

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Lake Region Water and Sewer	)	
Company's Application to Implement a General	)	Case No. SR-2013-0459
Increase in Water and Sewer Service	)	

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

**LAKE REGION WATER & SEWER COMPANY'S MOTION TO STRIKE PORTIONS  
OF THE WRITTEN TESTIMONY OF STAFF WITNESS KIM BOLIN AND SECTIONS  
OF STAFF'S REVENUE REQUIREMENT AND COST OF SERVICE REPORT**

Comes now Lake Region Water & Sewer Company ("Company") by and through counsel and respectfully moves to strike portions of the prefiled written direct testimony of Staff witness Kim Bolin and certain sections of Staff's Revenue Requirement and Cost of Service Report.

1. On November 15, 2015, Kim Bolin caused to be filed her written direct testimony in this matter. On the pages and in the lines identified below, Ms. Bolin described the manner in which availability fees had been applied to Staff's calculation of Staff's recommended revenue requirement in this matter. Accompanying her testimony and described therein was the Staff Report on Revenue Requirement and Cost of Service ("Staff Report"). The Staff Report, particularly on pages 14-15 thereof, discusses the use of availability fees in Staff's calculation of its recommended revenue requirement in this case.

2. The Commission lacks subject matter jurisdiction over the charging, collection and enforcement of availability charges or fees. Availability fees constitute a source of unregulated revenue. The Commission's jurisdiction is set out in Section 386.215 RSMo 2000, and in particular,

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

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

The term “service” is also statutorily defined.

“**Service**” includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons;

Section 386.020 (48) RSMo Cum. Supp. 2012. Having water or sewer system facilities available to an undeveloped subdivision lot does not constitute a “service” as defined in Section 386.020.

An owner of an undeveloped property consumes no service from a water or sewer company.

3. The Company does not charge or collect availability fees for unused water and sewer system infrastructure in place within its certificated territory. The Company has no control over availability fee revenue.

4. Evidence of availability fees is irrelevant to or for the calculation of the Company’s cost of service and revenue requirement, or for any other valid purpose, in this proceeding. Moreover, Staff has admittedly utilized an **estimate** of availability fees in the calculation of the Company’s revenue requirement.<sup>1</sup> The Commission has previously opined that estimates of availability fees that are charged to owners of undeveloped lots in the certificated area served by the Company are unreliable and incompetent as evidence. For these

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<sup>1</sup> To the best of Company’s knowledge, Staff has not engaged in any discovery device or investigative process through subpoena or otherwise by which to verify the data used for its calculation. The information upon which Staff has estimated the figure it has used is stale, derived from a hearsay source and therefore inherently unreliable.

reasons all references to, applications or uses of availability fees in Ms. Bolin's testimony, in the Staff's Report or in any other Staff filing to date or hereafter should be stricken from the record and ruled inadmissible for any purpose in this matter.

5. The Company has relied on the Commission's historical treatment of availability fees in the operations of its regulated business. If the Commission were to impute income from availability fees as proposed by the Staff, the reduction in the Company's revenue requirement and the rates that would be approved based upon that reduced revenue requirement would be confiscatory thus violating the Company's rights of due process guaranteed by the Missouri Constitution and US Constitution. The Commission so found in the past.

***Staff's Testimony and Report***

6. In her direct testimony, Ms. Bolin refers to availability fees on the following pages and line numbers:

Page 10	Line 13
Page 12	Lines 4-5
Page 13	Lines 12-16

7. The Staff Report refers to availability fees on the following pages and line numbers:

Page ii	Line 7 -8
Page 14	Lines 16-30
Page 15	Lines 1-30
Page 16	Lines 1-2

8. The Staff Report also explains Staff's use of availability fees in this matter:

Staff is including revenue in its case that is derived from "availability charges," also called "availability fees." Availability charges are monthly payments that lot owners agree to pay after the water or sewer systems become available to their unimproved lots but prior to the time they construct homes and

connect to the water or sewer systems. *The amount of revenue that Staff is including in its case for availability charges is an estimate of \$342,090. Staff's calculation of the availability fees is based upon the number of unimproved lots sold as of March 31, 2010, information that was provided by the Four Seasons Lakesites Property Owners Association in Lake Region's last rate case, SR-2012-0110.* Staff then subtracted the number of new connections that have been made to Lake Region Water & Sewer in its Shawnee Bend operating area since March 31, 2010, through June 30, 2013, *to arrive at an estimated number of unimproved sold lots.* The annual per lot availability charge is \$120 for water and \$180 for sewer.

