

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

In the Matter of Lake Region Water & Sewer)	File No. SR-2010-0110
Company's Application to Implement a General)	Tariff No. YS-2010-0250
Rate Increase in Water & Sewer Service)	

In the Matter of Lake Region Water & Sewer)	File No. WR-2010-0111
Company's Application to Implement a General)	Tariff No. YW-2010-0251
Rate Increase in Water & Sewer Service)	

STAFF'S POST HEARING BRIEF
PART II – REGARDING AVAILABILITY FEES

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STAFF'S POST HEARING BRIEF PART II – AVAILABILITY FEES

COMES NOW, the Staff of the Public Service Commission (Staff) by and through counsel, and respectfully provides the following to the Missouri Public Service Commission (Commission) as its Post Hearing Brief, Part II on the issue of availability fees, requesting that the Commission impute \$324,000 in availability fees to the Lake Region Water & Sewer Co.'s (Lake Region) Shawnee Bend Water and Shawnee Bend Sewer.

I. SUMMARY

The Commission has jurisdiction over availability fees created with an inherent tie to the water and sewer systems owned and operated by Lake Region. The smokescreen Lake Region and its shareholders tried to employ regarding the billing, collection, and distribution of availability fees fails at detracting from the truth that the Commission has sufficient and substantial evidence to rely on showing these availability fees are integrally connected to the operations, maintenance, and improvements of Lake Region's systems. The availability fees at issue were once billed, collected, and used for operating and maintenance expenses and capital improvements by Lake Region for the benefit of its customers. The utility chose to sever and sell the availability fees, separating it from Lake Region's revenue to the detriment of ratepayers.

This is a matter of first impression.¹ Since Lake Region’s Shawnee Bend water and sewer area certification case in 1997, Lake Region has not been subject to a general rate proceeding evaluating and determining treatment of availability fees, and thus the issue availability fees in this venue has not been fully vetted.²

Staff is requesting that the Commission assert its jurisdiction over the availability fees and impute availability fee revenue in the amount of \$129,600 for Shawnee Bend Water and \$194,400 for Shawnee Bend Sewer based on a 10% uncollectible rate.³ This would result in a zero dollar rate increase on both the Shawnee Bend water and sewer systems, but would have no effect on the recommended rate increase for the Horseshoe Bend sewer system.

II. AVAILABILITY FEES

A. PURPOSE OF AVAILABILITY FEES

Availability fees are paid by undeveloped lot owners at the time each owner purchases a lot in order to reserve sewer and water capacity on the Lake Region water and sewer system.⁴ A lot owner is responsible for paying availability fees from the time they purchase their lot until the time the owner connects to the water and sewer system.⁵ In this case, no end date exists in the creation documents as to availability fees.

Availability fees provide the utility with supplement revenue to support utility operations until such time as the lot owner connects to the water and/or sewer system, or until the lot owner begins to receive the utility service and pays a utility bill.⁶ Staff expert, James Merciel states

¹ “A case that presents the court with issues of law that have not previously been decided in that jurisdiction.” Black’s Law Dictionary, Seventh Edition, 1999.

² Staff Exhibit 15, James Merciel Rebuttal Testimony,, p. 12, lines 3 – 15.

³ Staff Exhibit 17, Cary Featherstone True-up Direct Testimony,, p 14.

⁴ Staff Exhibit 52, Answer of Defendant at p. 8 ¶ 6, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁵ Staff Exhibit 52, Answer of Defendant at p. 8 ¶ 6, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁶ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 3, lines 1-8.

that “availability charges can and should be used to offset the costs of the repairs and construction of infrastructure that benefit the owners of the unconstructed lots.”⁷ Typically, “availability charges . . . are created in subdivisions restrictions or covenants, or land sales agreements. Such documents usually require lot purchasers to pay the availability charge, initially to the developer. The rights to collect availability charges can be assigned to others, such as a utility or other party.”⁸

B. GENERAL HISTORY OF AVAILABILITY FEES RELATED TO LAKE REGION WATER & SEWER CO.

In December 1973, the Commission granted Four Seasons Lakesites Water & Sewer Company a Certificate of Convenience and Necessity in Case No. 17,975 to provide water and sewer service in a development commonly referred to as Horseshoe Bend, Lake Ozark, Missouri. In that case, the existence of availability fees as related to the water system was briefly acknowledged, but the Commission did not issue an order on how availability fees would be treated or include availability fees in the Company’s tariffs.⁹

Harold Koplar was the developer of Four Seasons Lakesites Water & Sewer Co.’s and the president of the water and sewer company until sometime in 1984 or 1985.¹⁰ Four Seasons Lakesites Water & Sewer Co. billed and collected availability fees for Horseshoe Bend from undeveloped lot owners for the accommodation of water capacity.¹¹ Subsequently, Four Seasons Lakesites Water & Sewer Co. sold some of its utility assets in the Horseshoe Bend area, obtained a certificate, and began providing water and sewer service in the Shawnee Bend area.¹² It also

⁷ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 4, lines 19-21.

⁸ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 3, lines 18-21.

⁹ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 13, lines 11-21.

¹⁰ Transcript, p. 641, lines 14-21; Staff Exhibit 16, James Merciel Surrebuttal Testimony, attachment 2, p. 1.

¹¹ Transcript, p. 242, lines 21-25.

¹² Transcript, p. 275, lines 4-7; p. 250, lines 7-12; p. 700, line 24 – p. 701, line 3.

changed its name twice; however, Four Seasons Lakesites Water & Sewer Co. continued to charge water availability fees until some point around 1998.¹³

In 1973, Four Seasons Lakesites, Inc., created availability fees through a declaration of restrictive covenants. The restrictive covenants state that availability charges will be paid to the owner of the water system, which will be a utility regulated by the Commission, for the accommodation of water and that the availability charge would be included in the regulated utility's tariff.¹⁴ The documents state that lot owners on Shawnee Bend will pay a \$10 per month water availability fee and a \$15 per month sewer availability fee.¹⁵ Additionally, lot owners entered into a water and sewer agreement at the time they purchased their lot which states that they agree to pay the utility company water and sewer availability fees.¹⁶

In 1985 Peter N. Brown became the president of Lake Region and remained in that position until August 17, 1998.¹⁷ Mr. Brown the developer of the Porto Cima, stated "[t]he purpose of availability fees was to recover the investment in the water and sewer systems, not to subsidize the operations of the systems."¹⁸ However, this is contrary to the documents lot owners obtain when they purchase a lot from Four Seasons Lakesites, Inc., in which it specifically states that the water availability fee will be paid directly to the utility company and be contained in the company's tariffs. Dr. Vernon Stump, Lake Region's executive management

¹³ Transcript, p. 275, lines 4-7; p. 250, lines 7-12; p. 700, line 24 – p. 701, line 3.

¹⁴ Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 3, p. 18-19, Third Amended and Restated Declaration of Restrictive Covenants, dated August 20, 1996. Since then, the Declarations of Restrictive Covenants have been modified twice.

¹⁵ Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 4, p. 5-6; Amendment to the Third Amended and Restated Declaration of Restrictive Covenants, dated July 15, 2009. The Fourth Amended and Restated Declaration of Restrictive Covenants were updated in October 2009, and did not change the water and sewer systems language. See Staff Exhibit 12, Fourth Amended & Restated Declaration on Restrictive Covenants, p. 17-18, ¶ 9.

¹⁶ Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 7.

¹⁷ Staff Exhibit 16, James Merciel Surrebuttal Testimony, attachment 2, p. 1; Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit, p. 1.

¹⁸ Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit, p. 1.

group's president testified at the evidentiary hearing, that availability fees are to run in perpetuity, in other words long after all the investments have been recovered.¹⁹

C. AVAILABILITY FEES FOR SHAWNEE BEND AREA & ASSIGNMENTS

In 1994, Ozark Shores Water Company (Ozark Shores) was granted the authority to acquire Four Seasons Lakesites Water & Sewer Co. water systems' assets on Horseshoe Bend, in Commission Case No. WM-93-59. At that time Ozark Shores also acquired the water availability fees for water service.²⁰

In 1994, Four Seasons Lakesites Water & Sewer Co. was granted a Certificate of Convenience and Necessity to provide water and sewer services in the Shawnee Bend area of Lake Ozark in Case No. WA-95-164. This case set pro forma rates for the mostly undeveloped area of Shawnee Bend, thereby not detailing how availability fees would be handled.²¹

In March 1997, Four Seasons Lakesites Water & Sewer Co. changed its name to Four Seasons Water & Sewer Company and continued to bill lot owners for availability fees.²²

On August 17, 1998, Four Seasons Water & Sewer Co. sold 100% of its stock to Roy and Cindy Slates and in 1999 they changed the company name to Lake Region Water & Sewer Company.²³ As part of Roy and Cindy Slates consideration for the sale of stock in Four Seasons Water & Sewer Co., they received the rights or interest in availability fees.²⁴ It was at this point that utility shareholders gave up the utility company's rights to the availability fees asset.

¹⁹ Transcript, p. 630, lines 20-21; p. 631 lines 1-6.

²⁰ Transcript, p. 485, lines 19-23; Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 14, lines 1-3.

²¹ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 14, lines 8-12.

²² Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 13, lines 11-21; Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 6.

²³ Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit, p. 1; Staff Exhibit 10, Contracts Regarding Availability Fees, p. 2.

²⁴ Exhibit 52, Answer of Defendant at ¶ 7, 9, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

On March 30, 1999, Roy Slates filed a Registration of Fictitious Name with the Missouri Secretary of State, entitled “Lake Utility Development,”²⁵ which expired on October 17, 2009.²⁶ It is believed that Lake Utility Development was set up to separate the billing and collections of availability fees to be outside of Lake Region’s revenue stream.²⁷

On April 12, 2000, Waldo Morris, through foreclosure in the Slates’ stock in Lake Region, became the sole shareholder and obtained the interest in availability fees.²⁸ Thereafter Waldo Morris and Lake Region became involved in litigation with various parties over ownership of the availability fees.²⁹ Circuit Court Cause No. CV103-760CC was settled on April 15, 2005 in a confidential settlement agreement.³⁰

Prior to settling the availability fee dispute, on September 10, 2004, Waldo Morris assigned his interest in availability fees to Robert P. Schwermann, Sally J. Stump and Lake Region.³¹ On October 13, 2010, Robert P. Schwermann paid \$1.00 and other good valuable consideration for the availability fees.³² In October 2004, Waldo Morris sold his interest in Lake Region’s stock to Sally Stump and RPS Properties, LLP (RPS Properties).³³

The shareholders of Lake Region are the same shareholders as North Suburban Public Utility Company (North Suburban). On November 20, 2004, North Suburban filed a *Registration of Fictitious Name* with the Missouri Secretary of State entitled “Lake Utility

²⁵ Staff Exhibit 42, Secretary of State Fictitious Name Registration.

²⁶ Staff Exhibit 42, Secretary of State Fictitious Name Registration.

²⁷ Transcript, p. 263, lines. 221 – p. 264, line. 7.

²⁸ Answer of Defendant at ¶ 8, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC; Staff Exhibit 10, Contracts Regarding Availability Fees, p. 2.

²⁹ Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit, p. 2.

³⁰ Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit, p. 2.

³¹ Staff Exhibit 10, Contracts Regarding Availability Fees, p. 1.

³² Staff Exhibit 10, Contracts Regarding Availability Fees, p. 2-3.

³³ Staff Exhibit 16, James Merciel Surrebuttal Testimony, attachment 2, p. 2; Transcript, p. 612, lines 21-22. Note the assignment of availability fees and sale of stock took place before the law suit involving availability fees ended.

Availability”.³⁴ Lake Utility Availability was setup for the utility shareholders to do business as (d/b/a) Lake Utility Availability for the billing and collecting of availability fees.³⁵

On August 15, 2005, Sally Stump and RPS Properties rights to availability fees were modified by the terms of a confidential settlement agreement between RPS Properties, L.P., Sally Stump, Lake Region, and Four Seasons Lakesites, Inc.”³⁶ Then on August 24, 2005, Sally Stump filed on behalf of herself and RPS Properties a fictitious name registration of “Lake Utility Availability 1.”

D. LAKE REGION’S CORPORATE STRUCTURE

Lake Region operates its company through a contractual relationship with the Public Water Supply District No. 4 of Camden County (PWSD#4).³⁷ In the fall of 2004, Lake Region shareholders, Sally Stump and RPS Properties, created this relationship with the PWSD#4.³⁸ The result is that Lake Region does not have any employees, but contracts with the PWSD#4 for all company services.³⁹ The shareholders of Lake Region are the same shareholders of Ozark Shores,⁴⁰ and they operate this affiliate utility in the same manner.⁴¹

John Summers is the general manager and employee of PWSD#4,⁴² and is the contract general manager for Lake Region⁴³ and Ozark Shores.⁴⁴ Mr. Summers has been the contract

³⁴ Staff Exhibit 11, Secretary of State Fictitious Name Registration “Lake Utility Availability.”

³⁵ Transcript, p. 324, line 8.

³⁶ Staff Exhibit 20, Sally Stump June 1, 2010 Affidavit, p. 1; Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 1.

³⁷ Transcript, p. 322, lines 20-24.

³⁸ Transcript, p. 323, lines 5-10.

³⁹ Staff Exhibit 7, Cost of Service Report, p. 24, lines 18-19.

⁴⁰ Transcript, p. 60, line 23; p. 127, line 14.

⁴¹ Staff Exhibit 7, Cost of Service Report, p. 24, lines 19-21.

⁴² Transcript, p. 256, line 1; p. 216, lines 7-8.

⁴³ Transcript, p. 216, lines 9-12; p. 255, lines 17-19.

⁴⁴ Transcript, p. 255, lines 20-22.

general manager of Ozark Shores since September 2002,⁴⁵ the general manager of the PWSD#4 in 2003,⁴⁶ and Lake Region since October 2004.⁴⁷

E. BILLING AND COLLECTION OF AVAILABILITY FEES

Currently, bills are sent out under the Lake Utility Availability,⁴⁸ to lot owners in the Shawnee Bend Water and Sewer service areas.⁴⁹ It is estimated that between 1200 and 1300 bills are sent out each year for availability fees,⁵⁰ and that 90% to 95% of those bills are collected.⁵¹

Cynthia Goldsby, PWSD#4 employee, is responsible for billing and collection of Lake Region's availability fees under the name Lake Utility Availability,⁵² and Ozark Shores water availability fee.⁵³ Ms. Goldsby, as an employee of PWSD#4, is under Mr. Summers' supervision.⁵⁴ Through a contractual relationship between PWSD#4 and Lake Region, Ms. Goldsby also does the billing and collecting of utility bills for Lake Region and Ozark Shores.⁵⁵ Notably, Ms. Goldsby is on the PWSD#4 payroll when she conducts duties on behalf of Lake Region, Ozark Shores, and Lake Utility Availability.⁵⁶

Lake Utility Availability bills are mailed to and from the same office space in which the Lake Region, Ozark Shores, and PWSD#4 headquarters office is located.⁵⁷ Lake Utility

⁴⁵ Transcript, p. 256, line 20.

⁴⁶ Transcript, p. 256, lines 16-17.

⁴⁷ Transcript, p. 256, line 23.

⁴⁸ Note that shareholders, Sally Stump and RPS Properties have registered the fictitious name "Lake Utility Availability 1." According to Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 6, bills are sent out with the name "Lake Utility Availability." For consistency throughout this brief, Staff will refer to the billing and collecting of availability fees as the fictitious name "Lake Utility Availability."

⁴⁹ Transcript, p. 257, lines 5-8.

⁵⁰ Transcript, p. 571, lines 4-5.

⁵¹ Transcript, p. 571, line 12.

⁵² Transcript, p. 257, line 22.

⁵³ Transcript, p. 312, lines 16-18.

⁵⁴ Transcript, p. 257, line 25; transcript, p. 258, line 5.

⁵⁵ Transcript, p. 167, lines 2-7, 19-22.

⁵⁶ Transcript, p. 259, lines 9-14.

⁵⁷ Transcript, p. 257, lines 12-16.

Availability bills are identical to the bills mailed to customers of Lake Region.⁵⁸ Lake Utility Availability does not pay rent for use of office space for the billing and collecting of availability fees.⁵⁹ According to Mr. Summers, Ms. Goldsby uses the PWSD#4, Lake Region, or Ozark Shores' resources when she is sending out Lake Utility Availability bills.⁶⁰

The shareholders of Lake Region, Sally Stump and RPS Properties, are the beneficiaries of the availability fees that Lake Utility Availability collects.⁶¹ At this point, the shareholders do not use the income from availability fees for maintenance, repairs, or expansion for either the water or sewer system to the benefit of the customers or lot owners paying the fees.⁶² Further, they do not pay for the billing and collection activities for availability fees. Ratepayers are shouldering the costs of billing and collection of availability fees without receiving the benefit of availability fee revenues.

F. SUPERVISION AND CONTROL OF AVAILABILITY FEES

Through discovery and testimony, inconsistencies emerged as to who actually supervises Ms. Goldsby's billing and collection of availability fees, raising serious concerns as to the credibility of Lake Region's witnesses. Mr. Summers' claim, that the shareholders of Lake Utility Availability oversee Ms. Goldsby's duties relating to availability fees, was not supported as Ms. Goldsby attested that the beneficiaries of Lake Utility Availability are not her supervisors relating to billing and collection of availability fees.⁶³

While Mr. Summers claims he does not supervise Ms. Goldsby's activities related to billing and collections of availability fees, he did know that Lake Utility Availability does not

⁵⁸ See Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 6.

⁵⁹ Transcript, p. 258, lines 23-25.

⁶⁰ Transcript, p. 259, lines 5-8.

⁶¹ Transcript, p. 262, lines 12-14.

⁶² Transcript, p. 262, lines 15-17.

⁶³ Transcript, p. 258, lines 6-11; p. 286, lines 2-6.

compensate Ms. Goldsby's for her activities related to Lake Utility Availability.⁶⁴ Mr. Summers also knew that the bills for availability fees collected by Lake Utility Availability are deposited in the same bank account as the executive management compensation fees that Lake Region pays to its executive management group.⁶⁵

Dr. Stump, attested that the Lake Region's shareholder, RPS Properties (specifically Brian Schwermann) oversees Cynthia's Goldsby's activities regarding availability fees.⁶⁶ However, Ms. Goldsby is not employed by the shareholders⁶⁷ and there is no contract between Lake Utility Availability and Ms. Goldsby.⁶⁸

Lake Region's shareholder, Ms. Stump, attested that PWSD#4 bills and collects the availability fees, but does not know who supervises the billing and collecting of availability fees.⁶⁹ Ms. Stump stated that she has no relationship with the PWSD#4, or its employees, including Cynthia Goldsby.⁷⁰ There is also no contractual relationship between RPS Properties and PWSD#4 in regards to billing and collecting availability fees.⁷¹

Lake Region's shareholder RPS Properties attested that it has no direct relationship with Cynthia Goldsby or a contract with the PWSD#4 regarding the billing and collection of availability fees.⁷² Brian Schwermann attested that RPS Properties made no payments to Cynthia Goldsby for services she provides to RPS Properties.⁷³

⁶⁴ Transcript, p. 258, lines 14-18.

⁶⁵ Transcript, p. 262, lines 18-22.

⁶⁶ Transcript, p. 574, lines 21-25.

⁶⁷ Transcript, p. 258, lines 9-11.

⁶⁸ Transcript, p. 285, lines 9-17.

⁶⁹ Staff Exhibit 20, Sally Stump June 1, 2010 Affidavit, p. 1.

⁷⁰ Staff Exhibit 20, Sally Stump June 1, 2010 Affidavit, p. 1.

⁷¹ Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 1.

⁷² Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 2.

⁷³ Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit.

Ms. Goldsby further attests that she has “no role or direct relationship with RPS Properties, L.P., and/or Lake Region Water and Sewer Company.”⁷⁴ Ms. Goldsby claims her sole employer is Camden County PWSD#4⁷⁵ and her direct supervisor is John Summers,⁷⁶ but sometimes, Vern Stump, Bob Schwermann and Brian Schwermann ask her to perform tasks.⁷⁷ She stated that her “. . . job responsibilities as an employee of . . . PWSD#4, [include] handl[ing] the] billing and collection of certain availability fees.”⁷⁸ However, Ms. Goldsby claims that she “do[es] not have information sufficient to state with certainty that the billing and collection of availability fees is on behalf of RPS or some other entity or entities.”⁷⁹

Staff is still unclear on who actually supervises and pays for Ms. Goldsby’s billing and collection activities for availability fees charged to lot owners in the Lake Region Shawnee Bend service territory. Mr. Summers, her direct supervisor, claims he does not oversee her duties regarding availability fees, while Lake Region’s shareholders and beneficiaries of availability fees believe PWSD#4 oversees her job responsibilities regarding the collection of availability fees.

G. ACCOUNTING OF AVAILABILITY FEES

RPS Properties provided an accounting of availability fees collected since the settlement of Circuit Court Action Cause No. CV103-760CC as follows: (2006) \$416,536.19; (2007) \$393,644.82; (2008) \$396,154.00; (2009) \$365,413.61.⁸⁰ RPS Properties asserts that the distribution of availability fees is governed by the terms of the assignment agreement and the

⁷⁴ Staff Exhibit 25, Cynthia Goldsby May 6, 2010 Affidavit, p. 1.

⁷⁵ Staff Exhibit 26, Cynthia Goldsby May 20, 2010 Affidavit p. 1.

⁷⁶ Staff Exhibit 26, Cynthia Goldsby May 20, 2010 Affidavit, p. 1.

⁷⁷ Staff Exhibit 26, Cynthia Goldsby May 20, 2010 Affidavit, p. 1.

⁷⁸ Staff Exhibit 25, Cynthia Goldsby May 6, 2010 Affidavit, p. 1.

⁷⁹ Staff Exhibit 25, Cynthia Goldsby May 6, 2010 Affidavit, p. 1.

⁸⁰ Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 3; Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit, p. 2.

confidential settlement agreement.⁸¹ In January 2010, Ms. Goldsby sent out 1,345 availability fee bills.⁸² Availability fees have been reported in Lake Region's annual reports since 1973 as set out in the following table:

Year	TOTAL Annual Availability Charges ⁸³
1973	\$0
1974	22,020
1975	32,423
1976	39,708
1977	49,378
1978	57,860
1979	106,546
1980	112,152
1981	124,599
1982	130,200
1983	139,571
1984	152,177
1985	173,981

Year	TOTAL Annual Availability Charges ⁸⁴
1986	not legible
1987	173,153
1988	168,080
1989	168,576
1990	166,900
1991	144,840
1992	85,560
1993	0
1994	0
1995	43,305
1996	42,491
1997	51,959
1998	52,648

Year	TOTAL Annual Availability Charges ⁸⁵
1999	0
2000	0
2001	0
2002	0
2003	0
2004	0
2005	0
2006 ⁸⁶	\$416,536
2007 ⁸⁷	393,645
2008 ⁸⁸	396,154
2009 ⁸⁹	365,414
2010	Not Available
TOTAL	\$3,809,876

Since RPS Properties began billing and collecting availability fees through the PWSD#4 in 2005, it has collected approximately \$2,309,019.⁹⁰

Based on information received from the Four Seasons Lakesites Property Owners Association identified as Property Owners Updated Exhibit 3, Staff calculated the total amount from 2003 to 2010 in the amount of \$3,197,100.⁹¹

⁸¹ Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 3.

⁸² Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 2; Staff Exhibit 25, Cynthia Goldsby May 6, 2010 Affidavit, p. 2.

⁸³ See Lake Region Annual Report Submitted to Commission for the years 1973-2005.

⁸⁴ See Lake Region Annual Report Submitted to Commission for the years 1973-2005.

⁸⁵ See Lake Region Annual Report Submitted to Commission for the years 1973-2005.

⁸⁶ Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit.

⁸⁷ Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit.

⁸⁸ Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit.

⁸⁹ Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit.

⁹⁰ Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit, p. 4.

⁹¹ Staff Exhibit 17, Cary Featherstone True-up Direct Testimony, p. 17.

H. LAKE REGION'S USE OF AVAILABILITY FEES

Availability fees paid prior to August 17, 1998 were recorded on the books of Four Seasons Water & Sewer Co.⁹² From August 1998 until October 2004, Waldo Morris, by Lake Utility Development, billed and collected availability fees.⁹³ Mr. Morris spent availability fees revenue for the benefit of Lake Region's water and sewer system to guarantee capacity and services for Four Seasons Lakesites, Inc., development.⁹⁴ Lake Region used availability fees revenue to build a sewage treatment plant and water tower, invest in capital improvements, and to increase capacity and services in order to ensure enough capacity for Four Seasons Lakesites, Inc., development.⁹⁵ Lake Region specifically advised the Camden County Circuit Court of these facts when Four Seasons Lakesites, Inc., sued Lake Region regarding ownership of the availability fees,⁹⁶ a position Lake Region now abandons.

Lake Region's use of the availability fees guaranteed Four Seasons Lakesites, Inc., the ability to continue development in Porto Cima.⁹⁷ Lake Region asserted in its *Answer* in Camden County Circuit Court, that had Lake Region not used the availability fee revenue for its "intended purpose . . . [Four Seasons Lakesites, Inc.], would have stopped [developing lots] long ago."⁹⁸ Lake Region provided Four Seasons Lakesites, Inc. with the ability to continue selling

⁹² Staff Exhibit 28, Peter N. Brown June 3, 2010 Affidavit, p. 3.

⁹³ Staff Exhibit 52; Answer of Defendant at p. 11 ¶ 23, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁹⁴ Staff Exhibit 52; Answer of Defendant at p. 11 ¶ 23, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁹⁵ Staff Exhibit 52; Answer of Defendant at p. 11 ¶ 27, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁹⁶ Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁹⁷ Staff Exhibit 52; Answer of Defendant at p. 12 ¶ 28, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

⁹⁸ Staff Exhibit 52; Answer of Defendant at p. 12 ¶ 28, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

lots and increasing its profit on the development.⁹⁹ Thus, Lake Region affirmatively admitting that it used availability fee income to support the water and sewer systems.

I. PAST COMMISSION TREATMENT OF AVAILABILITY FEES

There are three regulated water and sewer companies where availability fees were examined by Commission Staff and presented to the Commission for approval by a stipulation and agreement. I.H. Utilities had availability fee revenue included in the company's rates, however, it recently chose to cease charging availability fees.¹⁰⁰ Peaceful Valley's recent rate case, in which availability fees were tariffed and included as revenue, was resolved by a stipulation and agreement.¹⁰¹ Ozark Shores' last rate case included availability fees in revenue, but did not include availability fees in its tariffs.¹⁰²

For both I.H. and Peaceful Valley, the availability fee was assigned from the developer to the utility and included in the utility's tariff sheets.¹⁰³ In I.H.'s most recent rate case, I.H. voluntarily terminated availability fees, and subsequently they were removed from its tariffs.¹⁰⁴ In Peaceful Valley's last rate case, Staff included approximately \$14,000 of availability fees as annual revenue of Peaceful Valley's approximately \$39,000 total annual water utility revenue.¹⁰⁵ "Staff normally includes funds from availability charges as ordinary utility revenue."¹⁰⁶ Staff

⁹⁹ Staff Exhibit 52; Answer of Defendant at p.12 ¶ 29, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹⁰⁰ Transcript, p. 491, lines 5-15.

¹⁰¹ Transcript, p. 503, lines 11-22.

¹⁰² Transcript, p. 491, lines 18.

¹⁰³ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 12, lines 3-15.

¹⁰⁴ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 12, lines 3-15.

¹⁰⁵ See Peaceful Valley Lake Estates Schedule of rates, P.S.C. Mo. No. 2, 1st Revised Sheet No. 6. – Availability Charge, Case No. WR-2009-0145.

¹⁰⁶ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 12, lines 3-15.

normally treats availability fee revenue as utility revenue.¹⁰⁷ The revenue derived from availability fees would be used for day-to-day operating expenses or to offset an investment.¹⁰⁸

In Ozark Shores' last rate case, revenue derived from water availability fees was included in revenue per Commission approved stipulation and agreement.¹⁰⁹ The Commission approved the rate case where availability charges were applied as a reduction to utility's revenue requirement, but were not included in the utility's tariff.¹¹⁰ Lake Region's Shawnee Bend water and sewer service has not been subject to a general rate proceeding since its certification in 1997 and, thus, availability fees have not been fully examined by the Commission.¹¹¹

III. LEGAL ANALYSIS

A. PRIOR COMMISSION CASES NOT CONTROLLING

This Commission has not considered the issue of availability fees in detail. The Commission dealt tangentially with fees associated with availability of service in two cases, officially noticed in the record, but never scrutinized or decided the issue of availability fees on its merits.¹¹² This case is ripe for a Commission decision regarding availability fees.¹¹³

¹⁰⁷ Transcript, p. 482, lines 16-18.

¹⁰⁸ Transcript, p. 482, lines 18-20.

¹⁰⁹ Commission Case No. WR-2009-0145.

¹¹⁰ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 4, lines 1-7.

¹¹¹ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 12, lines 3-15.

¹¹² The Commission is not bound by *stare decisis*. see *State ex rel. Missouri Gas Energy v. PSC*, 186 S.W.3d 376, 390 (Mo. App. 2005); *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. banc 2003).

¹¹³ See *Cathy J. Orlor v. Folsom Ridge, LLC, Owning and Controlling the Big Island Homeowners Assoc. et al*, P.S.C. Case Nos. WC-2006-0082 et al. and WO-2007-0277, Report and Order Issued 06-14-2007, Effective 06-24-2007. (Nine pro se homeowners in the Big Island subdivision development alleged that Big Island was operating a water and sewer utility company without Commission approval. A Commission decision regarding treatment of the monthly water and sewer reservation and/or maintenance fees paid by homeowner association members not connected to the water and sewer system to cover the costs of making the facilities available for connection and maintaining those facilities was not reached as the Commission determined that the water and sewer systems were operated and managed by the homeowner's association, a non-profit organization, and therefore exempt from Commission jurisdiction.); see also *The Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith Certain Other Related Transaction*, P.S.C. Case No. SO-2007-0071, Report and Order issued 02-08-2007 and effective 02-28-2007. (The Commission, in approving a utility's transfer of assets to a public sewer district, evaluated an agreement between the sewer district and a subdivision developer allowing connection fees the developer was already charging when lot owners hooked onto the utility's water and sewer

B. JURISDICTION GENERALLY

Lake Region is a water corporation pursuant to Section 386.020(59), RSMo (2009), a sewer corporation pursuant to Section 386.020(49), RSMo (2009), and subsequently a public utility within the meaning of 386.020(43) RSMo, (2009); thereby subject to the jurisdiction of the Commission pursuant to Section 386.250, RSMo.¹¹⁴ Section 393.140(11) gives the Commission authority to regulate the rates Lake Region may charge its customers for water and sewer.

C. BURDEN OF PROOF

Lake Region has the burden of proving its proposed rates are just and reasonable.¹¹⁵ Staff has shown that for approximately six years availability fees were used by Lake Region to build plant, including a sewer treatment plant, maintain infrastructure and pay for Lake Region operating expenses.¹¹⁶ Lake Region cannot now attempt to remove this revenue and impose upon ratepayers these costs without showing that such an increase is just and reasonable. Lake Region has not met its burden and shown availability fee revenue should not be considered revenue.

D. JURISDICTION OVER AVAILABILITY FEES

The Commission has the authority to impute availability fee revenue once collected and used to maintain customers' service by Lake Region into its revenue stream.¹¹⁷ Section 386.020(48), RSMo (Supp. 2009) defines service as:

system. The Commission found, at page 14, that "...the Commission lacks jurisdiction and authority over the Sewer District and [developer], and has no standing to challenge the 'side dealings' surrounding this transaction....").

¹¹⁴ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise specified.

¹¹⁵ Section 393.150.2, RSMo.

¹¹⁶ See Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹¹⁷ Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

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 use an accommodation** of consumers or patrons; (emphasis added)

As previously discussed, availability fees were intended to be a part of utility revenue and under Commission jurisdiction.¹¹⁸ Further, as recently as 2004, availability fees were a part of Lake Region's revenue stream and used for operating and maintenance expenses and expanding the water and sewer system, even though not billed by Lake Region after 1998.¹¹⁹ In 1999, Lake Region's shareholders, under the fictitious name registration Lake Utility Development, began billing and collecting availability fees. However, the availability fees collected were used by Lake Region for the benefit of the water and sewer company.¹²⁰ This use by Lake Region makes perfect sense because lot owners pay availability fees for the accommodation of having water and sewer infrastructure in place, so that they are able to hook-up to the system upon construction of a home without having to wait for the utility company to expand its utility infrastructure.

Shawnee Bend availability fees were once owned by Lake Region.¹²¹ Around 1998, Lake Region severed availability fees and sold off the rights to availability fees by an

¹¹⁸ Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 3; attachment 4, attachment 7.

¹¹⁹ Staff Exhibit 16, James Merciel Surrebuttal Testimony, attachment 7.

¹²⁰ Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹²¹ Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 4, p. 5-6; Amendment to the Third Amended and Restated Declaration of Restrictive Covenants, dated July 15, 2009. The Fourth Amended and Restated Declaration of Restrictive Covenants were updated in October 2009, and did not change the water and sewer systems language. *See* Staff Exhibit 12, Fourth Amended & Restated Declaration on Restrictive Covenants, p. 17-18, ¶ 9.

assignment.¹²² However, Lake Region continued to use availability fees for the benefit of the company for approximately six years after they were assigned.¹²³ Then, the current shareholders of the utility and owners of the availability fees, Sally Stump and RPS Properties, completely severed availability fees from the utility. Such assignment to a different individual or legal entity through private contract does not remove the availability revenue from Commission jurisdiction, because availability fees are integrally tied to the operations and maintenance of the utility's water and sewer system and therefore cannot be untwined.

It is important to keep in mind that while parties disagree to what the initial intent of the developer, it is the treatment or use of availability fees, and the actual "accommodation afforded" of availability of water and sewer services that governs Commission jurisdiction.

E. RECOVERY OF INITIAL INFRASTRUCTURE

Peter N. Brown indicated that all of the lots developed by Four Seasons Lakesites, Inc., on Shawnee Bend have been sold and it no longer sells lots on Shawnee Bend.¹²⁴ Mr. Brown provided Four Seasons Lakesites, Inc.'s, financial statements for the years 1994-2003. The financial statements reflect that the price received for sales of lots exceeded the expenses associated with the development.¹²⁵ Thus, it is established that the initial investment in the water and sewer system has been fully recovered. Specifically, all expenses for the development are booked and contained in the financial statements. Four Seasons Lakesites, Inc., expensed all of the costs of development, including the costs of sales and marketing, roads, water, sewer, and

¹²² Exhibit 52, Answer of Defendant at ¶ 7, 9, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹²³ Exhibit 52, Answer of Defendant at ¶ 7, 9, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹²⁴ Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit, p. 1.

¹²⁵ Staff Exhibit 28, Peter N. Brown June 3, 2010 Affidavit, p. 3.

The system was designed to accommodate all customers, whether a lot was developed or not.¹³² The cost associated with repairing the system reflects the costs from the infrastructure in place to serve the undeveloped lots.¹³³ The Shawnee Bend distribution system was built for 1600 lots, and approximately 330 are developed.¹³⁴ If the water and sewer infrastructure was not in place, a lot owner could not build a house because the Department Natural Resources would not authorize an on-site sewer system.¹³⁵ Distribution pipes run past undeveloped properties, and the owner can immediately hook onto the system when their lot is developed.¹³⁶ Lake Region claims that ratepayers are not paying for maintenance of the pipe and plant for the undeveloped lots because undeveloped lots do not receive service,¹³⁷ but in reality the ratepayers are paying for all repairs and maintenance on the water and sewer system whether related to an undeveloped or developed lot.¹³⁸ Moreover, Lake Region's witness, Mr. Summers, indicated that Lake Region would most likely fix the distribution system if there was a break directly in front of an undeveloped lot.¹³⁹ Lake Region's ratepayers are supporting a system that is only thirty-percent developed, and at one point, was supported by the availability fees paid by the remaining seventy-percent (70%) of lot owners.¹⁴⁰

During the evidentiary hearing, Lake Region's and Staff's expert witnesses gave very different versions of how they believed availability fees were and should be used. Lake Region attempted to persuade the Commission into not asserting jurisdiction over availability fees because the developer stated that availability fees were to recoup the \$5.3 million in donated

¹³² Transcript, p. 435, lines 21-22.

¹³³ Transcript, p. 437, lines 6-8.

¹³⁴ Transcript, p. 332, lines 7-23.

¹³⁵ Transcript, p. 633, lines 16-22.

¹³⁶ Transcript, p. 248, line 23 – p. 249, line 4.

¹³⁷ Transcript, p. 253, lines 11-15.

¹³⁸ Transcript, p. 281, lines 2-4.

¹³⁹ Transcript, p. 331, lines 2-10.

¹⁴⁰ Transcript, p. 272, lines 16-18.

plant to Lake Region.¹⁴¹ On the other hand, Staff directed the Commission to the Third Declaration of Restrictive Covenants and Four Seasons Water and Sewer Agreement, which provided evidence that this was not the developer's intent.

Dr. Stump became interested in purchasing Lake Region in 1994.¹⁴² At that point Dr. Stump, knew that Four Seasons Lakesites Water & Sewer Co. was charging availability fees.¹⁴³ In 1997, Dr. Stump, while providing consulting services to Four Seasons Lakesites Water & Sewer Co., recommended that the Company keep availability fees within the water and sewer company so the company could invest in plant.¹⁴⁴

Dr. Stump attempted to defend the separation of availability fees at the evidentiary hearing in testifying that "availability fees are most appropriately used for capital costs"¹⁴⁵ and that availability fees should be used to recover the initial investment.¹⁴⁶ However, this investment in plant was already contributed to and part of the utility, and that the developer had already recovered its investment.¹⁴⁷ Dr. Stump even acknowledged that availability fees would not exist if the water and sewer system was not operating.¹⁴⁸

Dr. Stump attested that availability fees are paying for the infrastructure that was put in by the developer.¹⁴⁹ Peter N. Brown agreed, stating that the purpose of availability fees was to recover the initial investment.¹⁵⁰ Even if that was the original purpose or intent, which Staff is not asserting, availability fees are no longer necessary to recover the infrastructure. Again, it has

¹⁴¹ Transcript, p. 335, lines 7-9.

¹⁴² Transcript, p. 584, lines 16-21.

¹⁴³ Transcript, p. 586, line 10 – p. 587 line 21.

¹⁴⁴ Transcript, p. 600, line 19 – p. 601, line 7.

¹⁴⁵ Transcript, p. 564, lines 1-2.

¹⁴⁶ Transcript, p. 581, lines 17-18.

¹⁴⁷ Transcript, p. 581, lines 21-23; p. 582, lines 7-24.

¹⁴⁸ Transcript, p. 594, lines 1-5.

¹⁴⁹ Transcript, p. 616, lines 21-23.

¹⁵⁰ Staff Exhibit 27, Peter N. Brown April 29, 2010 Affidavit.

been established that the initial investment has been recovered.¹⁵¹ Further, the developer who might want to recover this investment is no longer collecting availability fees, having assigned them away with utility assets. Availability fees billed and collected by Ms. Stump and RPS Properties is straight cash in their pockets.

Contrary to Lake Region's witness, Staff's expert witnesses' theory follows the paper trail of the developer. The Declarations of Restrictive Covenants state the availability fees will be paid to the utility company under Commission regulation.¹⁵² The Four Seasons Sewer and Water Agreement states lot owners will pay availability fees to the water and sewer utility for the water and sewer accommodations.¹⁵³ Additionally, availability fees were used for operating and maintenance expenses and capital improvements.¹⁵⁴

Availability fees are accommodations for water and sewer service and within the statutory definition of utility service.¹⁵⁵ Staff witness James Merciel, asserted that availability fees are not service, in the traditional sense, of receiving water and waste water discharge¹⁵⁶ because his non-legal, but engineer's definition of water and sewer service would include some type of exchange of water and/or sewer between a structure and the mains.¹⁵⁷ The availability fees are an accommodation for water and sewer service.

Staff's witness Cary Featherstone stated that utility infrastructure "is necessary to provide utility service to both existing Lake Region customers and future customers of Lake Region. . . . To the extent the utility infrastructure for the unconstructed lots is interconnected to the regulated

¹⁵¹ See Staff HC Exhibits 32-41, Four Seasons Lakesites, Inc. financial statements from 1994-2003.

¹⁵² Staff Exhibit 12, Fourth Amended & Restated Declaration on Restrictive Covenants; Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 3-4.

¹⁵³ Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 7.

¹⁵⁴ See Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹⁵⁵ Transcript, p. 471, lines 1-2.

¹⁵⁶ Transcript, p. 497, lines 3-10.

¹⁵⁷ Transcript, p. 534, lines 21-24.

utility infrastructure both systems are required in order to be able to provide utility service.”¹⁵⁸ Lake Region’s infrastructure is the same for the developed lots and undeveloped lots.¹⁵⁹ Lake Region must maintain all of the system in order to be in compliance with Missouri law.¹⁶⁰ The undeveloped lot owners are paying fees for the accommodation of the water and sewer system, and their fees should be going to Lake Region for the benefit of the entire system,¹⁶¹ as they were from 1973 to 2004.¹⁶²

The developer set up availability fees to run in perpetuity.¹⁶³ If it was the developer’s intent to recover the initial investment, there comes a point in time when he has recovered all of his costs. Also, if it were the developer’s intent to recover the cost of the water and sewer utility infrastructure through availability fees, the developer would never recoup the cost of infrastructure from a lot owner who built immediately and never paid an availability fee.¹⁶⁴ It is also difficult to see how the developer is recouping the initial investment by allowing Lake Region to bill, collect and retain the availability fees.

The Lake Region ratepayers have been harmed by Lake Region’s deliberate maneuvering and shifting of availability fees from the Company’s revenue directly to the shareholders pockets. The availability fees should have continued to be used for maintenance and repair of the infrastructure or expanding the utility infrastructure. It would be harmful to the utility and ratepayers for the money to be separated out of utility revenue.¹⁶⁵

¹⁵⁸ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 6, lines 13-18.

¹⁵⁹ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 7, lines 12-20.

¹⁶⁰ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 7, lines 12-20.

¹⁶¹ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 7, lines 12-20.

¹⁶² Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹⁶³ Transcript, p. 630, lines 20-21, p. 631, lines 1-6; Staff Exhibit 15, James Merciel Rebuttal Testimony, attachment 7; Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹⁶⁴ Transcript, p. 346, lines 18-23.

¹⁶⁵ Transcript, p. 277, lines 10-16.

G. WITNESS CREDIBILITY

Lake Region's witness John Summers testimony regarding availability fees is not credible. Mr. Summers has been the contract general manager of Lake Region since 2004¹⁶⁶ with extensive knowledge of the service area and identifying each subdivision on the Shawnee Bend.¹⁶⁷ However, Mr. Summers claims he does not know anything about the billing and collection practices of Ms. Goldsby while under his direct supervision.¹⁶⁸ In fact, he claimed that Brian Schwermann with RPS Properties supervises Ms. Goldsby, while Brian Schwermann claims that PWSD#4 oversees Ms. Goldsby's responsibilities in regards to availability fees.¹⁶⁹ Who is telling the truth? This is a simple case of point the finger at the other person. No one wants to take responsibility for the billing and collection methods of availability fees; however, RPS Properties and Sally Stump have had no problem collecting over \$2 million dollars in availability fees since 2005. Additionally, Mr. Summers' provides the Commission with affirmative statements on the creation and theory of the use of availability fees, but later in his testimony, admits that he does not know the theory behind availability fees.¹⁷⁰

IV. TREATMENT OF AVAILABILITY FEES IN THIS RATE CASE

A. IMPUTING AVAILABILITY FEE REVENUE

Staff is recommending that the Commission impute availability fee revenues for the Shawnee Bend water and sewer service territory in the amount of \$324,000.¹⁷¹ By imputing revenues from availability fees, it creates an additional revenue stream to Lake Region, helping it support the largely unoccupied system.¹⁷² Staff's amount was derived by taking the number of

¹⁶⁶ Transcript, p. 256.

¹⁶⁷ See Transcript, p. 292, lines 5-17.

¹⁶⁸ See Transcript, p. 292, lines 5-17.

¹⁶⁹ Staff Exhibit 21, Brian Schwermann May 6, 2010 Affidavit.

¹⁷⁰ Transcript, p. 709, lines 17-18.

¹⁷¹ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 9, lines 21-22.

¹⁷² Transcript, p. 469, lines 8-10.

undeveloped lots by the price charged each lot owner by month.¹⁷³ Ms. Cason, the president of the Four Seasons Lakesites, Property Owners Association, testified that there were 1285 unimproved lots.¹⁷⁴ Staff based its number of undeveloped lots on that information,¹⁷⁵ and then reduced that number to 1200 to be conservative.¹⁷⁶

When 1,200 lots is multiplied by the \$10 per month availability fee for water, the result is a revenue calculation of \$144,000 per year [Shawnee Bend Water], and the \$15 per month availability charge for sewer results in a revenue calculation of \$216,000 [Shawnee Bend Sewer],¹⁷⁷ less a ten percent uncollectible rate.¹⁷⁸ The ten percent amount was supported by Dr. Stump, Lake Region's witness.¹⁷⁹ The calculated revenue results in additional revenue of \$129,600 for Shawnee Bend Water and \$194,400 for Shawnee Bend Sewer.¹⁸⁰ These amounts more than off-set the proposed revenue requirements for Shawnee Bend Water and Shawnee Bend Sewer.¹⁸¹ The amount also represents an annualized amount of a full years' level of availability charges for the Shawnee Bend systems.¹⁸²

While Staff is requesting that the Commission assert jurisdiction over availability fees and impute revenue derived from the fees, Staff is not recommending a rate decrease for the Shawnee Bend water and sewer systems. Staff believes it is just and reasonable for Lake Region to maintain its current rates for the Shawnee Bend water and sewer service territories. Since availability fees do not exist on Horseshoe Bend's sewer system, availability fees have no effect on its rates.

¹⁷³ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 2, lines 11-16.

¹⁷⁴ Transcript, p. 376, line 2.

¹⁷⁵ Transcript, p. 427, line 22 – p. 428 line 3.

¹⁷⁶ Transcript, p. 427, lines 3-8.

¹⁷⁷ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 2, lines 11-16.

¹⁷⁸ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 10, lines 3-4.

¹⁷⁹ Staff Exhibit 17, Cary Featherstone True-up Direct Testimony, p. 5, line 17 – p. 6, line 3.

¹⁸⁰ Staff Exhibit 17, Cary Featherstone True-up Direct Testimony, p. 5, line 17 – p. 6, line 3; p. 9, lines 16-18.

¹⁸¹ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 2, lines 1-2.

¹⁸² Staff Exhibit 17, Cary Featherstone True-up Direct Testimony, p. 13, lines 11-21.

B. THERE SHOULD BE NO OFFSET TO RATE BASE

There should be no corresponding shift in rate base with the imputation of availability fee revenues.¹⁸³ Section 393.270(5) 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. . . .” However, the Missouri Supreme Court has construed 393.270(5) “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.”¹⁸⁴

The shareholders of Lake Region get the opportunity to earn a return for their utility properties, plus their reimbursement costs.¹⁸⁵ In this case, the shareholders of Lake Region did not invest the initial infrastructure of the Shawnee Bend water and sewer system.¹⁸⁶ Four Seasons Lakesites, Inc., donated the plant to Four Seasons Lakesites Water and Sewer Co. in 1994.¹⁸⁷ The contributed plant donated by the developer is considered a contribution-in-aid-of-construction (CIAC), which results in a reduction to rate base.¹⁸⁸ Ratepayers do not pay a return on the donated contributed plant.

In determining utility rates, investment in contributed plant is not a recoverable utility cost because, generally, customers have already paid for the contributed plant through the purchase price of the lot and thus it is not included in rates.¹⁸⁹ Typically, a developer recoups the cost of building (developing) a lot with water and sewer infrastructure in place through the sale of individual lots.¹⁹⁰ If customers have to pay the utility company a return on property for

¹⁸³ Transcript, p. 439, lines 8-12.

¹⁸⁴ State ex rel. Martigney Creek Sewer Co. v. Public Service Commission, 537 S.W.2d 388, 396 (Mo. 1976).

¹⁸⁵ Transcript, p. 434, lines 11-12.

¹⁸⁶ Transcript, p. 253, lines 3-6.

¹⁸⁷ Transcript, p. 253, lines 3-6.

¹⁸⁸ Transcript, p. 253, lines 3-6.

¹⁸⁹ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 5, lines 4-7.

¹⁹⁰ Transcript, p. 465, lines 3-9.

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.

