

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 24th day
of March, 2010.

In the Matter of Lake Region Water & Sewer)	<u>File No. SR-2010-0110</u>
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)	<u>File No. WR-2010-0111</u>
Company's Application to Implement a General)	Tariff No. YW-2010-0251
Rate Increase in Water and Sewer Service)	

ORDER REGARDING STAFF'S MOTION IN LIMINE

Issue Date: March 24, 2010

Effective Date: March 24, 2010

On March 12, 2010, the Staff of the Missouri Public Service Commission filed a motion in limine. Staff argues that Lake Region Water and Sewer Company ("Lake Region"), at the upcoming evidentiary hearing, should be estopped from raising an objection to testimony concerning availability fees being charged by a separate non-party, corporate entity, i.e. RPS Properties, L.P. and Sally Stump d/b/a Lake Utility Availability 1.¹ Staff contends that because Lake Region did not raise an objection to testimony offered by customers at the local public hearing held on January 26, 2010, Lake Region has waived any objection and consented to the trial of this issue.

While Staff cited no legal support for its motion, the Commission is familiar with Section 536.063.3, RSMo 2000, of Missouri's Administrative Procedures Act. This section applies to the Commission and provides:

¹ The Office of the Public Counsel and Four Seasons Lakesites Property Owners Association filed pleadings in support of Staff's motion; however, neither of these pleading contributes anything material to this analysis.

Reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted. Where issues are tried without objection or by consent, such issues shall be deemed to have been properly before the agency. Any formality of procedure may be waived by mutual consent.²

Case law reveals that the only context in which this section was applied involved instances in which an evidentiary hearing of some type was held, not a public hearing.³ This application comports with the requirement that “reasonable opportunity” be given to prepare and present “evidence.” One expects the majority of the “evidence” in Commission cases, especially in relation to expert and technical evidence, to be fully developed at an evidentiary hearing.

The procedural mechanism required to preserve allegations of legal error for judicial review is a well-stated objection. Any attempt to estop Lake Region from raising valid objections at any stage of these proceedings would amount to a due process violation, because it would preclude Lake Region from preserving its rights to judicial review. And, even if the Commission determines that the testimony at the local public hearing was unchallenged, it is well settled law that even in instances where the admission of improper testimony without objection has occurred, this “does not preclude a party from objecting to subsequent testimony on the theory that he waived his right to object later by failing to object when objectionable testimony of like effect was first adduced.”⁴

Lake Region has not waived its right to object to any testimony offered at the

² Section 536.063.3 RSMo 2000 is applicable to the Public Service Commission. *Friendship Village of South County v. Public Service Comm’n*, 907 S.W.2d 339, 346 (Mo. App. 1995).

³ *Boyer v. City of Potosi*, 77 S.W.3d 62, 71 (Mo. App. E.D. 2002); *Division of Family Services v. Cade*, 939 S.W.2d 546, 549 -550 (Mo. App. W.D. 1997).

⁴ *Smith v. Sovereign Camp of Woodmen of the World*, 77 S.W. 862, 866 (Mo. 1903); *State ex rel. State Highway Commission v. Young*, 23 S.W.2d 130, 133-34 (Mo. 1929). See also *Carrel v. Wilkerson*, 507 S.W.2d 82, 87 (Mo. App. 1974), applying the same principle to improper argument of counsel; and, *State v.*

evidentiary hearing and has not consented to the trial of the issues surrounding availability fees. Staff has improperly attempted to use a procedural device (which is properly used to exclude tainted or prejudicial evidence) to prematurely block objections and curtail judicial review of issues that have not yet manifested at the evidentiary hearing. It is impossible for the Commission to prejudge what evidence will and will not be offered at the hearing and issue a ruling on objections that have not yet been made. The issues regarding the relevance and admissibility surrounding the information concerning availability fees will be properly taken up at the evidentiary hearing when evidence is offered and objections are registered. Staff's motion in limine will be denied.

THE COMMISSION ORDERS THAT:

1. The Staff of the Missouri Public Service Commission's March 12, 2010 Motion in Limine is denied.
2. This order shall become effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

Charles, 572 S.W.2d 193, 198 (Mo. App. 1978) where same principal applied in a criminal case.