\* \* \*

Staff believes that, since Lake Region is the entity that is providing a guarantee of water and sewer service availability to lot owners in Lake Region's service territory, the availability fee revenue should be included in Lake Region's cost of service. Lake Utility Availability 1 is a fictitious name used by RPS Properties and Sally Stump and serves merely as a collection entity for these charges, and the funds it collects are for no other service than that which is provided by Lake Region. RPS Properties is also an owner of Lake Region and Sally Stump was also an owner of Lake Region until December 31, 2012. Now, Vernon Stump, Sally Stump's husband, and RPS Properties are the owners of Lake Region. *Lake Utility Availability 1 is not the entity that owns the water works system and central sewer system that make it possible for the customers to connect and receive water and sewer utility service in the future, and Lake Utility Availability 1 does not have a certificate to serve this area.*

Staff Report at pages 14, 15-16.

9. To condense these portions of the Staff Report, Staff acknowledges that its supporting data is derived from a ***hearsay source*** that supplied information in a previous rate case involving the Company<sup>2</sup>---the findings, conclusions and orders of which Staff has ignored<sup>3</sup>--which allowed Staff to arrive at an ***estimated number*** of lots on which to base its ***estimate*** of revenue availability fee revenue. Staff further admits that the shareholders of the Company, not

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<sup>2</sup> Case Nos. SR-2010-0110 and WR-2010-0111; *Report and Order* issued August 18, 2010 (herein referred to as *Lake Region 2010 Report and Order*).

<sup>3</sup> Staff ignores the fact which was found and determined by the Commission in the Company's previous rate case that the **developer** of the property located within the Company's service territory is **also collecting a portion of the availability fees**. See *Lake Region 2010 Report and Order* at page 99. Staff makes no effort to calculate what of portion of its estimate has been paid to the developer thus compounding its inaccuracy.

the Company itself, are recipients of and this revenue and acknowledges that the Company does not control that revenue.

***Case Nos. SR-2010-0110 and WR-2010-0111***

10. In the previous Company rate case, which the Staff mentions in the Staff Report, Staff proposed imputing an estimate of availability fee revenue to reduce the Company's revenue requirement as a means of erasing a needed rate increase. This Commission rejected the proposal in an extensive and detailed discussion of the issue in the 123 pages of the *Lake Region 2010 Report and Order*. In the *Lake Region 2010 Report and Order*, the Commission in error concluded that it had jurisdiction over availability fees and like charges, but ruled that it was unjust and unreasonable to impute additional revenue to the Company derived from the availability fees.

11. The Company reasserts that the Commission lacks jurisdiction over availability fees and revenue derived therefrom but irrespective of whether jurisdictionally the Commission may consider the issue, the facts and circumstances upon which the Commission rendered its rulings in the Company's last rate case have not changed: Imputation of availability fee revenue to the Company in the manner proposed by the Staff remains unjust and unreasonable and no testimony or other evidence concerning availability fees should be considered in this matter.

12. It was the conclusion of this Commission that before it could lawfully reclassify availability fee revenue as revenue attributable to the Company it must engage in a rulemaking.

The Commission explained:

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.** 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 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.** 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. Agencies cannot engage in this type of rulemaking by an adjudicated order. 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.

\* \* \*

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, 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.

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.<sup>4</sup>

(emphasis added).

13. The Commission opened a special workshop docket for purposes of developing the rulemaking which was anticipated in the *Lake Region 2010 Report and Order*. The Commission assigned Case Nos. SW-2011-0042 and WW-2011-0043 to that proceeding. The proceeding was closed without recommendations.<sup>5</sup> **No rule has been promulgated.**

14. The Commission has declared that it is unlawful for the Commission to impute revenue from the collection of availability fees for ratemaking purposes in the absence of a definitive rule promulgated pursuant to Section 536.021. In the absence of such a valid rule that governs the manner in which availability fees should be applied, if at all, as a factor in determining revenue requirement, any evidence regarding the charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting enforcing or applying the same would be meaningless to the Commission's decision and therefore unquestionably irrelevant to this proceeding. Testimony or other proof regarding the same should be stricken.

WHEREFORE, on the basis of the above and foregoing, Lake Region Water & Sewer Company respectfully requests the Commission to strike the portions of Staff witness Kim Bolin's direct testimony and the portions of the Staff Report identified herein and further order and declare that evidence in any form offered in this proceeding pertaining to the charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting, enforcing or applying the same is irrelevant and inadmissible.

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<sup>4</sup>*Lake Region 2010 Report and Order* at 103-107.

<sup>5</sup> See, *Order Granting Motion To Close File*, Case No. WW-2011-0043 (Consolidated) (January 23, 2013).

Respectfully submitted,

/s/ Mark W. Comley

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 22nd day of November, 2013, to General Counsel's Office at staffcounservice@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley