

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 RESPONSE TO LAKE REGION WATER & SEWER COMPANY'S
MOTION TO STRIKE PORTIONS OF STAFF'S POST HEARING BRIEF PART II
AND ITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through counsel, and respectfully submits its response to Lake Region Water & Sewer Company's (Lake Region) *Motion to Strike* stating to the Missouri Public Service Commission (Commission) as follows:

1. On June 24, 2010, Staff requested that the Commission take official notice of Circuit Court case, Cause No. CV103-760CC.¹ No objection was made to the Commission taking official notice of the Circuit Court proceeding, and Regulatory Law Judge Harold Stearley stated, "[t]he Commission will take official notice of the case that counsel just enumerated, CV103-760CC."²

2. "Agencies **shall** take official notice of all matters of which the courts take judicial notice," which includes other relevant case records.³ "Official Notice" permits an agency to accept certain facts as true without the need for formal proof, if it notified the parties during a

¹ Transcript, p. 849, lines, 22-24.

² Transcript, p. 850, lines 1-2.

³ Quoting Section 536.070, RSMo (2000) (emphasis added); see *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54-55 (2010); *Moore v. Missouri Dental Board*, 311 S.W.3d 298, 305 (Mo. App. W.D. 2010); *Environmental Utilities, LLC., v. Public Service Commission*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007); *Smitty's Super Mkts., Inc. v. Retail Store Employees Local 332*, 637 S.W.2d 148, 151 (Mo. App. S.D. 1982).

hearing, which is what occurred in this matter with no objections.⁴ By taking official notice of Cause No. CV103-760CC, the Commission has the ability to treat those case records and documents as a part of the record.⁵ The Commission has the authority to take official notice of pleadings, particularly when the pleadings are relevant to the Commission matter, and the pleadings contain relevant and significant admissions against interest, thus section 536.070(6), RSMo (2000) is applicable. No party objected to the Commission taking official notice of the entire Circuit Court case Cause No. CV103-760CC, and it was appropriate of the Commission to take official notice.

3. Further, Supreme Court Rule 55.03(c)(3) states that an attorney filing on behalf of client is “certifying that to the best of person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that: . . . (2) [t]he allegation and other factual contention have evidentiary support . . .”. In Cause No. CV103-760CC, Lake Region asserted that it used availability fees for operating and maintenance expenses and for capital improvements.⁶ Under Supreme Court Rule 55.03(c)(3), Lake Region’s attorney, by signing his name to the *Answer*, was providing truthful and accurate information to the best of his knowledge and belief. In this matter, Lake Region has maintained that the availability fee revenue is kept separate from the water and sewer utility revenue; a position that is different from its *Answer* regarding the subject matter of availability fees.

4. The documents directly relate to the questions posed by the Commission to the parties in the April 8, 2010 Order requiring Staff to conduct additional discovery regarding availability fees. In *Sher v. Chand*, the Court states, “[a] court may judicially notice its own

⁴ Section 536.070(6), RSMo (2000).

⁵ See Section 536.070(6), RSMo (2000); *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54-55 (2010); *Moore v. Missouri Dental Board*, 311 S.W.3d 298, 304 (Mo. App. W.D. 2010); *Environmental Utilities, LLC., v. Public Service Commission*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007); *Smitty’s Super Mkts., Inc. v. Retail Store Employees Local 332*, 637 S.W.2d 148, 151 (Mo. App. 1982).

⁶ Answer of Defendant, *Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al*, No. CV103-760CC.

records and may judicially notice the records of other cases when justice so requires.”⁷ In this case, justice required that the Commission take official notice of the documents, as they are relevant and material to the proceedings.

5. In this case, the Commission took official notice of Cause No. CV103-760CC after sustaining objections to Staff’s request that the documents be admitted as a judicial admission, admissions against interest, and under the rule of completeness.⁸ When the Commission took official notice of Cause No. CV103-760CC it was a lawful way of admitting the documents into evidence.

6. Because the Commission took official notice of Cause No. CV103-760CC, it was therefore appropriate for Staff to use facts contained within that case file in its brief and findings of fact and conclusions of law. The Commission took official notice of the entire case file, which included the *Petition* and *Answer*.

7. The Commission has the ability to evaluate and weigh each officially noticed piece of evidence. Lake Region’s admissions in its *Answer* in Cause No. CV103-760CC are admissions against interest,⁹ as Lake Region asserted that it used availability fees for operating and maintenance expenses, and to fund capital improvements, such as a new water tower.¹⁰ These admissions go directly to Staff’s argument in this matter.¹¹ Here, the Commission will have opportunity to evaluate Lake Region’s *Answer* in Cause No. CV103-760CC and the assertions made therein and determine the weight to apply to such lawfully admitted evidence.

⁷ *Sher v. Chand*, 889 S.W.2d 79, 84-85 (Mo. App. E.D. 1994); see *C.M.W. v. P.W.*, 813 S.W.2d 331, 333 (Mo. App. W.D. 1991). Lake Region cites in footnote 1 of its *Motion to Strike* an excerpt of the *Sher* case relating to judicial notice. However, when you take the case cite in its entirety it illustrates how this case is distinguishable. The Eastern District noted that the circuit court did not take judicial notice over cases which the plaintiff included in the legal file, thus those cases were not part of the record.

⁸ Transcript, p. 850, lines 1-2.

⁹ See *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54-55 (2010).

¹⁰ See Answer of Defendant at p. 8 ¶ 6, *Four Seasons Lakesites, Inc., v. Lake Region [sic] Water and Sewer Co., et al*, No. CV103-760CC.

¹¹ *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo En Banc 2010) .

WHEREFORE, for the reasons explained above, the Commission should deny Lake Region's *Motion to Strike*.

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 27th day of July, 2010.

/s/ Jaime N. Ott