Sometimes, customers are charged a CIAC fee prior to receiving utility service.¹⁹¹ This CIAC fee is intended to offset investment of plant such as wells, storage tanks, sewage treatment facilities, and major water or sewer pump stations.¹⁹² There are instances when the developer pays the CIAC for the lot purchasers.¹⁹³ Since CIAC fees are paid up-front, such recovery is not included in rates paid by the utility customers.¹⁹⁴ CIAC, “whether in the form of contributed assets or contributed cash for capital, is a reduction to the utility’s total plant cost, or a reduction to what is referred to as ‘rate base,’ and recovery is not included in rates.”¹⁹⁵ Even if the developer intended for availability fees to be the method to recoup his original cost of the donated utility infrastructure, Staff would still treat the donated plant the same and not include it in rate base.¹⁹⁶ However, it is clear that Lake Region once used availability fees to invest in its infrastructure and make capital improvements;¹⁹⁷ only since 2004 have shareholders retained the benefits of availability fees for themselves.¹⁹⁸

Currently, Lake Region customers are not paying for the CIAC investment or donated property in their utility rates.¹⁹⁹ This is the appropriate method of treatment for the contributed plant, even with the imputation of availability fees. Four Seasons Lakesites, Inc., has fully recovered its investment in the Lake Region water and sewer system through the sale of lots. It

¹⁹¹ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 5, lines 8-13.

¹⁹² Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 5, lines 8-13.

¹⁹³ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 5, lines 8-13.

¹⁹⁴ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 5, lines 8-13.

¹⁹⁵ Staff Exhibit 15, James Merciel Rebuttal Testimony, p. 5, lines 14-16.

¹⁹⁶ Transcript, p. 468, lines 12-18.

¹⁹⁷ See Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹⁹⁸ Staff Exhibit 52; Answer of Defendant, Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al, No. CV103-760CC.

¹⁹⁹ Transcript, p. 461, lines 17-19.

would not be appropriate to not treat the CIAC amount relating to the contributed plant as an offset to rate base.²⁰⁰ Further, it is not inconsistent to include availability fees as utility revenues and also treat CIAC as offset to rate base.²⁰¹

The chart in section III. E. *Recovery of Initial Infrastructure*, clearly shows that throughout the development of Porto Cima, Four Seasons Lakesites, Inc., was able to sell all the lots, and recover all of its expenses, while making a profit of **[REDACTED]**. It would be inappropriate for the Commission to make a corresponding shift in rate base to reflect the donated plant when the developer has already recovered its investment through the sale of lots. This would result in ratepayers paying twice for the same plant. More importantly, it would be completely improper for Lake Region to receive a return for contributed plant in which it had no investment. This would result in a windfall of “free” money to the Company’s shareholders.²⁰²

V. ALTERNATIVE POSITION

In the event that the Commission finds availability fees are out of Commission jurisdiction, then the Commission should remove costs currently allocated to Lake Region that are associated with Lake Utility Availability and be excluded from Lake Region’s cost of service.²⁰³

Staff believes that costs associated with billing and collecting availability fees should be excluded from Lake Region’s cost-of-service.²⁰⁴ This approach is consistent with Staff’s treatment of costs assigned to operate and maintain the regulated entities of Lake Region, Ozark Shores and the PWSD#4.²⁰⁵ Staff requests that the Commission assign the \$55,802 (Staff

²⁰⁰ Staff Exhibit 17, Cary Featherstone True-up Direct Testimony, p. 36, line 18.

²⁰¹ Staff Exhibit 17, p. 30, line 20.

²⁰² Staff Exhibit 17, Cary Featherstone True-up Direct Testimony, p. 31, line 2.

²⁰³ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 3, lines 12-18.

²⁰⁴ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 14, lines 11-15.

²⁰⁵ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 14, lines 11-15.

proposed²⁰⁶) executive management costs on the basis of one-third (\$18,600) to Lake Region, one third (\$18,600) to Ozark Shores, and one-third (\$18,600) to Lake Utility.²⁰⁷

Staff allocated executive management group costs between the two regulated entities, Lake Region and Ozark Shores. It is appropriate to assign executive management costs and other related costs between Lake Region, Ozark Shores, and Lake Utility Availability because the executive management is providing oversight to all three entities.²⁰⁸ The following chart illustrates the executive management costs assigned to Lake Region re-allocated among its three operating systems:²⁰⁹

Lake Region Operating System	Allocation	Re-assigned Costs to Lake Region
Shawnee Bend Water	25.5%	\$4,743
Shawnee Bend Sewer	26.8%	\$4,985
Horseshoe Bend Sewer	47.7%	\$8,872
Total	100%	\$18,600

Further the salary and benefits of the general manager Mr. Summers, should be allocated based on all of his responsibilities and duties to District Water, Lake Utility Availability, Ozark Shores and Lake Region, assigning one-fourth of his salary to each entity.²¹⁰

Since RPS does not compensate Ms. Goldsby for services provided to Lake Utility Availability,²¹¹ her time spent on billing and collecting the availability fees should also be assigned to the appropriate entity.²¹²

Lake Region's witness, Dr. Stump, believes it would be fair to estimate 3 percent of Ms. Goldsby time for providing services to Lake Utility Availability.²¹³ However, as previously

²⁰⁶ Note the \$55,802 executive management fees recommendation was a combined total for both Lake Region and Ozark Shores. Lake Region's individual recommendation was \$27,901.

²⁰⁷ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 15, lines 7-9.

²⁰⁸ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 14, lines 16-22.

²⁰⁹ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 15, lines 10-11.

²¹⁰ Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 16, lines 8-12.

²¹¹ Staff Exhibit 22, Brian Schwermann May 20, 2010 Affidavit, p. 1.

²¹² Staff Exhibit 17, Cary Featherstone Surrebuttal Testimony, p. 16, lines 21-22.

discussed in this brief, Dr. Stump does not oversee Ms. Goldsby's duties for Lake Utility Availability.²¹⁴ Since Ms. Goldsby claims her only supervision comes from the PWSD#4 and Mr. Summers, Dr. Stump's estimate of her time is not reliable.²¹⁵ Dr. Stump further stated that "[t]here's a cost of probably 50 cents a bill - - for stamps and buying paper. There is a cost for the management of providing that service."²¹⁶ Dr. Stump feels a reasonable cost for providing that service is \$2,000 a year.²¹⁷

However, Lake Region has the burden of proof in this matter. Lake Region has failed to prove that Staff's reallocation of expenses associated with Lake Utility Availability is unjust and unreasonable. Staff's \$18,600 reallocation of expenses association with Lake Utility Availability is just and reasonable, and should be removed from Lake Region's cost-of-service, if the Commission determines that revenue collected from availability fees should not be included in Lake Region's cost-of-service.

VI. CONCLUSION

As a matter of first impression, the Commission should assert jurisdiction over the availability fees once billed, collected, and retained by Lake Region Water and Sewer Company. Availability fees were used for operating and maintenance expenses and capital improvements. The current shareholders have unjustly removed availability fees from Lake Region's revenue to the detriment of ratepayers. Staff is requesting that the Commission impute availability fees revenue in the amount of \$129,600 for Shawnee Bend Water and \$194,400 for Shawnee Bend Sewer. This would result in a zero dollar rate increase on both the Shawnee Bend water and sewer systems, but not change the \$44,552 increase for Horseshoe Bend water system.

²¹³ Transcript, p. 567, lines 2-10.

²¹⁴ See *infra* Section (Availability fee collection).

²¹⁵ Staff Exhibit 25, Cynthia Goldsby May 6, 2010 Affidavit, p. 1.

²¹⁶ Transcript, p. 567, lines 8-12.

²¹⁷ Transcript, p. 568, lines 1-2.

WHEREFORE, the Staff submits the foregoing as its Post-Hearing Brief, Part II. on the issue of availability fees in this matter.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 19th day of July 2010.

/s/ Jaime N. Ott