assignee until such time as the buyer constructs a home on the property; and,

²⁰⁰ See 1st, 3rd and 4th Covenants. Transcript, p. 731.

h.) once the buyer constructs a home, the buyer shall pay the sewer system operator a one-time connection fee and monthly fee for sewer service.²⁰¹

153. It is unclear whether this specimen contract was actually used by the developer; or what time period it might have been used; or if it had been used, whether it is still used by the developer. No actual contracts that had been executed between a property owner and the developer were offered into evidence.²⁰²

154. There is no provision or language in the specimen contract that identifies an intent or purpose for charging or collecting availability fees.

155. The specimen land sales contract constitutes an agreement between the developer and the property owner. The land sales contract is not a contract or agreement between Lake Region and the property owner.

Purpose of Availability Fees

156. In Commission Case Number 17,954, the original certification case, the Commission received into evidence an engineering report and the testimony of James W. French, registered professional engineer.²⁰³

157. The engineering report and testimony demonstrate that the economic feasibility of constructing the water and sewer system for what would ultimately become the service area for Lake Region was dependent upon the use of availability fees charged to the purchasers of the undeveloped lots.²⁰⁴

²⁰¹ Staff Exh. 53, Four Seasons Lakesites, Inc. Sales Contract.

²⁰² *Id.*; No copies of an executed land sales contract were introduced into evidence. Transcript, pp. 708-709, 713-715.

²⁰³ Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954.

²⁰⁴ Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954; *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience*

158. A copy of a separate availability fee agreement is attached to the engineering report.²⁰⁵ The availability fee agreement contains provisions mirroring the terms for water and sewer service outlined in the 1st Covenants as described in Finding of Fact Numbers 122-128.²⁰⁶

159. The Commission's Report and Order in Case No. 17,954, effective December 27, 1973, ("1973 Order") granting Four Seasons Lake Sites Water and Sewer Company (Lake Region's predecessor in interest) its CCN for water service, acknowledges the use of availability fees and distinguishes the agreement for those charges from the rates and charges proposed for rendering metered and unmetered water service.²⁰⁷

160. The 1973 Order requires Lake Region's predecessor in interest to file tariffs including the rates for metered and unmetered water service. The Commission's order does not requiring the tariffing of availability fees.²⁰⁸

161. The collection of availability fees, by the terms and timing of the original agreements, began prior to construction or completion of the water and sewer systems and were collected to make construction of the systems feasible.²⁰⁹

162. The purpose for establishing the availability fees was to recover the investment in the water and sewer systems, not to maintain or repair the existing operations of the systems once they were constructed.²¹⁰

and Necessity to Construct, Operate and Maintain an Intrastate Water System, Case No. 17,954, Report and Order, Issued December 17, 1973, Effective December 27, 1973.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954.

163. People who purchase lots who are subject to paying the availability fees receive a benefit from paying the availability fees. That primary benefit is access to required utility service, in this instance potable water and sewage treatment, without having to sustain additional costs of installing a well or a septic system. A secondary benefit for paying the fees is the avoidance of having a lien placed on the property by operation of the terms of the land sales contract or the restrictive covenants. Having the infrastructure in place also facilitates the sale of lots by complying with deed restrictions.²¹¹

164. 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 the ratepayers.²¹²

²¹⁰ Transcript, pp. 281-282, 335, 343-346, 364-365, 562, 565, 692-702 (see in particular pp. 700-702). Staff Witness Featherstone testified that Staff's theory that the cost of original infrastructure was recovered in the price of the lots, and not from availability fees, was based upon an assumption. (Transcript, p. 461). Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010; Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954. While the Commission's Staff has levied many accusations regarding the purpose of the availability fees being to repair and maintain existing infrastructure, as opposed to recovering the investment in infrastructure, Staff has not provided any evidence to support its theories. Moreover, Staff's testimony has been contradictory; for example, without supporting evidence, Staff witness Featherstone testifies that he believes availability fees would be used to offset maintenance and repair and future replacement construction (Transcript, pp. 415, 468, 731-732). Mr. Featherstone appears to contradict himself when he further testified: The original infrastructure, "to the extent there has been construction and additions" was donated to Lake Region, while: "Replacements to that infrastructure, that would have been paid for by the Lake Region utility and ultimately paid for by the Lake Region customers," i.e., not from availability fees. (Transcript, p. 459). Staff Witness Merciel also contradicts Mr. Featherstone when he testifies that "you can't tell what they're (the availability fees) supposed to be for" (Transcript, p. 482). Staff's latest argument (in its post-hearing brief) refers to a 2003 civil case involving Lake Region and one of its previous owners, Waldo Morris. That argument will be addressed in the conclusions of law section.

²¹¹ Judicial admission by Public Counsel: "Standby and availability charges are fees which are exacted for the benefit which accrues to property by the virtue of having water available to it even though the water might not actually be used at the present time." Transcript, p. 20. The deed restrictions require accessing the utility infrastructure and compliance with paying the availability fee allows for sale of the lots. Transcript pp. 249-250. Alleviates the need for the property owner to drill a well or install a septic system. Transcript, pp. 357-358. The chief benefit of having the infrastructure in place is the availability of potable water distribution and permanent sewer treatment – lot owners gain this benefit from paying availability fees. Transcript 458-459, 741-742 (Featherstone) Mr. Featherstone's prefiled testimony contradicts his testimony at hearing. Transcript, p. 734. There is an economic benefit to pay the fees to avoid a lien on the property. Transcript, p. 499.

²¹² Transcript, pp. 253, 357-358, 432-433, 455, 461. See also Footnote 211.

Assignment or Transfer of Ownership of the Availability Fees

165. On August 17, 1998, Four Seasons Lakesites, Inc. (Developer) and Four Seasons Water & Sewer Co. assigned the availability fees to Roy and Cindy Slates.²¹³

166. The 1998 and 1999 Annual Reports for the company confirm that the company's stock was also transferred to the Slates, but no Stock Purchase Agreement was offered or entered into evidence.²¹⁴

167. Following the August 17, 1998 assignment, neither Four Seasons Group, Inc. nor Four Seasons Lakesites, Inc. were involved with the billing or collection of availability fees assessed to the properties in water and sewer companies' service areas.²¹⁵

168. On July 27, 1999, Lake Region filed its annual report for the year ending December 31, 1998. Availability fees are listed as being "other income" and total \$52,648.²¹⁶ This is consistent with timing of the assignment of the fees to the Slates. The 1998 Annual Report was the last year availability fees were reported.²¹⁷

169. On April 12, 2000, Roy and Cindy Slates assigned the availability fees to Lake Region Water & Sewer Company.²¹⁸

²¹³ Transcript pp. 242-247, 259-262, 277, 287, 342-346, 351-352, 355, 357, 423-424, 457-458, 518, 544, 635-636; Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement; OPC Exh. 2, Robertson Direct, pp. 3-5 (Lake Region's response to Staff Data Request No. 44.1).

²¹⁴ *Id.*; Lake Region Exh. 7, Annual Report of Lake Region Water and Sewer Company for the year ended December 31, 1998; Lake Region Exh. 8, Annual Report of Lake Region Water and Sewer Company for the year ended December 31, 1999; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

²¹⁵ Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010. As previously noted, on October 9, 1998, Lakesites W&S changed its name to Four Seasons Water and Sewer Company ("Four Seasons W&S"), and On May 16, 1999, Four Seasons W&S changed its name to Lake Region. Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8. Note: Staff reports the name change occurring in this case; however, the docket entries do not reflect a name change application; *In the Matter of Four Seasons Water and Sewer Company for Name Change to Lake Region Water and Sewer Company*, Case No. WO-99-0469, Order Recognizing Change of Corporate Name and Filing of Adoption Notice, Effective May 16, 1999.

²¹⁶ See Footnotes 213 - 215.

²¹⁷ *Id.*

²¹⁸ *Id.*

170. On April 12, 2000, Lake Region Water & Sewer Company assigned availability fees to Waldo I. Morris.²¹⁹

171. On October 13, 2004, Waldo I. Morris (President of Lake Region Water & Sewer Co.) and Robert P. Schwermann and Sally J. Stump executed a “Contract Regarding Availability Fees” (“Fee Contract”).²²⁰

172. Part of the Fee Contract included consummating and closing a Stock Purchase Agreement (dated September 10, 2004) in which Robert P. Schwermann and Sally J. Stump purchased all of the stock in Lake Region for three million dollars.²²¹ The Stock Purchase Agreement was not offered or entered into evidence.

173. The Fee Contract was accompanied by a separate “Assignment of Availability Fees” agreement specifying that for the amount of \$1.00, and “other good and valuable consideration,” Mr. Morris assigned the availability fees to Robert P. Schwermann and Sally J. Stump.²²²

174. Robert P. Schwermann and Sally J. Stump hold the availability fees as tenants in common.²²³

175. On October 8, 2003, a lawsuit was initiated by Four Seasons Lakesites, Inc., contesting the ownership of the property rights for the availability fees; Civil Case No. CV103-760CC. The defendants in that lawsuit included Lake Region and Roy and Cindy Slates, and Waldo Morris, the former owners of Lake Region. On April 15, 2005, a

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement. Transcript, p. 612, 643-644.

²²² *Id.*; Transcript, pp. 245, 259-261, 612-613.

²²³ Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement.

confidential settlement was reached regarding who owned the property rights to the fees. Because the ownership of Lake Region had changed hands again, this settlement included the assignment of availability fees from Waldo Morris to Robert P. Schwermann and Sally J. Stump. Sally J. Stump and RPS Properties, L.P. received the right to collect the availability fees as a result of that settlement; however, terms were put in place as to which party received what portion of the availability fees.²²⁴

176. Four Seasons Lakesites, Inc. holds a security interest in RPS Properties, L.P.'s and Sally Stump's availability fees as defined in the Collateral Assignment and Security Agreement dated April 15, 2005 and the Availability Fee Assessment rights as defined in the Collateral Assignment and Security Agreement dated April 15, 2005. This security interest includes all accounts, accounts receivable, payment intangibles, contract rights, chattel paper, instruments and documents and notes; all proceeds relating thereto; and all of the foregoing, which are related to or arising from such Availability Fees and the Availability Fee Assessment Rights.²²⁵

²²⁴ Civil Case No. CV103-760CC. The Commission took administrative notice of this case during the evidentiary hearing. The lawsuit also involved a "Demand for Delivery of Possession" wherein the ownership of a certain tract of property was in dispute. Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010; (HC – Paragraphs 12, 13, 15 to be made public by this order). Staff Exh. 23, Confidential Settlement Agreement in Circuit Court Case CV-103-760CC executed between Four Seasons Lakesites, Inc., Lake Region Water and Sewer Company, Sally J. Stump and RPS Properties, L.P. on April 15, 2005. (HC – no terms of the agreement are disclosed). See also Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010; Transcript, pp. 245, 247, 250, 697, 707-708,

²²⁵ Lake Region Exh. 10, UCC Financing Statement: Four Seasons Lakesites, Inc.'s Security Interest in Availability Fees owned by Sally Stump and RPS Properties, L.P. Beginning with Lake Region's 2005 Annual Report, filed on August 1, 2006, a new entry appears in Annual Reports in the category of "Payments for Services Rendered by Other than Employees." The new entry is entitled Lake Utility Availability, Management. Lake Region Water and Sewer Company, Water and Sewer Annual Report, Small Company, to the Missouri Public Service Commission for the year ending December 31, 2005. This line item books costs associated with debt service cost for the amount of money the shareholders borrowed to purchase Lake Region. *Id.* See also Staff's Response to Commission Request for Annual Report Analysis, filed on May 28, 2010, and Lake Region's Response to June 1, 2010 Order of the Commission, filed June 8, 2010.

Collection and Amount of Availability Fees

177. According to the terms of the sales contract and the restrictive covenants (described in Findings of Fact Numbers 121-155) availability fees are levied on the owners of undeveloped lots. Once lots are developed, the owner of the property must connect to the water and sewage systems and availability fees are no longer charged once the connection is made and water and sewer service are being provided.²²⁶

178. Availability fees are not paid by Lake Region's water and sewer service customers.²²⁷

179. Lake Region must provide service to any property owner requesting service within Lake Region's service area, even if the property owner does not pay or is in arrears on paying the availability fees.²²⁸

180. The number of annual bills for availability fees will vary while lots are sold and developed and will continue to vary annually until all lots are sold and developed.²²⁹

181. The actual amount of availability fees collected will vary based upon the property owners fulfilling their obligation to pay.²³⁰

182. The actual amount of availability fees collected annually will vary based upon when the property owners pay the fees.

²²⁶ The undeveloped lots contain no structures, no service lines to connect a structure to a main and there is no actual exchange of water or sewage discharge between a structure and a water or sewer main. Transcript, pp. 534-535.

²²⁷ Transcript pp. 557-558.

²²⁸ Transcript, pp. 489-490, 614.

²²⁹ See the annual reports for Lake Region and its Predecessor Company that report varying amount of fees collected. See Lakesites POA Exhs. 3 and 5. See also "Staff's Response to Commission Request for Annual Report Analysis," filed on May 28, 2010.

²³⁰ See the annual reports for Lake Region and its Predecessor Company that report varying amount of fees collected. See also "Staff's Response to Commission Request for Annual Report Analysis," filed on May 28, 2010.

183. Depending on how quickly property owners develop their lots, some may pay availability fees for a very small number of months and some may pay the fees for years.

184. Availability fees collected during the years of 1974 through 2004 that were reported by Lake Region's predecessors vary in amount. Fees collected were reported for the years 1974 through 1985, 1987 through 1992, and 1995 through 1998.²³¹

185. The total amount of availability fees that were collected and reported during the years of 1973 through 2004 that can be verified by the company's annual reports is \$1,571,749.²³²

186. The total amount of availability fees that were collected and reported during the years of 1973 through 2004 were collected by the previous owners of the company, i.e. Harold Koplar, Peter N. Brown, Roy and Cindy Slates, and Waldo I. Morris.

187. The total amount of availability fees that were collected and reported during the years of 1974 through 2004 that can be verified by the Lake Region's predecessor's annual reports is inaccurate because: (1) data is missing for the years of 1986, 1993, 1994, 1999, 2000, 2001, 2002, 2003, and 2004; (2) there is no breakdown of the dollars collected to know whether the fees were collected for water or sewer customers on Shawnee Bend versus Horseshoe Bend; and (3) based on the timing of the certification cases and the transfer of assets cases, availability fees collected between the years of 1974 and 1992 are comprised primarily, if not totally, from fees collected in relation to the Horseshoe Bend water system, which is irrelevant to this matter.

188. The availability fee income that is reported appears on line F-42 of the annual reports for "Other Income and Deductions."²³³

²³¹ *Id.*

²³² *Id.*

189. Since the sale of Lake Region's stock and the assignment of availability fees to Robert P. Schwermann and Sally J. Stump, and the settlement agreement executed in Civil Case No. CV103-760CC, Sally J. Stump and RPS Properties, L.P. have the right to collect the availability fees.²³⁴

190. RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 bills for and collects "availability fees" from land owners of undeveloped lots within the service area of the Lake Region. Lake Utility Availability 1 is a fictitious name.²³⁵

191. For convenience, management fees are paid into the same account in which the availability fees are deposited. That account is titled Lake Utility Availability Fees and is owned by RPS Properties and Sally Stump.²³⁶

192. Billing statements for the availability fees bear the caption "Lake Utility Availability" and display the same address and phone number as a copy of a customer bill for water and sewer service from Lake Region.²³⁷

193. Cynthia Goldsby is currently a billing clerk employed by Camden County Public Water Supply District Number 4.²³⁸

194. Ms. Goldsby's hourly wage is paid by Camden County PWSD4 and is \$12.90.²³⁹

²³³ See the annual reports for Lake Region and its predecessor companies.

²³⁴ Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

²³⁵ Transcript, pp. 261-266, 279-280, 323-327, 609, 650; Staff Exhibit 11, Registration of Fictitious Name – Lake Utility Availability, Filed with the Secretary of State on December 1, 2004, expired December 1, 2009; See also Registration of Fictitious Name – Lake Utility Availability 1, Filed with the Secretary of State on August 24, 2005, expires August 24, 2010; Staff Exh. 7, Cost of Service Report, pp. 1-7.

²³⁶ Transcript, p. 358, 417-418. There has been no objections from the original registrant of the fictitious name Lake Utility Availability made to the current registrant of the fictitious name Lake Utility Availability 1 to the use of the abbreviated name. Transcript, p. 650.

²³⁷ Staff Exh. 15, Merciel Rebuttal, Attachment No. 6.

²³⁸ Staff Exh. 26, Affidavit of Cynthia Goldsby, executed May 24, 2010.

195. As part of Ms. Goldsby's job responsibilities, she handles billing and collection of the availability fees, but she is unaware as to which entity or entities for which she conducts these activities.²⁴⁰

196. RPS Properties, L.P. makes no payments for Ms. Goldsby's services.²⁴¹ RPS Properties, L.P. makes no payments to the Camden County PWSD4 for Ms. Goldsby's services.²⁴²

197. Ms. Goldsby currently sends bills for annual availability fees to 1,345 individuals or entities owning Shawnee Bend properties.²⁴³

198. The annual availability fees for both water and sewer for each entity billed is \$300.²⁴⁴

199. RPS Properties, L.P. and Sally Stump began collecting availability fees in 2005, but they retain only a portion of the availability fees pursuant to the April 15, 2005 settlement agreement in Civil Case No. CV103-760CC.²⁴⁵

²³⁹ Staff Exh. 26, Affidavit of Cynthia Goldsby, executed May 24, 2010.

²⁴⁰ Transcript pp. 257-258, 282-287, 307-314; Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010.

²⁴¹ Staff Exh. 22, Affidavit of Brian Schwermann, executed May 23, 2010. (HC – Paragraphs 4 & 5 to be made public by this order).

²⁴² *Id.*

²⁴³ Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010; Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010. (HC – Paragraph 8 to be made public by this order). Lakesites POA introduced evidence of the number of undeveloped lots in the Porto Cima subdivision of the Shawnee Bend Peninsula. These numbers presented by Lakesites POA demonstrate the annual fluctuation in the number of unimproved lots; however, these numbers, absent an accurate count of the actual bills levied for availability fees are of no value in determining the actual amount of availability fees billed for and collected on an annual basis. See Lakesites POA Exhs. 3 and 5.

²⁴⁴ Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010; Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010 (HC – Paragraph 9 to be made public by this order); Staff Exh. 20, Affidavit of Sally Stump, executed June 1, 2010.

²⁴⁵ Staff Exhibit 23, Confidential Settlement Agreement in the Circuit Court Case Between Four Seasons Lakesite and Lake Region Water & Sewer Company's Sally Stump and RPS Properties. (HC– no confidential material disclosed).

200. Based upon the confidential affidavits introduced into evidence identifying the total amount of availability fees collected, and the amount RPS and Sally Stump cannot retain pursuant to the settlement agreement in Civil Case No. CV103-760CC (the specific terms of which the Commission will not disclose), the annualized amount of revenue actually received from the availability fees by RPS and Sally Stump can be definitively calculated. However, for reasons more fully articulated in the conclusions of law, those actual numbers will not be disclosed ²⁴⁶

201. On November 13, 2006, John Summers (General Manager of Lake Region) received an e-mail from Roberta Grissum of the Commission's Staff, instructing Ozark Shores (one of the companies managed in conjunction with Lake Region) to file an amended Annual Report for the calendar year of 2005. The e-mail directs Ozark Shores to include only regulated revenues in its annual reports. The e-mail was giving Ozark Shores specific instructions to remove any revenue the company collected as availability fees and any expense associated with collecting those fees from its annual report because Staff classified these fees as unregulated revenue. Mr. Summers has continued to follow the practice of not including availability fees on the annual reports after receiving Staff's instructions. ²⁴⁷

²⁴⁶ Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010 (HC – Paragraphs 10 & 17 NOT to be made public by this order); Staff Exh. 22, Affidavit of Brian Schwermann, executed May 24, 2010. (HC – Paragraph 6 NOT to be made public by this order). Staff Exh. 23, Confidential Settlement Agreement in Circuit Court Case CV-103-760CC executed between Four Seasons Lakesites, Inc., Lake Region Water and Sewer Company, Sally J. Stump and RPS Properties, L.P. on April 15, 2005. (HC – no terms of the agreement are disclosed) (NOT to be made public – Protective Order in place).

²⁴⁷ Lake Region Exh. 9, E-mail dated November 13, 2006 from Roberta Grissum to John R. Summers; Transcript, pp. 360-362.

202. Staff's calculations regarding the amount of the availability fees being collected are estimates that are not reliable, that have not been verified and that assume that Lake Region is the entity collecting the fees.²⁴⁸

Historical Treatment of Availability Fees

203. The Commission has had a number of cases come before it in the past that have dealt with issues concerning availability fees. Those issues involved determinations regarding whether the fees constitute regulated utility services and how to treat the revenue derived from fees.

204. In Case No. WR-92-59, where Lakesites Water & Sewer Company (Lake Region's predecessor) sought an increase in rates, the availability fees were removed from the general revenue stream and the rate base was reduced a certain amount as an offset for the reduction in general revenue related to the availability fees. This case was settled with a unanimous agreement from the parties that the Commission approved.²⁴⁹

205. In Case No. WR-99-193, where Ozark Shores sought an increase in rates, the parties agreed to add availability fees into the general revenue stream of the company and add additional rate base to the company as an offset. The availability fees are included in utility rates and are not tarified. This case was settled with a unanimous agreement from the parties that the Commission approved.²⁵⁰

²⁴⁸ Transcript, pp. 523-524. Judicial admission of Staff Counsel in opening statement for the True-Up Proceeding: "Staff's total amount of availability fee revenue is based upon its estimated number of undeveloped lots in the Shawnee Bend region. Staff has been unable to be [sic] verify this number to be true and accurate from Lake Region, Lake Utility Availability and/or Lake Utility Availability One." Transcript, p. 687. The actual amounts of availability fees collected by the current owners of Lake Region are provided in the Affidavits from Brian Schwermann.

²⁴⁹ Case No. WR-92-59, *In the Matter of Four Seasons Lakesites Water and Sewer Company's Tariff to Increase Rates Pursuant to Their Informal Rate Procedure*, Report and Order, issued November 27, 1991, Order Approving Tariff, Issued may 15, 1992; Transcript, pp. 559-561.

²⁵⁰ Case No. WR-99-183, *In the Matter of Ozark Shores Water Company, Inc. for a Small Company Rate Increase*, Order Approving Tariff, issued December 10, 1998, Effective December 11, 1998 ; Transcript, pp.

206. Peaceful Valley Service Company, a wholly owned subsidiary of Peaceful Valley Property Owners Association, collects availability charges as general revenue to reserve access to its water service and the fees are tarified. Peaceful Valley's tariff provision applies to availability charges that are generated through a contract between the property owner and the company, or from a contract between a property owner and a developer that was assigned to the utility company. The treatment of the availability fees stemmed from a unanimous agreement from the parties that the Commission approved ²⁵¹

207. I.H. Utilities formerly collected availability fees as general revenue and these charges were tarified in rates. The fees originated in a contract between the developer and the property owner that was later assigned to the company. I.H. Utilities no longer collects the fees and they are no longer tarified in rates.²⁵²

208. Staff's subject matter experts have consistently testified in their expert capacity that availability fees are not utility services.²⁵³

359-360, 491-492, 559-561. This case was referenced as Case No. WR-98-990 during Mr. Stump's testimony; however, Lake Region clarified the proper case number in its brief as being Case No. WR-99-183.

²⁵¹ Transcript pp. 491-497, 502-507, 529-532, 538; Tariff JW-2002-0105, P.S.C. Mo. No. 2, 1st Revised Sheet # 6; Staff Exh. 15, Merciel Rebuttal, Attachment 2.

²⁵² Transcript pp. 532-533.

²⁵³ Transcript pp. 432 (Featherstone), 496-498, 534-535 (Merciel): Staff Exh. 15, Merciel Rebuttal, p. 6. "As a technical expert, I believe that "service" is provided to a water customer when that customer is connected to the water system and has use of the water, which is the utility's product/commodity furnished to the customer, as desired. Similarly, a "service" is provided to a sewer customer when that customer is connected to the sewer system, in that any time the customer discharges sewage it will be taken and properly treated by the sewer utility. The availability charge is different because it applies when the utility "service" is available to the property owner by virtue of the existence of pipelines in front of the property, but the property owners does not connect and actually receive utility 'service.'" *Id.*

In the Report and Order in *Orler v. Folsom Ridge, LLC* 2007 WL 2066385, 16 (Mo.P.S.C.) (Mo.P.S.C.2007), the Commission determined that fees paid to reserve service is not the provision of water or sewer service and does not involve a use, accommodation, product or commodity, based upon Mr. Merciel's testimony in that case (Transcript from WC-2006-0082 & WO-2007-0277, pp. 1093-1096). See also the testimony of Gregory Meyer in WA-95-164: "An availability fee is established by a developer and is charged to a lot owner when that lot has the capability of receiving water and sewer service. In order words, the water and sewer mains and production and treatment facilities have been constructed, but no service is being provided as of yet." OPC Exh. 2, Robertson Direct, pp.6-7.

209. The Commission has previous found that availability fees are not utility services.²⁵⁴

210. The Commission's Staff has always been aware of the availability fees being charged to the property owners in the Shawnee Bend area.²⁵⁵

Costs Associated with Billing and Collection of Availability Fees

211. Staff did not audit the actual costs associated with billing and collection for the availability fees. Staff treated RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 as a fourth entity to estimate an allocation of costs related to the management and payroll associated with billing and collection of the fees.²⁵⁶

212. Lake Region examined the cost associated with billing 1200 individuals or entities for availability fees each year. Based upon total billing of 38,000 bills per year, Lake Region's billing clerk spends 3% of her time associated with billing for availability fees. There is a cost of 50 cents for each bill associated with stamps and paper. There is a cost for the management of providing the billing and collection service of 3/10th of one percent or \$600 a year for that function. In total, a reasonable cost for providing the billing and collection service for 1200 bills for availability fees is \$2,000 annually.²⁵⁷

L. Executive Management Fees

213. Lake Region does not have any employees.²⁵⁸

²⁵⁴ *Id.* Similarly, in *In re Central Jefferson County Utilities, Inc.* 2007 WL 824040, 11, (Mo.P.S.C.) (Mo.P.S.C.2007), the Commission determined that it lacked jurisdiction over the developers charging connection fees for services, even when the developers and the utility company were owned by the same individuals, because these were separate corporate entities.

²⁵⁵ Transcript, pp. 525-526.

²⁵⁶ Transcript, pp. 446-454.

²⁵⁷ Transcript, pp. 566-568.

²⁵⁸ Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Transcript, pp. 122-213.

214. Lake Region contracts with the Camden County Public Water Supply District Number Four (“Water District”), to operate and manage the day-to-day operations of the Lake Region and Ozark Shores Water Company (“Ozark Shores”).²⁵⁹

215. The Water District staff performs normal day-to-day administrative and operational functions for all three entities and consists of a General Manager, two accountant-administrative assistants and seven field operators.²⁶⁰

216. The work of the employees is structured to share in their efforts to perform the necessary tasks required of operating water and sewer companies. Economies are gained and benefits recognized by all three entities when the work of the employees is spread out among Lake Region, Ozark Shores and the Water District.²⁶¹

217. Lake Region does not have its own office space.²⁶²

218. Lake Region shares office space with Ozark Shores and the Water District. This is an older building that is not excessive in its size or décor.²⁶³

219. There are economic benefits to the sharing of office space versus having to acquire stand-alone office space.²⁶⁴

220. There are common facilities and equipment (vehicle equipment, wells for the water services and a water storage tank) that are owned by either the Water District or Lake Region or Ozark Shores that are used by all three of these entities to provide each with respective utility services.²⁶⁵

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

221. Overlapping service areas between the three entities require coordination and evaluation of decision making to ensure the most effective approach to these operations.²⁶⁶

222. Coordinating the efforts of the three entities--Lake Region, Ozark Shores and the Water District-- is required to take full advantage of the economies of scale of operating all the water and sewer entities.²⁶⁷

223. To the extent the personnel, work procedures and equipment can be coordinated and shared between the three entities, all three companies benefit.²⁶⁸

224. If each of these entities operated separately as stand-alone companies they would have to have additional equipment which would be costly to the customers and would incur greater payroll and benefit costs.²⁶⁹

225. In lieu of owning equipment needed to operate water and sewer utilities, the stand-alone companies could lease this equipment as needed but this too would be costly over time.²⁷⁰

226. Lake Region and Ozark Shores benefit from its relationship to each other as well as to the Water District in sharing the expensive equipment such as backhoes and trucks.²⁷¹

227. There is a written agreement between the entities to share the equipment and reimburse the Water District for its use.²⁷²

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

228. This agreement and the coordination of the three entities are in place because of the efforts of the general manager, John Summers, and the Executive Management Group (“EMG”).²⁷³

229. Mr. Summers, as General Manager, could not act on his own, to create the operational structure that exists for Lake Region, Ozark Shores and the Water District.²⁷⁴

230. Mr. Summers is an employee of the Water District who manages that entity and manages Lake Region and Ozark Shores by contract.²⁷⁵

231. Only the EMG had the authority to set up the organization in the matter in which it operates and enter into the contractual arrangement with the Water District.²⁷⁶

232. The EMG, consisting of Vernon Stump, Robert Schwermann and Brian Schwermann, interacts with the Water District staff and provides executive management oversight on a variety of advanced operational, technological and financial issues that are not generally expected to occur in the normal course of day-to-day operations.²⁷⁷

233. The EMG shares offices with the non-utility operations of RPS Properties Inc. (the company owned by the Schwermanns) for its investments in real estate that is located in Overland Park, Kansas.²⁷⁸

234. The EMG holds its annual Board meeting at the offices of RPS Properties Inc.²⁷⁹

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*; Lake Region Exh. 2, Stump Rebuttal, p. 2.

²⁷⁸ Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Registration of Fiction Name for Lake Utility Availability 1 filed with the Missouri Secretary of State on August 24, 2005 confirms that RPS properties, L.P. is located at 10777 Barkley, suite 210, Overland Park, Kansas (See Transcript p. 29).

235. When Mr. and Mrs. Stump are in Kansas City for Board meetings and meetings regarding the operations of the two regulated companies they own they work out of the Overland Park offices.

236. The EMG attends the monthly meetings of the Water District to determine whether there are issues affecting Lake Region and/or Ozark Shores.²⁸⁰

237. The EMG evaluates the operations of Lake Region and Ozark Shores and makes decisions based on the overall best interest of each entity.²⁸¹

238. Mr. Stump provides the over-all direction of Lake Region, takes care of the operational, functional and engineering aspects Lake Region; including, but not limited to, expansions and repairs, decisions with respect to DNR requirements, budget parameters, negotiates contracts and tracking performance of the company.²⁸²

239. Mr. Stump communicates with Mr. Summers, the General Manager, twice a week.²⁸³

240. The Schwermanns take care of the financial aspects of Lake Region, including, but not limited to, financial services, tax returns and accounting issues.²⁸⁴

241. While one responsibility of the EMG is to prepare and participate in the Board of Directors meetings of Lake Region and Ozark Shores, the EMG provides many other managerial services to Lake Region and its affiliate Ozark Shores that are not normally duties of a company's Board of Directors.²⁸⁵

²⁷⁹ Staff Exh. 9, Harris Surrebuttal, pp. 1-16. The office space shared with Water District is insufficient for the EMG to perform all of its functions on a permanent basis. *Id.*

²⁸⁰ Transcript, p. 124,148; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

²⁸¹ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

²⁸² Transcript, pp. 125, 150.

²⁸³ Transcript, p. 126.

²⁸⁴ Transcript, p. 125-126.

242. Activities the EMG performs which are not normally the responsibilities of

Board members include:

- a.) Meeting and negotiating with representatives of the Company's largest customer to resolve a dispute regarding an inflow and infiltration (I&I) issue.
- b.) Developing and implementing plans to install a new lift station and force main.
- c.) Planning the implementation of a new automated meter reading system.
- d.) Identifying solutions for water pressure issues.
- e.) Arranging the financing of capital projects and on-going operations.
- f.) Maintaining the accounting system, tax reporting requirements and overall records of the company.
- g.) Maintaining ongoing relationships with lending institutions and outside auditors.
- h.) Communicating regulatory matters with the Missouri Public Service Commission, its Staff and other stakeholders on an on-going basis.
- i.) Attending industry meetings and open discussions such as the Small Utility Meeting hosted by the Missouri Public Service Commission on December 14, 2009.
- j.) Actively participating in this rate case including filing testimony (Mr. Stump) and attending discussions with representatives of Staff, the Office of Public Counsel and other parties to this case.
- k.) Maintaining the utility operations in accordance with the Missouri Department of Natural Resources permits, rules and regulations.²⁸⁶

243. The Commission knows of no other Board of Directors member of any of its regulated public utilities who provides any of the aforementioned services.²⁸⁷

²⁸⁵ Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Transcript, pp. 122-213.

²⁸⁶ Staff Exh. 9, Harris Surrebuttal, pp. 1-16 Transcript, pp. 122-213.

²⁸⁷ *Id.*

244. Board members who are not employees do not make management decisions. Non-employee board members who are not compensated in any other manner than through board of director fees do not make the managerial proposals such as capital expenditures. Those decisions are presented to the Board for approval.²⁸⁸

245. Boards of Directors do not negotiate labor agreements or other contracts affecting the utility operations; do not develop capital and operating budgets and do not get directly involved in the operational issues of running a public utility like Lake Region and Ozark Shores.²⁸⁹

246. While directors are typically advised of the operations of the companies and have to approve major decisions including contracts and financing, they do not implement those decisions nor do directors have the responsibility to carry out the decisions of the board - that is the job of the executive management team.²⁹⁰

247. All of the members of Lake Region's EMG have other work activities they are involved in. They work on a part time basis to run the water and sewer operations of Lake Region and Ozark Shores.²⁹¹

248. The EMG is responsible for approximately 1,400 total customers for Lake Region (splitting out the overlapping water and sewer customers) and 1,790 customers for Ozark Shores or a combined total of 3,190 customers.

249. While Lake Region does have over-lapping water and sewer customers for Shawnee Bend, these customers represent two separate entities. There may be one bill for water and sewer service, but each water customer requires infrastructure, i.e. a tower,

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

well and water meter, and each sewer customer requires a treatment plant and a collection line.²⁹²

250. The amount of pipe the EMG is responsible for maintaining totals 322,173 feet, broken down as follows: (1) Shawnee Bend Water 96,832 feet; (2) Horseshoe Bend Water 216,427 feet; and (3) Horseshoe Bend Sewer 8,914 feet.²⁹³

251. Lake Region's service of the large condominium customers generates customer equivalents, in terms of water and sewer usage, closer to having 3000 customers.²⁹⁴

252. Lake Region is a complicated utility requiring the management of a large amount of infrastructure.²⁹⁵

253. Lake Region is, on a stand-alone basis, the eighth largest water or sewer utility in the state in terms of customers served. As a combined water and sewer utility, it ranks behind only Missouri-American and Aqua Missouri in total number of Missouri customers. If it is combined with Ozark Shores, which shares the cost of executive management with Lake Region, they collectively rank fifth in revenue, sixth in number of customers and third in number of feet of water and sewer mains of the water or sewer utilities in Missouri.²⁹⁶

254. A company the size of Lake Region requires management leadership. Considering the total number of customers served by Lake Region, as well as the number

²⁹² Transcript, pp. 128-129, 140, 176.

²⁹³ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

²⁹⁴ Transcript, p141.

²⁹⁵ Transcript, p. 141. Staff Exh. 18, Staff Accounting Schedules, True-Up Direct, Schedule 9, Plant in Service for each utility division. In addition to the pipes, and water towers, there are four separate treatment plants with 40 or 50 small lift stations. *Id.* See also Findings of Facts Numbers 12-16.

²⁹⁶ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

of customers served by its affiliate company, Ozark Shores, it is necessary to have an executive management team in place to direct and guide the operations of these entities.²⁹⁷

255. Proper executive management of Lake Region's enterprises requires regular onsite attendance and review to prevent deterioration of the operations and unnecessary increases in costs.²⁹⁸

256. The management oversight by the EMG is directly related to the operations of both Lake Region and Ozark Shores and must be compensated like any other service provider to these companies.²⁹⁹

257. There are several theories that serve as the basis for determining proper executive management compensation, including: (1) cost per customer basis; (2) percentage of revenue basis; and (3) an hourly compensation basis.

Per Customer Basis

258. All other water and sewer utilities in the state with annual revenues exceeding \$500,000, (like Lake Region) where utilities pay management fees to an outside service or a salary to an executive or owner is summarized in the following table:³⁰⁰

Water & Sewer Revenues >\$500,000

UTILITY COMPANY NAME	UTILITY TYPE	CY-2008 INTRASTATE REVENUE	Number of customers	Water and sewer mains (in feet)	Management Fees (outside services)	Management Salary (payroll)	Total Payroll (inc. mgmt.)
Algonquin Water Resources of Missouri, LLC	Water & Sewer	\$697,914	not in Annual Report			not included in annual report	
Aqua Missouri, Inc. (CU)	Water & Sewer	\$912,200	2,544	216,562	\$51,717	\$75,588	\$309,278
Aqua Missouri, Inc. (RU)	Water	\$399,067	897	134,497	\$23,510		\$103,650
Aqua Missouri, Inc. (Combined)	Water & Sewer	\$1,311,267	3,441	351,059	\$75,227	\$75,588	\$412,928
House Springs Sewer Company, Inc	Sewer	\$560,295	not in Annual Report			\$59,383	\$125,161
Roark Water and Sewer, Inc.	Water & Sewer	\$556,778	1,290	54,567	\$33,369		not in annual report
Timber Creek Sewer Company	Sewer	\$662,693	1,313	176,998		\$70,510	\$242,967
Tri-States Utility, Inc	Water	\$961,786	3,484	227,244	not in Annual Report		\$213,600
U.S. Water Company	Water	\$742,014	2,135	223,769		\$97,200	\$387,904
TOTAL WATER and SEWER		\$5,492,747	11,663	1,033,637	\$183,823	\$302,681	\$1,382,560

²⁹⁷ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

²⁹⁸ Transcript, pp 133-135.

²⁹⁹ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

³⁰⁰ Staff Exh. 9, Harris Surrebuttal, pp. 1-16 and Schedule VWH-1.

259. Management fees on a per customer basis for the companies in the table above are as follows:

Name of Utility	Number of Customers	Management Fees	Dollars Per Customer
Algonquin Water Resources of Mo.	Unknown	Unknown	Unknown
Aqua Missouri, Inc.	3,441	\$150,815	\$43.83
Roark Water & Sewer	1,290	\$33,369	\$25.87
House Springs Sewer Co.	Unknown	\$59,383	Unknown
Timber Creek Sewer Co.	1,313	\$70,510	\$53.70
U.S. Water Company	2,135	\$97,200	\$45.53

260. The average dollar per customer for management fees for those companies where the data was reported is \$42.23.

Percentage Basis

261. Lake Region compared management fees as a percentage of revenue for Aqua Missouri, Inc., Aqua Missouri RU, Inc. and US Water Company and determined that executive management fees were, on average, compensated at a rate of 8% of the companies' revenue.³⁰¹

262. Applying Lake Region's 8% analysis to the full proxy group of regulated Missouri water and sewer companies earning over \$500,000 annually from the table in Finding of Fact Number 258 produces the following results:

Name of Utility	Intrastate Revenue	Management Fees at 8% of Intrastate Revenue
Algonquin Water Resources of Mo.	\$697,914	\$55,833
Aqua Missouri, Inc. (combined)	\$1,311,267	\$104,901
Roark Water & Sewer	\$556,778	\$44,542
House Springs Sewer Co.	\$560,295	\$44,824
Timber Creek Sewer Co.	\$662,693	\$53,015
Tri-States Utility, Inc.	\$961,786	\$76,943
U.S. Water Company	\$742,014	\$59,361
Average		\$62,774

³⁰¹ Lake Region Exh. 2, Stump Rebuttal, p. 3 and accompanying Schedule 1.

Hourly Compensation Basis

263. Each member of the EMG spends approximately one travel day and four days each month involved with managing the systems.³⁰²

264. The proper hourly compensation rate for this level of executive management is approximately \$64 per hour.^{303 304}

265. After a full review of the evidentiary record, the Commission finds that \$64 per hour is the appropriate hourly compensation for Lake Region's level of executive management.

266. For reasons to be more fully articulated in the conclusions of law section, the Commission finds the appropriate amount of executive compensation for the EMG to be recovered in rates is \$33,232.

M. Rate Case Expense

267. Lake Region's direct costs for rate case expense was \$22,498 through April 2, 2010.³⁰⁵ Lake Region's rate case expense as of April 22, 2010 is \$26,449, and this amount continued to rise with the litigation.³⁰⁶ Lake Region's rate case expense through May 12, 2010 is \$42,997.³⁰⁷

³⁰² Transcript, pp. 123-124,151.

³⁰³ *Id.*; Lake Region Exh. 2, Stump Rebuttal, p. 3 and accompanying Schedule 1; Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

³⁰⁴ Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

³⁰⁵ Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

³⁰⁶ Lake Region Exh. 12, Summers True-Up Rebuttal, p. 3.

³⁰⁷ Staff Exh. 50, [Second Updated] Reconciliation; Staff Exh. 19, [Updated] Reconciliation; Final [Updated] Reconciliation, filed on July 16, 2010; Staff's Update to Rate Case Expense - Staff's July 9, 2010 Response to Missouri Public Service Commission's June 24, 2010 Order Regarding Rate Case Expense, filed July 9, 2010, verified by the Affidavit of Cary G. Featherstone.

268. Due to increasing operating expenses and anticipated capital improvements, Lake Region will likely file for additional rate relief closer to the three-year time frame; consequently, amortization of rate case expense over three years is more appropriate.³⁰⁸

269. For reasons more completely articulated in the conclusions of law, the Commission finds \$42,997 is the correct rate case expense. The appropriate annualization period is a three years, and the annual amount of rate case expenses to be included in revenue requirement is \$14,331. When allocated for the three operating systems, \$4,777 is included in the revenue requirement of each, i.e. Shawnee Bend Water, Shawnee Bend Sewer and Horseshoe Bend Sewer.³⁰⁹

N. Service Quality

270. The customers of Lake Region are happy with the services they receive and have no service or billing problems with the company.³¹⁰

271. No party alleges any deficiencies, problems or issues with the quality of service provided by Lake Region.

272. No party alleges any deficiencies, problems or issues with Lake Region's billing for services.

273. No party alleges any deficiencies, problems or issues with Lake Region's response to customer calls.

274. The Commission finds no deficiencies, problems or issues with the quality of service provided by Lake Region.

³⁰⁸ Lake Region Exh. 11, Summers True-Up Direct, pp. 1-3.

³⁰⁹ See Footnote 307.

³¹⁰ Transcript, pp. 11(Elrod), 14-15 (Finn), 18 (Parham), 20 (Becker), and 375 (Cason).

III. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

A. Jurisdiction, Burden of Proof, Presumption of Prudence and the Public Interest³¹¹

Lake Region is a sewer corporation, a water corporation and a public utility as defined in Sections 386.020(49), 386.020(59), and 386.020(43), RSMo Cum. Supp. 2009, respectively, and as such is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. The Commission's subject matter jurisdiction over Lake Region's rate increase request is established under Section 393.150, RSMo 2000.³¹²

Sections 393.130 and 393.140, RSMo 2000, mandate that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable. Section 393.150.2 makes clear that at any hearing involving a requested rate increase the burden of proof to show the proposed increase is just and reasonable rests on the corporation seeking the rate increase. As the party requesting the rate increase, Lake Region bears the burden of proving that its proposed rate increase is just and reasonable. In order to carry its burden of proof, Lake Region must meet the preponderance of the evidence standard.³¹³ And in order to meet this

³¹¹ See Findings of Fact Numbers 1-36 for this section.

³¹² Lake Region filed its application pursuant to Section 393.150 and Commission Rules 4 CSR 240-2.060, 2.065, and 3.030. These rules outline the minimum filing requirements for Lake Region to pursue its rate increase request.

³¹³ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

standard, Lake Region must convince the Commission it is “more likely than not” that Lake Region’s proposed rate increase is just and reasonable.³¹⁴

While a utility has the burden of proof to justify its proposed rate increase, there is initially a presumption that its expenditures, comprising one component of its revenue requirement, are prudent. The Commission has previously cited the following description of this process as found to apply to the Federal Energy Regulatory Commission:

The Federal Power Act imposes on the Company the “burden of proof to show that the increased rate or charge is just and reasonable.” Edison relies on Supreme Court precedent for the proposition that a utility’s cost are [sic] presumed to be prudently incurred. However, the presumption does not survive “a showing of inefficiency or improvidence.” As the Commission has explained, “utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.”³¹⁵

While the standard for evaluating the proposed rate increase pursuant to Section 393.150 is clear, and while Lake Region receives an initial presumption that its expenditures are prudent, the Commission must also consider the “public interest” when it

³¹⁴ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109-111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992). The burden of proof has two parts: the burden of production and the burden of persuasion. The burden of production requires Lake Region to introduce enough evidence on the material issue or issues to have that issue or those issues decided by the Commission, rather than the Commission deciding against Lake Region in a peremptory ruling such as a summary determination or a determination on the pleadings. *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 745 (Mo. App. 2005); *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001); *State v. Ramires*, 152 S.W.3d 385, 395 (Mo. App. 2004). The burden of persuasion requires Lake Region to convince the Commission to favor its position, (*Id.*) and this burden always remains with Lake Region. *Middlemas v. Director of Revenue, State of Missouri*, 159 S.W.3d 515, 517 (Mo. App. 2005); *R.T. French Co. v. Springfield Mayor's Com'n on Human Rights and Community Relations*, 650 S.W.2d 717, 722 (Mo. App. 1983).

³¹⁵ *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

makes its determination as to if the proposed increased rates are just and reasonable.³¹⁶ The public interest is a matter of policy to be determined by the Commission.³¹⁷ It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.³¹⁸ Determining what is in the interest of the public is a balancing process.³¹⁹ In making such a determination, the total interests of the public served must be assessed.³²⁰ This means that some of the public may suffer adverse consequences for the total public interest.³²¹ Individual rights are subservient to the rights of the public.³²² The “public interest” necessarily must include the interests of both the ratepaying public and the investing public;³²³ however, as noted, the rights of individual groups are subservient to the rights of the public in general.

³¹⁶ *In re Rahn's Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (Mo. 1926); *Morrishead v. Railways Co.*, Mo. 121 165, 96 S.W. 261, 271 (Mo. banc 1907); *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974). The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission's authority.

³¹⁷ *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980); *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

³¹⁸ *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

³¹⁹ *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

³²⁰ *Id.*

³²¹ *Id.*

³²² *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

³²³ The United States Supreme Court tells us simply that “the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.” *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 186 S.W.3d 376, 383 (Mo. App. W.D. 2005), *citing to*, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The Missouri Supreme Court has also previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property. See *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

B. Rate Making Standards and Practices³²⁴

The Commission has exclusive jurisdiction to establish public utility rates,³²⁵ and the rates it sets have the force and effect of law.³²⁶ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;³²⁷ neither can a public utility change its rates without first seeking authority from the Commission.³²⁸ A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission’s,³²⁹ subject to judicial review of the question of reasonableness.³³⁰

A “just and reasonable” rate is one that is fair to both the utility and its customers;³³¹ it is no more than is sufficient to “keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested.”³³² The Commission’s guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.³³³ However, the Commission must also afford the utility an opportunity to

³²⁴ See Findings of Fact Numbers 36-72 for this section.

³²⁵ *May Dep’t Stores*, 107 S.W.2d at 57.

³²⁶ *Utility Consumers Council*, 585 S.W.2d at 49.

³²⁷ *Id.*

³²⁸ *Deaconess Manor Ass’n v. Pub. Serv. Comm’n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

³²⁹ *May Dep’t Stores*, 107 S.W.2d at 50.

³³⁰ *St. ex rel. City of Harrisonville v. Pub. Serv. Comm’n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm’n*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis’d*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm’n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm’n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis’d*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

³³¹ *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm’n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

³³² *St. ex rel. Washington University et al. v. Pub. Serv. Comm’n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

³³³ *May Dep’t Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

recover a reasonable return on the assets it has devoted to the public service.³³⁴ “There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment.”³³⁵

Ratemaking involves two successive processes:³³⁶ first, the determination of the “revenue requirement,” that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.³³⁷ The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers.

Revenue requirement is usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.³³⁸ The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.³³⁹ For any

³³⁴ *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

³³⁵ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).

³³⁶ It is worth noting here that Missouri recognizes two distinct ratemaking methods: the “file-and-suspend” method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility’s rates are not just and reasonable. See *Utility Consumers Council*, 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975).

³³⁷ *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

³³⁸ *Id.*, citing Colton, “Excess Capacity: Who Gets the Charge From the Power Plant?,” 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).

³³⁹ *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 75 - 76 (Mo. App. S.D. 2009); *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988). The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility’s books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility’s prudent operating costs. Section 393.230 authorizes the Commission to value the property of any water and sewer corporation operating in Missouri, that is, to determine the rate base.

utility, its fair rate of return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of common equity, the cost used is its estimated cost.³⁴⁰

In the final analysis, it is not the method employed, but the result reached, that is important.³⁴¹ The Constitution "does not bind ratemaking bodies to the service of any single formula or combination of formulas."³⁴²

Section 393.240 authorizes the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

³⁴⁰ Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized. See Phillips, *The Regulation of Public Utilities*, Public Utilities Reports, Inc., p. 394 (1993). The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. *Bluefield, supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

³⁴¹ Within a wide range of discretion the Commission may select the methodology. *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434 (Mo. App., W.D. 1998), *rehearing and/or transfer denied*; *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880, 882 (Mo. App., W.D. 1985); *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 888 (Mo. App., W.D. 1981). It may select a combination of methodologies. *State ex rel. City of Lake Lotawana v. Public Service Comm'n of State*, 732 S.W.2d 191, 194 (Mo. App., W.D. 1987).

C. Lake Region's Baseline Revenue Requirement, Rate Design and Miscellaneous Tariff Issues³⁴³

Baseline Revenue Requirement

Throughout this proceeding the parties have filed numerous accounting schedules, revenue scenarios and reconciliations. The parties have stipulated and conceded to the determination of the baseline revenue requirement for Lake Region that is exclusive of the contested issues concerning availability fees, executive management fees and rate case expense. The Commission finds it highly persuasive that multiple parties representing diverse interests utilizing accounting and auditing analyses from multiple subject matter experts have reached agreement on Lake Region's baseline revenue requirement. The factors considered in reaching this agreement, *inter alia*, include Lake Region's current earnings, expenses, rate base, capital structure, and the appropriate return on equity and rate of return.

After undertaking an independent review of all relevant factors,³⁴⁴ the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that Lake Region's baseline revenue requirement for its water and sewer districts is as follows:

³⁴² *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1049-50 (1942).

³⁴³ Refer to Findings of Facts Numbers 73-120 for this section.

³⁴⁴ When interpreting Section 386.420, the statute delineating the Commission's procedural requirements for conducting hearings and making its reports, Missouri Courts have held that in contested cases the Commission must include findings of fact in its written report. Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The Commission cannot merely adopt agreements or positions of the parties on the ultimate legal issues presented because such action fails to satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. *Id.* Litigants cannot stipulate as to questions of law. *State v. Biddle*, 599 S.W.2d 182, 186 and n. 4 (Mo. banc 1980). The Commission must independently and impartially review the facts and make a separate and independent determination. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. 1988).

Utility Division	Horseshoe Bend Sewer	Shawnee Bend Sewer	Shawnee Bend Water	TOTAL
Baseline Revenue Requirement Exclusive of all Disputed Revenue Issues	28,743	102,350	12,637	143,730

Rate Design

The parties have also reached agreement on the proper rate design for Lake Region. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper method to implement any over-all revenue increase is the Water and Sewer Department's small company rate design methodology.

Applying this methodology, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper rate design for any over-all rate increase in Lake Region's Shawnee Bend water customers' rates is to implement an equal percentage increase for the customer and commodity charges. Similarly, based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper rate design for any over-all rate increase in sewer rates for the residential sewer customers served by Shawnee Bend's sewer operations and Horseshoe Bend's sewer operations is to implement an equal percentage increase for any customer and commodity charges.

Lake Region currently has two different rate designs in place for charging its Shawnee Bend and Horseshoe Bend commercial sewer customers. The design of the commercial sewer customer's charge of the Horseshoe Bend service area should be similar

to the design of the customer charge for the Shawnee Bend sewer operations. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper rate design for the Horseshoe Bend commercial sewer operations includes changing the commercial sewer customer charge to a traditional customer charge similar to the customer charge for the Shawnee Bend sewer operations to result in a consistent rate design for all of Lake Region's customers. Following this change, the proper application for any over-all rate increase is to implement an equal percentage increase for the customer and commodity charges.

Miscellaneous Tariff Issues

Lake Region also needs to correct certain miscellaneous defects in its tariffs. Lake Region's current returned check charge of \$15.00 is less than the actual cost incurred by Lake Region related to bank charges, account, tracking, monitoring and additional notices. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusion that the proper return check charge for Lake Region is \$25.00.

Lake Region's current tariff language does not include a method to allow Lake Region to disconnect a customer for any reason except upon the request of the customer. The tariff lacks legally required language to allow the company to disconnect a customer for non-payment pursuant to Commission Rule 4 CSR 240-13.050. Based upon the parties' unanimous stipulation and the Commission's independent review of all relevant factors, the Commission determines that the substantial and competent evidence on the record as a

whole supports the conclusion that Lake Region will be directed to add language to its tariff to bring it into compliance with 4 CSR 240-13.050.

D. Availability Fees³⁴⁵

The issue surrounding the proper treatment of availability fees collected by RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 is the most hotly contested issue in this matter. Staff, Public Counsel and Lakesites POA advocate for considering the fees to be part of Lake Region's ordinary revenue, while Lake Region argues the fees are outside the Commission's supervision and regulation. And, because the various positions advocated by the parties involve whether ratemaking treatment should be applied to the revenue generated from these fees, the Commission will initially make note of its authority to determine the assets of water and sewer corporations.

Section 393.230.1, RSMo 2000, conveys the power upon this Commission to "ascertain the value of the property of every . . . water corporation and sewer corporation in this state and every fact which in its judgment may or does have any bearing on such value." Section 393.270.4 and .5 provide that the Commission, when determining the price to be charged for water or sewer service may "consider all facts which in its judgment have any bearing upon a proper determination of the question." Commission Rules 4 CSR 240-50.030(4) and 4 CSR 240-61.020(4) provide that the Commission "does not commit itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining other matters before the commission." In other words, the Commission is not bound by the generally accepted principles of accounting in all instances when determining proper rates.

³⁴⁵ Refer to Findings of Facts Numbers 121-212 for this section.

1. Lake Region's Position

Lake Region has maintained throughout this proceeding that the Commission lacks the jurisdiction to consider the availability fees. Lake Region's position is that: (1) Lake Utility Availability 1 (the d/b/a collecting the availability fee) is not a water company, not a sewer company and not a regulated public utility; (2) utility customers do not pay availability fees; (3) the revenue stream generated by the availability fees is not generated by the provision of a regulated utility service; (4) Lake Region has no access to the revenue stream generated by the availability fees; and (5) Lake Region has no legally enforceable right to acquire the revenue stream generated by the availability fees.

Lake Region further argues that the history of how the availability fees originated and the Commission's past treatment of these fees weigh in favor of not considering this revenue when determining its rates. Lake Region asserts: (1) the purpose behind the property developer's creation of the fees was to recover the investment in the utility infrastructure; (2) the Commission, recognizing this purpose or recognizing that it had no jurisdiction over the fees, has elected for 37 years not to consider the availability fees when setting rates; (3) the Commission's Staff, prior to this case, has informed the company that these fees are not regulated revenue; and, (4) the Commission has made several past determinations that support its position that the fees are not regulated. Lake Region contends it has relied on the Commission's past treatment and determinations regarding the nature of these fees not being revenue for the company.³⁴⁶

However, Lake Region argues in the alternative that should the Commission find the fees are within its jurisdiction to regulate the Commission should not impute the revenue

³⁴⁶ Transcript, pp. 238-239, 738-739 (Staff repetitively stipulated to agreements that did not include availability fees in customer rates.) See also the history of the company outlined in the Findings of Fact and Staff Exh. 15, Merciel Rebuttal, pp. 13-14 on the company's history.

collected from those fees without providing a corresponding adjustment (an increase) to its rate base to allow for more earnings. Lake Region claims that imputing the fees without offsetting the rate base would violate the matching principle in accounting. Because the availability fees were used to pay for infrastructure, and because that infrastructure was donated by the developer when he divested himself of the utility company, to impute availability fees as income would have the effect of artificially donating the infrastructure the fees financed twice.³⁴⁷ As Lake Region further explains:

The Developer always reported this revenue as Non-utility Income in the Annual Report to the Missouri Public Service Commission and no one from the Commission ever notified the Company this was incorrect. The rights to the availability fees owned by the utility in 1998 were transferred to individuals in 1998 when the stock of the Company was sold to Roy and Cindy Slates. The Developer owned the rights to all subsequently created availability fees until 2005 when the rights were assigned to RPS Properties and Sally Stump. By imputing revenues to the Company without allowing the corresponding return on the plant the Staff is creating an actual loss at the Company which will threaten its financial viability.³⁴⁸

Lake Region's proposed adjustment to rate base would be implemented on the accounting schedules by reducing the amount of plant donated by the company in the form of contributions in aid of construction. Thus, CIAC would be offset to increase the rate base of the company to balance the effect of imputing revenue from availability fees.

2. Staff's Position

Staff's position is that: (1) the availability fees were created to repair, maintain the infrastructure and for future replacement of infrastructure; (2) the developer recovered the cost of the infrastructure in the sales price of the lots that were sold; (3) the availability fees provide an "accommodation" for future utility service and as such they are a regulated utility

³⁴⁷ Lake Region Exh. 12, Summers True-Up Rebuttal, pp. 3-4.

³⁴⁸ Transcript pp. 561-562, 598-600 (The Commission's Staff has repeatedly changed its position on treatment of the fees); Lake Region Exh. 12, Summers True-Up Rebuttal, pp. 3-4.

service; (4) the Commission has jurisdiction over the fees; and, (5) the fees should be considered as ordinary income to Lake Region and considered when setting rates. Staff doesn't believe the Commission's past treatment of availability fees is relevant to this matter.

With regard to Lake Region's alternative theory about providing a corresponding offset to rate base, Staff argues there should be no corresponding shift in rate base with the imputation of availability fee revenues. Staff cites to Section 393.270(5) that provides the Commission with the authority to determine sewer rates, including a "reasonable average return upon the value of the property actually used in the public service. . . ." and cites to the holding in the Missouri Supreme Court decision in *Martigney Creek Sewer Co. v. Public Service Commission* interpreting Section 393.270(5). In that case the Court held: "where the **customers and users** of a utility have substantially paid for the facilities employed in the public service, the antithesis of a just and reasonable rate is one that would permit a utility's stockholders to recover a return on money which they, in fact, never invested."³⁴⁹ (Emphasis added).

Staff's theory is premised on its position that the plant has already been paid for by the customers when they purchased their lots from the developer. The contributed plant donated by the developer is considered a contribution-in-aid-of-construction (CIAC), which results in a reduction to rate base. Ratepayers do not pay a return on the donated contributed plant. Staff claims that when determining utility rates, investment in contributed plant is not a recoverable utility cost because, generally, customers have already paid for

³⁴⁹ *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 SW2d 388, 392 (Mo. banc 1976). Later in the opinion, the Court restates its holding as follows: "The court has construed 393.270(5) earlier in this opinion to mean that the value of the plant is one of the elements to be considered by the PSC in arriving at a rate base, but that it does not authorize the PSC to include in the rate base property donated or paid for by the rate payers by contributions in aid of construction." *Id.* at 393. As previously determined by the Commission, the ratepayers do not pay the availability fees.

the contributed plant through the purchase price of the lot and thus it is not included in rates. Consequently Staff argues that if customers have to pay the utility company a return on property for which there is no investment, then customers will have to pay for the contributed plant twice; in the lot sale price and in the payment of utility rates.

Staff's theory on how much revenue to impute to Lake Region is based upon an estimated number of undeveloped lots (1200), the known annual charge for availability fees (\$300), and an estimated number or percentage of those billed who do not pay the charges when they are assessed (10%). Staff argues that \$324,000 of revenue should be allocated to the Shawnee Bend operations (no availability fees are collected on Horseshoe Bend for sewer service) in a 60/40 ratio – 60% allocated to Shawnee Bend Sewer and 40% to Shawnee Bend Water. While this allocation would result in a negative increase for these two operations, Staff does not advocate for a rate reduction. Staff simply argues there should be no rate increase for the Shawnee Bend operations.

Two things should be noted at this juncture that are problematic for Staff's assertions. First, while the *Martigney* case might limit the Commission's ability to consider a rate base adjustment in other circumstances, the guidance to be derived from it in this matter is murky at best because it has been established in this matter that ratepayers, the customers and users of the utility, do not pay the availability fees. Second, in its opening statement during the True-Up hearing Staff Counsel stated:

“Mr. Featherstone's true-up direct executive summary illustrates Staff's position in this proceeding. Mr. Featherstone included in amounts of availability fees to be imputed into revenues base on information obtained during the evidentiary hearing. During this evidentiary hearing, Lake Region's witness, Dr. Stump, testified that 10 percent of the lot owners who are billed availability fees simply do not pay. With this information, Staff then reduced the total amount of availability fees it believes Lake Utility Availability and/or Lake Utility Availability One collect by 10 percent. Staff's total amount of availability fee revenue is based upon its estimated number of undeveloped lots in the Shawnee Bend region. **Staff has been unable to**

verify this number to be true and accurate from Lake Region, Lake Utility Availability and/or Lake Utility Availability One.” (Transcript p. 687).

Should the Commission decide that availability fee revenue should be included in Lake Region’s revenue, Staff’s judicial admission of its inability to verify its estimates as being true and accurate must taken into consideration when determining how much availability fee revenue has, in fact, been collected on an annual basis in order to decide how much to impute.

3. Public Counsel’s Position

Public Counsel argues the availability fees should be considered as income for similar reasons as Staff, although Public Counsel also claims that the availability fees are not just an accommodation, but are a commodity pursuant to the definition of utility service. Public Counsel asserts that the availability fees are used to repay the utilities’ cost of plant and infrastructure and that it makes no difference that the charge originates with a contract from the developer because it is a charge for a service provided by the utility.

As its first line position, Public Counsel claims the amount recouped from availability fees should be used to offset rate base, a negative offset to rate base. This lowering of rate base would lower the company’s revenue requirement. As an alternative position, Public Counsel argues that the income should be imputed. But, instead of estimating fees to determine the amount of income to impute, Public Counsel’s calculation utilizes the number of undeveloped lots attested to by Lakesites POA’s witness Nancy Cason (1285) the known annual charge for availability fees (\$300), and does not reduce this amount by any estimated number or percentage of those billed who do not pay the charges when they are assessed.³⁵⁰

³⁵⁰ While Public Counsel’s estimates have a sounder basis than Staff’s, the Commission notes that actual

Public Counsel claims that \$385,500 of availability fee revenue should be allocated to the Shawnee Bend operations – 60% allocated to Shawnee Bend Sewer and 40% to Shawnee Bend Water. And unlike Staff, Public Counsel seeks a rate reduction for the Shawnee Bend Operations – a reduction to Shawnee Bend Sewer of \$231,300 and a reduction to Shawnee Bend Water of \$154,200. Public Counsel's recommendation would not alter the baseline revenue requirement for the Horseshoe Bend sewer operations, but it would result in a negative revenue requirement of \$131,529 for the Shawnee Bend water operations and a negative revenue requirement of \$118,554 for the Shawnee Bend sewer operations.

4. Lakesites POA's Position

It is not completely clear what Lakesites POA's specific position is regarding how to consider the availability fees, because the Association did not file a brief on this issue. However, throughout the proceeding, Lakesites POA has advocated that the Commission should consider the availability fees as revenue to lower Lake Region's revenue requirement. Because the Association represents lot owners and home owners, the Commission will assume that its position is in alignment with Public Counsel who represents the public and the ratepayers.

5. The Commission's Decision

The Purpose of the Fees and Lake Region's Pending Motion to Strike

Staff's position is that the availability fees were established to maintain and repair existing infrastructure or for the future replacement of decaying infrastructure. Staff has asserted that the purpose of establishing the availability fees could not have been related to

amounts collected in availability fees were provided in affidavits from Brian Schwermann. Those numbers taken in conjunction with the requirement for distribution of the fees provided in the confidential settlement agreement form Civil Case CV103-760CC provide an exact calculation that can be annualized.

recovery of the cost of the infrastructure, because according to Staff the cost of the infrastructure was recovered in the sales price of the lots sold by the developer. But Staff has provided the Commission with no evidence to support its allegation that the price of infrastructure was recovered in the sales price of the lots. In fact, Mr. Featherstone has testified that this was an assumption on Staff's part.³⁵¹ Staff also claims that the original infrastructure cost has been fully recovered, so if the original purpose for the fees was to recover this cost the fees have served their purpose and the revenue currently being generated from the fees should be considered ordinary revenue for Lake Region.³⁵²

The Commission did receive into evidence numerous financial statements of Four Seasons Lakesites, Inc., the developer. But, these statements do not identify individual lot sales prices, do not identify specific costs associated with installing utility infrastructure, and do not even identify the specific properties to which the financial data applies. These statements, without further documentation are of little assistance to Staff's position.

Staff also points to Civil Case Number CV103-760CC, a circuit court case where ownership of the availability fees was contested, in an attempt to demonstrate how the third owner of Lake Region, Waldo Morris, spent the fees. The Commission took official notice of this case: "Four Seasons Lakesites, Inc., Plaintiff, versus Lake Region Water & Sewer Co., et al., Defendants."

Staff argues Mr. Morris's Answer in that case is a judicial admission binding the current owners of Lake Region and his Answer shows that the purpose of the fees was to maintain the infrastructure, not to recover the cost of investment in the infrastructure. Staff's argument prompted Lake Region to file a Motion to Strike Staff's the portions of

³⁵¹ Transcript p. 461.

³⁵² Ordinary revenue has been defined by Witness Merciel as being revenue used for the day-to-day operations of the company. Transcript, p. 482-483.

Staff's brief in relation to these arguments. The Commission took the motion with the case because the arguments must be addressed as part of the Commission's over-all decision on how to treat the availability fees.

In its motion to strike, Lake Region asserts that while the Commission took official notice of Case No. CV103760CC at Staff's request, Staff did not request that the Commission take official notice of the pleadings or other records in that case. And that even if Staff made that request, official notice of such records is generally refused. Lake Region, cites to *Sher v. Chand*, 889 S.W.2d 79, 84-85 (Mo. App. 1994) for the general rule that: "[C]ourts in general do not take judicial notice of records in one proceeding in deciding another and different proceeding, as a party is entitled to have the merits of his case reviewed upon evidence properly introduced. [citation omitted]." Consequently, Lake Region claims that Staff's use and dependence upon matters outside the record in this proceeding for purposes of briefing and argument, and for purposes of Staff's proposed Findings, is inappropriate and objectionable.

To evaluate Staff's position, and Lake Region's motion to strike, the Commission must decide if taking official notice of Civil Case Number CV103-760CC, elevated the file in that case to the level of competent evidence, if the Answer filed by Waldo Morris is in fact an admission against Lake Region's interest, and if it is in fact "evidence" if it actually supports Staff's theory.

Section 536.070(6) permits an administrative agency to "take official notice of all matters of which the courts take judicial notice."³⁵³ It is well settled law that courts may,

³⁵³ *Moore v. Missouri Dental Bd.*, 311 S.W.3d 298, 305 -306 (Mo. App. 2010); *Chandler v. Hemeyer*, 49 S.W.3d 786, 791 -792 (Mo. App. 2001); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474 (Mo. App. 1998); *Meiners Co. v. Clayton Greens Nursing Ctr., Inc.*, 645 S.W.2d 722, 724 (Mo. App. 1982); *Hardin v. Hardin*, 512 S.W.2d 851, 854 (Mo. App. 1974). See also *State v. Hurst*, 845 S.W.2d 669, 670 (Mo. App. 1993); *Schrader v. State*, 561 S.W.2d 734, 735 (Mo. App. 1978).

and should, “take judicial notice of their own records in prior proceedings **which are between the same parties on the same basic facts involving the same general claims for relief.**”³⁵⁴ (Emphasis added). “Judicial notice of records from other related proceedings involving the same parties can be on the court's own motion or at the request of a party.”³⁵⁵

This does not conclude our inquiry, however. It must be determined whether the Commission took official notice of the other case file in a manner sufficient to place those documents in evidence.³⁵⁶ “When the record in another case forms an essential element of a party's claim or defense, the record itself must be introduced in evidence, absent an admission of its contents by the opposing party.”³⁵⁷ “The introduction of the other court file into evidence may be accomplished by the court taking judicial notice of the file if it is physically before it.”³⁵⁸ A party's “[f]ailure to specifically object to the court taking judicial notice constitutes a waiver.”³⁵⁹

When the Commission took administrative notice of civil case number CV103-760CC, Staff had a copy of the legal file, or parts of it, present before the RLJ at the time of the hearing.³⁶⁰ Lake Region objected to the direct admission of the documents, objected to the offer of proof in relation to the documents, but did not specifically object to the taking of official notice. Lake Region also requested additional hearing time to rebut the alleged evidence should the Commission decide to consider the documents.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Rice v. James*, 844 S.W.2d 64, 68 (Mo. App. 1992).

³⁶⁰ Absent from the file was the Petition.

At hearing, and in its post hearing brief, the Commission's Staff cites to the Answer filed by Waldo Morris in Civil Case No. CV103-760CC as evidence of the purpose of the availability fees being to maintain the company's infrastructure as opposed to recovering the cost of the infrastructure investment. The specific paragraphs of the Answer to which Staff cites, and those surrounding Staff's citations, read as follows:

23. Since August, 1998, Plaintiff has continued attaching the requirement to pay availability or standby fees to the lots it sells, has continued to allow Defendant Waldo Morris to collect the fees, and has continued to allow Defendant Waldo Morris to spend the fees for the benefit of Defendant Lake Region Water & Sewer Company to guarantee capacity and service for Plaintiff's developments.

24. Pursuant to Chapter 644, RSMo, and its implementing regulations, Plaintiff cannot sell lots without first demonstrating to the Missouri Department of Natural Resources that the entity certificated by the Missouri Public Service Commission to provide sewerage to the geographic area where the lots are located has sufficient capacity to provide sewer service for the lots Plaintiff sells.

25. Defendant Lake Region Water & Sewer Co. is the entity certified by the Missouri Public Service Commission to provide sewerage to Plaintiff's developments.

26. When Four Seasons Group, Inc. transferred the water and sewer company through the July, 1998, Stock Purchase Agreement, Plaintiff Four Seasons Lakesites, Inc. was limited by the State of Missouri to sell no more than fifty lots because of insufficient sewage capacity.

27. Lake Region Water & Sewer Company has used the availability or standby fees to build new sewage treatment plant and new water tower, invest in capital improvements, and otherwise increase capacity and services in order to provide capacity for Plaintiff's developments.

28. Plaintiff has never had to stop selling lots due to lack of capacity from Lake Region Water & Sewer Company, and Plaintiff has been able to develop and sell more lots because of Lake Region Water & Sewer Company's use of the availability or standby fees. Had Lake Region Water & Sewer Company not used the fees for their intended purpose, which only Lake Region Water & Sewer Company can do, Plaintiff's development would have stopped long ago.

Staff claims that the Answer in the 2003 civil case serves as a judicial admission against interest of Lake Region in this matter. Staff's theory is incorrect for multiple reasons:

- (1) Administrative notice in this instance did not elevate the noticed legal file to the level of competent evidence. Indeed, Civil Case No. CV103-760CC is not between the same parties, nor does it involve the same basic facts or the same general claims for relief. Case No. CV103-760CC involves a lawsuit over who possessed the availability fees assigned by Four Seasons Lakesites, Inc. to Roy and Cindy Slates in 1998 and later to Waldo I. Morris in 2000. The case has nothing to do with the original developer's intent of establishing availability fees. Even Lake Region, the only named party in common to both matters, is not the same entity today as it was in the year this case was filed, 2003, because Lake Region's ownership has changed. The parties, facts and claims for relief are not in privity.
- (2) An Answer to a petition is a pleading drafted by and filed by the attorney of record and statements of attorneys (in opening arguments in the current case) can only constitute a judicial admission **if they are "a clear, unequivocal admission of fact,** in which case they are binding on the party in whose interest they are made;" **however,** "[a] mere statement or outline," . . . "of anticipated proof upon one or more issues in the case is not to be regarded as a binding admission to either bind the party whose counsel made the statement or to dispense with the necessity of proof on the issue on the part of his adversary." *Mills v. Redington*, 736 S.W.2d 522, 525 (Mo. App. 1987). An answer to a petition, unless declaring itself to be an admission or unless it is accompanied by any underlying documentation to support the statement, is merely an outline of anticipated proof, not an admission of fact. Mr. Morris' statement of how he used the availability fees would require documentation to prove the statement; therefore it can only be an outline of anticipated proof. Moreover, how he spent the fees was not an issue in the civil case. The issue was who owned the fees.
- (3) A judicial admission has two parts: (1) an allegation, and (2) an admission by the opposing party. *Creech v. MBNA America Bank, N.A.*, 250 S.W.3d 715, 717 (Mo. App. 2008). As the Answer reflects, there is no allegation concerning the intent for collecting the availability fees made by the Plaintiff, so the paragraph providing the statement regarding how availability fees may have been spent does not constitute an answer to, or an admission of, an un-alleged intent. In fact, the paragraphs in the Answer cited by Staff are not responsive to any allegations at all. They appear under a section outlining affirmative defenses captioned "Estoppel, Laches, and Course of Conduct;" a section that follows the section of the answer that addresses the specific counts of the petition.
- (4) "A true judicial admission is one made in court or preparatory to trial by a party or his attorney that concedes, **for the purposes of that particular trial**, the truth of some alleged fact so that one party need offer no evidence to prove it, and the other party ordinarily is not allowed to disprove it." (Emphasis added). *Owens v. Dougherty*, 84 S.W.3d 542, 547 (Mo. App. 2002). The Answer is from a separate civil matter that occurred when Waldo Morris was the sole shareholder and owner of Lake Region.

Waldo Morris' statements in this 2003 civil case are not made in privity with the current shareholders and owners and cannot be construed to be admissions on the part of the current owners. Waldo Morris is not a party to the present case and cannot make an admission for the purposes of this case that is proceeding some seven years after the 2003 case.

- (5) How Waldo Morris, the third owner of Lake Region, spends the availability fees is totally irrelevant to what the original purpose was for creating the fees. Harold Koplar and Peter Brown, the original owners of the utility, created the fees to recover investment in the infrastructure. This is borne out by Mr. Brown's affidavit and the original feasibility study and testimony in the company's first CCN case that concluded in 1975.
- (6) Finally, assuming, *arguendo*, that the Answer could be construed to be an admission by the current incarnation of Lake Region, the Answer does not support Staff's theory. Staff predicated its theory that availability fees were not used for recovery of infrastructure investment but rather to maintain and repair all of the existing infrastructure, including infrastructure installed for undeveloped lots. Waldo Morris' Answer outlines his anticipated proof that he spent the money on new infrastructure to expand capacity and services "in order to provide capacity for Plaintiff's developments," not to maintain or repair the existing system or for replacement of decaying infrastructure. Waldo Morris' statement, without additional specificity, demonstrates that he was spending the availability fees in the same manner as the original developer – to put new infrastructure in the ground.

In fact, Staff Witness Merciel discusses two types of capital improvement in his testimony. The first type he refers to is capital investment that is normally recoverable through utility rates paid by customers or that could be recovered by developers through lots sales. The second is "legitimate capital recovery through availability charges" where the investment exists for lot owners not yet connected.³⁶¹ In this instance, Staff not only failed to demonstrate that any capital investment was recovered through the sales price of the lots, but the investment in capital improvements referenced by Mr. Morris in paragraph 27 of his Answer was made to increase capacity to promote the sales of lots, i.e. legitimate capital recovery through availability fees to place infrastructure in the ground for potential lot owners that are not yet connected. Because Staff's argument concerning Mr. Morris'

³⁶¹ Staff Exh. 15, Merciel Rebuttal, p. 8.

Answer in Civil Case No. CV103-760CC is of no legal consequence, there is little need to grant Lake Region's Motion to strike it from Staff's brief.

While Staff has failed to support its position that the availability fees were recovered in the sales price of the lots or that they were created to maintain the water and sewer systems after they were installed, the record includes the affidavit of the original developer, who attests that the purpose for the fees was recover the cost of the infrastructure. The record also includes the feasibility study and testimony filed in the first certification case for the water operations. That evidence also demonstrates that the fees were collected to pay for the infrastructure. Indeed, the Commission acknowledged the availability fees in Case No. 17,954 and elected not to consider that revenue when setting rates for the company.

Further, Mr. Summer's testimony and the confidential settlement agreement of Civil Case No. CV103-760CC demonstrate that the original developer is still collecting a portion of the fees and as Mr. Summer's has deduced, the purpose must be related to recovery of his initial investment since the developer has nothing to do with maintaining the water and sewer systems. In short, 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.

Jurisdiction Over the Availability Fees

Staff and Public Counsel have argued that the availability fees are either an "accommodation" or a "commodity," and, as such, the fees constitute a regulated utility "service" subject to the jurisdiction of the Commission. Public Counsel has also argued that it makes no difference that the availability fees arise from a land sales contract or the restrictive covenants – both contractual agreements to which Lake Region is not a party – because the charge is for a utility service.

Section 386.020(48), RSMo Cum. Supp. 2009, defines “service” as including:

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.

Staff’s subject matter experts, however, have consistently testified, in this and in past proceedings, that availability fees are not a utility “service,” nor are they the provision of a utility “service.” While Staff’s subject matter experts are not experts in the law, their technical knowledge concerning what constitutes a utility service is persuasive, and the Commission has relied on this testimony when making decisions in prior actions.³⁶²

An “accommodation” is defined as: the act of accommodating or the state of being accommodated; adjustment; or something that meets a need; a convenience.³⁶³ Legally, however, there is a distinction because legally an “accommodation” is an arrangement or engagement made as a favor to another, not upon consideration received.³⁶⁴

A “commodity” is defined as: something useful that can that can be turned to commercial or other advantage.³⁶⁵ Legally speaking a commodity is a thing that is useful or serviceable, particularly articles of merchandise movable in trade such as goods or wares; things that are bought and sold.³⁶⁶

Because an “accommodation” does not involve consideration, an availability fee does not fall within that definition. However, the ability to hook up to a water and sewer

³⁶² See Finding of Fact Number 208 and accompanying footnote.

³⁶³ The American Heritage College Dictionary (3rd), Houghton Mifflin Company, 1997, p. 8.

³⁶⁴ Black’s Law Dictionary (6th) West Publishing Company, 1990, p. 16.

³⁶⁵ The American Heritage College Dictionary (3rd), Houghton Mifflin Company, 1997, p. 281.

³⁶⁶ Black’s Law Dictionary (6th) West Publishing Company, 1990, p. 274.

system is property right that can be transferred; it can be bought and sold. 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. To make this determination in this matter would be a substantial departure from past Commission decisions, policy and practice. And, although the Commission is not bound by *stare decisis*³⁶⁷ the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which **courts and litigants** may properly resort for guidance.” (Emphasis added).³⁶⁸ 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.³⁶⁹ 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.³⁷⁰

³⁶⁷ *State ex rel. AG Processing, Inc. v. Public Serv. Comm’n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm’n*, 835 S.W.2d 356, 371 (Mo. App. 1992).

³⁶⁸ *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004).

³⁶⁹ See Footnotes 206, 208-215; Transcript, p. 239.

³⁷⁰ As the Eastern District has succinctly stated in *Sapp v. St. Louis*:

The doctrine of quasi-estoppel prevents a party from taking a position directly contrary to or inconsistent with another position previously taken. See *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703, 710 (Mo. App. 2008) and *Porter v. Erickson Transport Corp.*, 851 S.W.2d 725, 736 (Mo. App. 1993). In this case, the City took the position that Sapp was not entitled to a contested case hearing through its promulgation of the Commission’s policy that suspensions such as his were handled through written review procedures that fall short of those required for contested case hearings. Then when Sapp attempted to appeal his case under the statute for non-contested cases, the City changed its position and argued he was

Additionally, even if the Commission reverses course and the fees are determined to be a “service,” this alone does not confer jurisdiction over those fees to the Commission. There are many entities, such as municipalities, cooperatives and not-for-profit property or home owners associations that provide utility services, which are not subject to the Commission’s jurisdiction.

There is another factor at play when determining its jurisdiction over the availability fees. In past cases where availability fees, standby fees, reservation fees or connection fees were collected, and where the Commission determined it lacked jurisdiction over those fees, the fees were always kept completely separate from the entity providing utility service. The fees were never part of the regulated public utility. Even if the ownership of the corporate entity collecting the fees was identical to the ownership of the utility, the revenue was never comingled with, or directly available to, the utility.

The record in this case demonstrates the utility had possession of the fees at their inception. The fees were paid to directly to the utility between 1974 and 1998. After that, the availability fee revenue stream was sold to Roy and Cindy Slates. Availability fee revenue was combined with the utility during of the sale of the stock and fees to Waldo Morris, but only long enough to split it off for Mr. Morris as a separate revenue stream. This

entitled to a contested case hearing, but that he waived it. Further, the City asserted because he was entitled to a contested case hearing, his notice of appeal of the Commission's decision was untimely. As a result, we find the doctrine of quasi-estoppel applies to prevent the City from contending Sapp waived his contested case hearing after it led him to believe he was only entitled to a non-contested written review.

Therefore, applying the doctrine of quasi-estoppel, we find the trial court's judgment finding it did not have subject matter jurisdiction in this case was unauthorized by law. As a result, we hereby deny the City's motion to dismiss for lack of subject matter jurisdiction, and we remand this matter to the circuit court with orders to remand it to the Commission so the Commission can hear and decide the appeal in accordance with contested case procedures prescribed by Section 536.010 et seq.

Sapp v. City of St. Louis, L 2749645, 5 -6 (Mo. App. 2010).

was repeated when the stock and fees were sold to the current owners of Lake Region. Because the utility had, at different intervals, direct use of or access to this revenue stream, and because the fees can be defined as a commodity falling under the definition of utility service, the Commission concludes that it should assert jurisdiction over availability fees. And when the prior owners eliminated Lake Region's access to these fees, these acts had the potential to become a detriment to the ratepayers; albeit, these actions were done with Public Service Commission acquiescence or approval in many cases over many years.³⁷¹

Appropriate Treatment of the Availability Fees

The history of the Commission's action in relation to availability fees is paramount in determining the appropriate method of how to treat the fees in this instance. While the Commission has approved settlement agreements that have included similar charges in a company's tariffs, when the issue has been contested and adjudicated, the Commission has long held that availability fees are not a utility service and are not within the Commission's jurisdiction, regulation or control.³⁷² This policy stems from the Commission's prior interpretation of Section 386.010(48), its expert Staff's testimony, and the Commission's past approval of the use of availability fees as being legitimate method of capital recovery. Changing this interpretation will have a future effect which will act on

³⁷¹ See the findings of fact related to Lake Region's history and the historical treatment of availability fees. See also Transcript pp. 239, 739, Staff Exh. 15, Merciel Rebuttal, pp. 13-14 describing the overall history of company. The Commission cannot definitely conclude from this record that transferring the fees was, in fact, a detriment to the ratepayers because the evidence shows the infrastructure paid for with the availability fees was donated as contributions in aid of construction, thus lower rate base and decreasing utility rates for Lake Region's customers. Also, the record indicates that there are no service issues with the company and the customers are happy with the service they receive. A potential detriment could occur where the availability fee revenue exceeds the cost of the infrastructure investment, but the record is incomplete with regard to that possibility.

³⁷² The fact that the Commission's Staff entered into agreements with different companies to allow different ratemaking treatment of the availability fees does not escape the Commission. This flip-flopping on position does little to bolster Staff's credibility in this action where it has strenuously argued for declaring jurisdiction and imputing the revenue. See the findings of fact related to Lake Region's history and the historical treatment of availability fees. See also the Transcript, pp. 598-600, 561-562.

unnamed and unspecified persons and facts – persons or entities not party to this proceeding.

The Commission asserting jurisdiction over revenue derived from availability fees, as now declared in this matter, cannot simply be based on an adjudication on a specific set of accrued facts.³⁷³ What the Commission is announcing today is it is going to prospectively change its statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements before this agency.³⁷⁴ Agencies cannot engage in this type of rulemaking by an adjudicated order.³⁷⁵ Pursuing a major change in the Commission's interpretation, implementation and prescription of its definitional statutes and its long-standing policy regarding ratemaking treatment of availability fees, requires compliance with the more stringent and lengthy process of rulemaking as required under section 536.021.³⁷⁶

³⁷³ In contrast to a rule, an adjudication is “[a]n agency decision which acts on a specific set of accrued facts and concludes only them.” *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004). An adjudication results from a “contested case,” which the APA defines as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” *Id.* Section 536.010(4), RSMo Cum. Supp. 2009. *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004)

³⁷⁴ Section 536.010(6) defines a rule as “each agency statement of general applicability that implements, interprets, or prescribes law or policy.” In other words, a rule is “[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified persons or facts.” *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo.App.1979). *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004); *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

³⁷⁵ *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

³⁷⁶ Similarly, Missouri Courts apply changes in decisional law **prospectively-only** in order to avoid injustice and unfairness “when “parties have relied on the state of the decisional law as it existed prior to the change.” (Emphasis added). *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985). In *Sumners*, the Supreme Court adopted a three-factor test for determining whether or not to apply a change in substantive law prospectively only. First, the decision “ ‘must establish a new principle of law ... by overruling clear past precedent[.]’ ” *Id.* at 724 (citation omitted). Second, the court determines whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. *Id.* The third factor involves a balancing of interests: “[T]he Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.” *Id.* Applying the *Sumners* test in

The Commission has been rebuked before by the Courts for attempting to make major shifts in policy without following proper rulemaking procedure. In *Beaufort Transfer Co. v. Public Service Comm'n*, the Court of Appeals reversed the Commission's decision attempting to apply a methodology advocated by its Staff to define a particular trade territory using a mileage formula because to do so would have the effect of a rule, i.e. a future application or interpretation of the law that can affect future litigants. The court determined that application of this formula went beyond adjudicating the facts of the case being immediately considered.³⁷⁷ Again, in *Gulf Transport Co. v. Public Service Comm'n*, the Commission had attempted to apply a general policy authorizing charter rights in conjunction with "regular route" operations and the Court held the policy was a rule within the definition of Section 536.010 and as such to apply this policy required the rule be properly promulgated pursuant to the Missouri Administrative Procedures Act.³⁷⁸

While not every generally applicable statement or announcement of intent by a state agency is a rule, an agency declaration that has the potential, however slight, of impacting the substantive or procedural rights of some member of the public is a rule.³⁷⁹ "Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract."³⁸⁰

Moreover, the Commission has not found an example of when it has ever completely reclassified revenue and imputed that revenue to the company for ratemaking purposes,

this instance would also weigh in favor of prospective application of the Commission's change in decisional law.

³⁷⁷ *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100-101 (Mo. App. 1980).

³⁷⁸ *State ex rel. Gulf Transport Co. v. Public Service Comm'n of State*, 658 S.W.2d 448, 454 -455 (Mo. App. 1983).

³⁷⁹ *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994).

³⁸⁰ *Id.*

and to do so now after Lake Region legitimately relied on the Commission's past treatment of this revenue would be the very definition of an arbitrary and capricious ruling. As the Missouri Supreme court has observed:

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." An agency must not act in a totally subjective manner without any guidelines or criteria.³⁸¹

To satisfy the standards of due process and avoid unpredictability with such a significant issue involved with determining a company's operational revenues, the Commission will open a workshop docket to lead to rulemaking. In the rulemaking proceeding, the Commission will delineate the definitive policy for the prospective treatment of availability fees, reservation fees, standby fees, connection fees, or any other similar fees, their proper use as mechanisms of capital recovery and their proper ratemaking treatment.

In making its decision not to impute the revenue derived from the availability fees in this proceeding, the Commission notes that it has spent a significant amount of time and analysis of the issues surrounding the fees, their prior legal treatment, the Commission's policies and practices, and the practical effects of such action. Indeed, the Commission directed its Staff and Lake Region to file numerous revenue requirement scenarios to analyze the effects of reclassifying and imputing the revenue and of imputing the revenue while providing corresponding offsets to rate base. Additionally, the Commission examined

³⁸¹ *Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 11 (Mo. banc 2008). See also Section 536.140, RSMo 2000.

the effects of not imputing revenue but reclassifying it as CIAC to reducing the company's rate base and revenue requirement.

After considering all of the possible revenue scenarios, the relevant law, and the Commission's prior policy and practice on ratemaking treatment of availability fees, the Commission determines that the substantial and competent evidence in the record as a whole supports the conclusion that it would be unjust and unreasonable to impute additional revenue to Lake Region derived from the availability fees already collected.

E. Executive Management Fees³⁸²

1. Lake Region's Position

Lake Region initially sought \$99,695 in management fees for the company's cost of service for executive management oversight, but it has reduced this request to \$49,848,³⁸³ recognizing that half of the Executive Management Group's ("EMG") time is spent managing Ozark Shores and half is spent on managing Lake Region.³⁸⁴ Lake Region initially reviewed the 2008 Annual Reports for Aqua Missouri, Aqua RU, Inc., and US Water Company and determined that the amounts recorded for salary and benefits for top management fees range from 6% to 12% of the operating revenue of the companies (\$31,562 to \$87,200) with the average being 8% (\$56,826).³⁸⁵ Lake Region also quantified the number of days spent by each member of the EMG involved with the management of Lake Region, and claim that each member of the EMG spends approximately four days a month, usually longer than 8 hours days, working on matters for Lake Region – 2 days a month from home and 2 days a month in Missouri with 1 additional day for travel.

³⁸² See Finding of Facts Numbers 213-266 and 270-274 for this section.

³⁸³ Transcript, p. 127-138; Lake Region Exh. 3, Stump Surrebuttal, p. 3; Staff Exh. 19, Updated Reconciliation (True-Up Reconciliation).

³⁸⁴ Transcript, p. 127.

³⁸⁵ Lake Region Exh. 3, Stump Surrebuttal, p. 3.

Based on its analysis, Lake Region incorporated its survey amounts for the top executive, the top engineering executive and the top financial executive of privately owned utilities, the same way it defines the three members of its EMG,³⁸⁶ and took the average of the annual salaries and derived an hourly rate of \$75 based upon 1,769 annual hours.³⁸⁷ However, as Lake Region Witness Vernon Stump would later testify, Lake Region ultimately agreed with Staff's analysis based upon 2080 annual hours that \$64 dollars an hour is the standard rate of compensation for Missouri executives.³⁸⁸ Lake Region's request, if approved, would result in each member of the EMG receiving approximately \$1385 per month.³⁸⁹

Lake Region and the Commission's Staff agree that the executive management compensation should be allocated in the following percentages based upon the relative amount of management and executive oversight associated with each utility division: Shawnee Bend Water – 25.5%; Shawnee Bend Sewer – 26.8%; and Horseshoe Bend Sewer – 47.7%. Consequently, if Lake Region's request for \$49,848 were approved the management fees would be allocated as follows: Shawnee Bend Water – \$12,711; Shawnee Bend Sewer – \$13,359; and Horseshoe Bend Sewer – \$23,777.

2. Staff's Position

The Commission's Staff toured Lake Region's facilities and discussed all aspects of the operations with Mr. Summers and the EMG.³⁹⁰ Staff reviewed the executive salaries in the *American Water Works Association 2008 Water Utility Compensation Survey* for

³⁸⁶ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

³⁸⁷ Staff Exh. 9, Harris Surrebuttal, pp. 9-10.

³⁸⁸ Transcript p. 131.

³⁸⁹ Transcript, pp. 129-138.

³⁹⁰ Transcript, pp. 150-151, 154-159; 161-163; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

executive salaries,³⁹¹ and compared the average annual executive salary Lake Region was using with the salaries published by the Missouri Economic Research and Information Center (MERIC) for chief executives in Missouri's Central Region (including Camden County, the county Lake Region is in) and compared them with the executive salaries of Missouri water and sewer utilities whose operating revenues exceeded \$500,000 annually.³⁹²

Staff determined the annual rate Lake Region was using was reasonable, but applying it to 2,080 annual hours instead of 1,769 annual hours it arrived at an hourly rate of approximately \$64 (\$63.77).³⁹³ Staff then applied its hourly rate to 288 annualized hours for each of the two general functions of executive management – operational management (provided by Mr. Stump) and financial management (provided by the Schwermanns)³⁹⁴ Staff views the services provided by the Schwermanns as being interchangeable.³⁹⁵

Staff's annualized hour calculation included three eight-hour days per month per function -- two days on site at Lake Ozark meeting with the District's board of directors and staff and the equivalent of one eight-hour day per month from remote locations. Staff also factored in twenty-four days of lodging, meal and travel costs for the time that executive management spends in Lake Ozark, and included costs for office expense and communication expense associated with the time that executive management spends on the utilities from remote locations.³⁹⁶

³⁹¹ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

³⁹² Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

³⁹³ Staff Exh. 9, Harris Surrebuttal, p. 10; OPC Exh. 3, Robertson Rebuttal, p. 6.

³⁹⁴ Staff Exh. 9, Harris Surrebuttal, pp. 1-16, and accompanying Scheduled VWH 1-3.

³⁹⁵ Transcript, pp. 149-150.

³⁹⁶ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

Based upon its calculations, and recommendation that the Commission use the “two function” approach to determining executive compensation, Staff recommends \$27,901 be awarded in executive management fees. However, Staff believes this amount is conservative given the size and complexity of the Lake Region/Ozark Shores/Water District Operation.³⁹⁷ Staff is in agreement with Lake Region with regard to the percentage allocation of EMG compensation among the three utility divisions and recommends the total of \$27,901 be allocated as follows: Shawnee Bend Water – \$7,115; Shawnee Bend Sewer – \$7,477 and Horseshoe Bend Sewer – \$13,309.³⁹⁸

Staff’s has also put forth an alternative position that reduces executive management compensation and payroll costs further in the event the Commission declines to impute the availability fees as revenue. Since the Commission has concluded it would not be proper to impute that income, the Commission must evaluate this alternative position. Under these circumstances, Staff proposes to treat RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 as a separate entity or utility division and re-allocate a total of \$17,493 in what it believes would be management and payroll costs connected to the fictitious name.

3. Public Counsel’s Position

Public Counsel believes the EMG acts more like a board of directors and that each member of the EMG should receive only \$200 annually for a total of \$600.³⁹⁹ Under its analysis, Public Counsel would allocate \$200 to each of the three utility divisions. Public

³⁹⁷ Transcript, p. 160; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

³⁹⁸ Transcript, p. 145; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

³⁹⁹ Transcript, pp. 195-196; OPC Exh. 2, Robertson Direct, pp. 14-23; OPC Exh. 3. Robertson Rebuttal, pp. 3-9; OPC Exh. 4, Robertson Surrebuttal, pp. 3-11. See Generally Transcript, pp. 164-213.

Counsel derived the \$200 amount based upon a review of what Raytown Water paid its board of directors for each meeting.⁴⁰⁰ Public Counsel also concurs with implementing Staff's alternative position in the event the Commission declined to impute the availability fees.

However, Public Counsel's witness, Ted Robertson, did not visit Lake Ozark and see first-hand the combined Water District/Lake Region/Ozark Shores operation and service area,⁴⁰¹ nor did he visit the office in Overland Park where the annual board of directors meetings are held.⁴⁰² Mr. Robertson did not interview any members of the EMG,⁴⁰³ or make a comparison between Lake Region and similarly sized utilities in this state to see how it fit in with other water and sewer companies.⁴⁰⁴ Instead, he relied upon data requests, viewing the minutes from board of directors meetings and communications with Mr. Summers, the general manager.⁴⁰⁵

Mr. Robertson did not include any travel costs in order for the executive management group to attend the annual board meeting or any travel costs associated with the EMG attending the monthly Water District meetings where the EMG determines if there are issues affecting Lake Region.⁴⁰⁶ He did not include an amount for Brian Schwermann to attend the board meeting even though Mr. Schwermann, in his capacity as board secretary, is required to take the minutes.⁴⁰⁷

⁴⁰⁰ Transcript, p. 195-196.

⁴⁰¹ Transcript, p. 181-182; Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

⁴⁰² *Id.*

⁴⁰³ Transcript, pp. 173-174, 181-182.

⁴⁰⁴ Transcript, p. 175.

⁴⁰⁵ Transcript, p. 181-182, 168, 170

⁴⁰⁶ Staff Exh. 9, Harris Surrebuttal, pp. 1-16.

⁴⁰⁷ *Id.*

4. Lakesites POA's Position

Again, it is unclear what position Lakesites POA has on this position because it did not file a brief on this issue.

5. The Commission's Decision

The management oversight by Lake Region's EMG is directly related to the operations of Lake Region and the EMG must be compensated like any other service provider. The Commission's Staff performed an extensive review of Lake Region's operations and as the Commission's findings bear out, contrary to Public Counsel's position, the EMG's management and oversight duties far exceed the duties of a board of directors. Public Counsel failed to conduct a thorough investigation or analysis of Lake Region's management structure and it substantially understated the true costs of the executive management compensation that should be included in rates.⁴⁰⁸ Because Public Counsel's analysis and position are not credible, the Commission will review Lake Region's and Staff's positions considering the relevant facts and appropriate methods for determining executive compensation.

Having determined that Lake Region's EMG is deserving of an appropriate level of executive management compensation, the Commission's review of the record and its findings demonstrate there are several valid methods for determining the proper amount of executive management fees. The three methods supported in the record, and delineated in the Commission's findings of fact, are a \$42.23 per customer basis, an 8% percentage of total revenue basis, and an the \$64 per hour basis.⁴⁰⁹

⁴⁰⁸ *Id.*

⁴⁰⁹ Finding of Fact Numbers 257-266.

Accounting for the overlap of Lake Region's water and sewer customers, approximately 785 households receive bills each month from Lake Region for either water service, sewer service, or both. Using households to represent customers and applying the \$42.23 per customer basis for determining management fees results in management compensation totaling \$33,150. Using the uncombined water and sewer customers, i.e. 1400 customers, would result in management fees of \$59,122.

Applying the percentage of revenue method, whereby 8% of total revenue is included in rates as compensation for salary and benefits, to Lake Region's revenue of \$678,016 would result in management fees totaling \$54,241.⁴¹⁰ Applying the 8% method to the full proxy group of Missouri water and sewer companies (identified by Staff Witness Harris) earning over \$500,000 per year produces an average of executive compensation fees of \$62,774.

Lake Region and Staff, through their independent analyses, have reached agreement on a \$64 per hour method for determining executive compensation, and because the accountants and auditors of both Lake Region and Staff have reached this same conclusion, the Commission finds it persuasive that the hourly basis is the most appropriate method to determine executive compensation. But, examining all of the methods and the credible evidence produces a range for comparison, whereby reasonable management fees for Lake Region could fall anywhere between \$27,901 to 62,774 (mid-point of \$45,337) depending upon what the specific facts of the case support.

Where Lake Region and Staff disagree is the number of annualized hours spent by each member of the EMG managing Lake Region and number of members of the EMG that should be compensated. Lake Region appears to have focused on a combined cost of the

⁴¹⁰ Staff Exhibit 18, Accounting Scheduled, True-Up Direct, Schedule 3 for each water and sewer division.

hours each member of the EMG contributes and associated expenses, while Staff's analysis breaks out hours and expenses. Working backwards from Lake Region's requested total of \$49,848, Lake Region is essentially arguing that each member of the EMG spends approximately 21.635 hours per month or 259.62 annualized hours involved with the management and executive oversight of Lake Region, inclusive of expenses.⁴¹¹

Staff, on the other hand, has provided a much more detailed accounting and has determined that each member of the EMG spends approximately 288 annualized hours managing Lake Region and Ozark shores, or 144 for Lake Region alone.⁴¹² Staff adds specific expenses and then factors in its functional analysis whereby only two members of the EMG should be compensated to reach its total recommendation of \$27,901. While Staff's accounting appears to be more detailed, Staff concedes that its total is low due to Lake Region being a complex utility to manage. And, the Commission finds Mr. Stump's testimony regarding the hours spent managing the company to be very persuasive.

While Lake Region receives a presumption that its expenses are prudent, Staff's challenge to their requested level of compensation is sufficient to rebut that presumption requiring Lake Region to proffer further evidence to carry its burden. The evidence that convinces the Commission that Lake Region is entitled to more compensation than what Staff recommends is the size and complexity of the operations and the fact that this is a well managed company with satisfied customers – it requires a significant investment of hours to run Lake Region properly. As Mr. Stump has testified, failure to maintain proper

⁴¹¹ Transcript, pp. 123-124,151. This figure must include the accounting for expenses based upon the number of days the EMG is involved with Lake Region's operations, but that specific amount is not clear from the record. Lake Region's original calculation of \$99,695 was apparently based upon each of the three members of the EMG contributing approximately 43.27 hours each month towards managing the Lake Region and Ozark Shores. This would translate to approximately \$1385 per month for each member of the team for wages and travel expenses.

⁴¹²

hands-on oversight would result in deterioration of the company that would increase overall costs for the ratepayers.⁴¹³

Nevertheless, the Commission is also persuaded that Staff's functional analysis is correct and having two members of the EMG involved with the financial oversight is duplicative. Lake Region has not provided enough evidence to rebut Staff's evidence in this regard, but it has provided sufficient evidence that the two functions of the EMG (operational and financial) should be compensated at a higher rate than Staff's recommended total of \$27,901. Consequently, the Commission determines that substantial and competent evidence in the record as a whole supports the conclusion that Lake Region should be awarded two thirds of its total request for \$49,848 or \$33,232 in executive compensation, the compensation for the two functions of its EMG. And, as a cross-check, this amount falls within the acceptable range produced by all three methods of determining executive management fees. This total compensation shall be allocated to the utility divisions as follows: Shawnee Bend Water – 25.5%; Shawnee Bend Sewer – 26.8% and Horseshoe Bend Sewer – 47.7%.

With regard to Staff's alternative argument of making a reduction in executive management compensation and payroll by treating RPS Properties and Sally Stump d/b/a Lake Utility Availability 1, a fictitious name, as a fourth entity being managed by the EMG, the evidence demonstrates that Staff did not undertake an actual audit of expenses associated with the billing and collection of availability fees. Consequently, Staff's argument is based on speculation and assumption and not on credible evidence. Lake Region has provided a much more accurate accounting of these expenses of totaling approximately \$2,000 annually, an amount the Commission finds to be *de minimis* given

⁴¹³ Transcript, p. 134.

the quality of the EMG's management and oversight of the company and the Commission's determination to implement its change of policy regarding availability fees prospectively with properly promulgated rules. The Commission has already substantially reduced the amount of executive management compensation to be recovered in rates and concludes there is no substantial or competent evidence requiring it to further reduce this amount.

F. Rate Case Expense⁴¹⁴

1. The Parties' Positions

Lake Region is seeking recovery in rates for rate case expense totaling \$42,997 to be amortized over three years and allocated equally among its three utility divisions. The Commission's Staff has confirmed that these expenses were incurred through May of this year.⁴¹⁵ While Staff believes the three-year amortization period is correct, Staff believes Lake Region should only be allowed to recover expenses through the True-Up Date of March 31, 2010, totaling \$26,273.⁴¹⁶ Staff argues that it is not customary for the Commission to authorize rate case expense past the True-Up date, and believes that taking an out-of-period adjustment for rate case expense distorts the revenue calculation requirement.⁴¹⁷

Public Counsel updated its analysis on rate case expense through June 17, 2010. Public Counsel calculated rate case expense to be \$44,729. However, Public Counsel claims that Lake Region should only be allowed to recover \$25,830 in rate case expense. Public Counsel believes that the Commission should disallow \$18,899 in legal expenses

⁴¹⁴ See Finding of Facts Numbers 267-269 for this section.

⁴¹⁵ Staff Exh. 50, [Second Updated] Reconciliation; Staff Exh. 19, [Updated] Reconciliation; Final [Updated] Reconciliation, filed on July 16, 2010; Staff's Update to Rate Case Expense - Staff's July 9, 2010 Response to Missouri Public Service Commission's June 24, 2010 Order Regarding Rate Case Expense, filed July 9, 2010, verified by the Affidavit of Cary G. Featherstone.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

associated with Lake Region's jurisdictional arguments concerning availability fees and for objecting to data requests concerning the same issue.⁴¹⁸ Public Counsel asserts that a five-year amortization is appropriate because the company has not sought a rate increase for 11 or 12 years and five years is approximately how long the present owners have owned the company.⁴¹⁹

2. The Commission's Decision

When examining the procedural history, the Commission must acknowledge that the delay in prosecuting past the True-Up period in this case is attributable to the Commission directing its Staff to engage in further discovery on the issue of availability fees. This delay is not the fault of Lake Region and because of the delay the company incurred additional litigation expense. As was noted at the Agenda session in which the Commission voted on its decisions, this is precisely the reason that all issues should be fully developed and presented to the Commission at the earliest possible stage of the litigation.

Additionally, Lake Region was justified in raising its jurisdictional challenges and it could have conceivably constituted legal malpractice for Lake Region's attorney to overlook the jurisdictional arguments as they pertain to availability fees. Public Counsel offers no evidence to support a determination that Lake Region engaged in any frivolous or unnecessary legal practice with prosecuting its case that would support a disallowance. The objections Lake Region made with regard to data requests concerning availability fees were never over-ruled, and there were no motions filed by any party seeking to compel answers to the data requests where Lake Region lodged an objection. There simply is no

⁴¹⁸ OPC Exh. 5, Robertson, True-Up Direct, pp. 1-3; OPC True-Up Brief and Attachment A, filed June 24, 2010.

⁴¹⁹ OPC Exh. 5, Robertson, True-Up Direct, pp. 3-4.

evidence in the record to suggest that Lake Region's rate case expenses were imprudently incurred that would support any disallowance of rate case expenses.

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusion that Lake Region should be allowed to recover \$42,997 in rates for rate case expense. Because of increasing operating expenses and anticipated capital improvements that Lake Region will be seeking recovery for, and because the Commission is directing Lake Region as a part of this proceeding to return in within three years for another ratemaking proceeding, the appropriate amortization period for rate case expense is three years. Allocating the amortized expense among the three utility division results in an annual allocation of \$4,777 to each operating division (Shawnee Bend Water, Shawnee Bend Sewer and Horseshoe Bend Sewer) as depicted in the Reconciliation filed on July 16, 2010.

G. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.⁴²⁰ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.⁴²¹

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.⁴²² "Courts are not concerned with alleged

⁴²⁰ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

⁴²¹ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

⁴²² *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review*

inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”⁴²³ The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.⁴²⁴ “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”⁴²⁵

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider

Committee, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm’n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

⁴²³ *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

⁴²⁴ *Id.*

⁴²⁵ *State ex rel. Gulf Transport Co. v. Public Service Com’n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

relevant evidence, but indicates rather that the material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following final decision.

Lake Region has, by a preponderance of the evidence, met its burden of proving, that the baseline rate increase for its operations totaling \$143,730 (Shawnee Bend Water - \$12,637; Shawnee Bend Sewer - \$102,350; Horseshoe Bend Sewer \$28,743) approved in this order is just and reasonable. Lake Region has also, by a preponderance of the evidence, met its burden of proving that \$33,232 is the just and reasonable amount to be recovered in rates for executive management compensation and that \$42,997 is the just and reasonable amount to be recovered in rates for rate case expense, as amortized and allocated as described.

Additionally, Lake Region provides safe and adequate service and the Commission concludes, based upon its independent review of the whole record that the rates approved in this order support the provision of safe and adequate service. The revenue increase approved by the Commission today is concluded to be no more than what is sufficient to keep Lake Region's utility plants in proper repair for effective public service, and insure to Lake Region's investors an opportunity to earn a reasonable return upon funds invested.

The Commission must address one final issue in this matter. Staff Exhibits 21, 22, and 23 were filed as highly confidential documents. The Commission specifically issued a protective order with regard to Staff Exhibit 23 prior to its filing. Because the Commission is not imputing availability fees to Lake Region in this case, the Commission will not alter the classification of the documents and will not disclose the actual amounts of availability fees collected or how the portions of those fees are divided as a result of the confidential settlement agreement in Civil Case No. CV103-760CC. However, there were answers to

various questions contained in Staff Exhibits 21 and 22, the Affidavits of Brian Schwermann, which pertained to matters not falling under the definitions of proprietary or highly confidential information as defined in Commission Rule 4 CSR 240-2.135. The Commission shall declassify this information.

THE COMMISSION ORDERS THAT:

1. The water and sewer service tariff sheets submitted on October 7-8, 2009, by Lake Region Water & Sewer Company, assigned Tariff Nos. YS-2010-0250 and YW-2010-0251, are rejected.⁴²⁶ The specific sheets rejected are:

PSC MO. No. 1 (Water)

First Revised Sheet No. 4, Replacing Original Sheet No. 4

First Revised Sheet No. 5, Replacing Original Sheet No. 5

PSC MO. No. 2 (Sewer)

Second Revised Sheet No. 6, Replacing First Revised Sheet No. 6

Second Revised Sheet No. 7, Replacing First Revised Sheet No. 7

2. Lake Region Water & Sewer Company is authorized to file tariff sheets in compliance with this order, sufficient to recover revenues approved in the body of this order. Lake Region Water & Sewer Company shall file its compliance tariff sheets no later than August 23, 2010.

3. No later than 3:00 p.m. on August 26, 2010, the Staff of the Missouri Public Service Commission shall file its recommendation concerning approval of Lake Region Water & Sewer Company's compliance tariff sheets.

⁴²⁶ Originally tariff sheets were filed on October 7, 2009. The original tariff sheets for sewer service, Tracking No. YS-2010-0249, were withdrawn by Lake Region on October 8, 2010, new sheets were filed and assigned Tracking No. YS-2010-0250. These sheets were then substituted but retained the Tracking No. of YS-2010-0250. The original tariff sheets for water service were assigned Tracking No. YW-2010-0251, substitute sheets were filed but they retained the Tracking No. YW-2010-0251.

4. No later than August 27, 2010, the Staff of the Missouri Public Service Commission and Lake Region Water & Sewer Company shall jointly file updated and revised rate design schedules 1-11, that were originally filed by Staff Witness James Russo on January 21, 2010, to reflect the implemented rate increase and rate design, and the monthly bill comparisons.

5. Lake Region Water & Sewer Company shall file a new general rate increase request no later than three years following the effective date of this order.

6. Lake Region Water & Sewer Company's motion to strike portions of Staff's brief regarding availability fees is denied.

7. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.

8. The following portions of Staff Exhibits 21 and 22, Affidavits of Brian Schwermann, received into evidence as highly confidential documents shall be publically disclosed: Exhibit 21, Paragraphs 1-9, 11-16 and 18; Exhibit 22, Paragraphs 1-5. The Commission's Data Center shall file redacted versions of these exhibits in the Commission's Electronic Information and Filing System.

9. By separate order, The Commission shall open a workshop docket, as described in the body of this order to prospective treatment of availability fees, reservation fees, standby fees, connection fees, or any other similar fees, their proper use as mechanisms of capital recovery and their proper ratemaking treatment.

10. This Report and Order shall become effective on August 28, 2010.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. Reed', is positioned above the printed name of the Secretary.

**Steven C. Reed
Secretary**

(S E A L)

Clayton, Chm., Gunn, and Kenney, CC., concur;
Davis and Jarrett, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 18th day of August, 2010.