

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 18<sup>th</sup> day of  
December, 2013.

In the Matter of Lake Region Water & Sewer	)	
Company's Application to Implement a General	)	
Rate Increase in Water and Sewer Service	)	<b><u>File No. WR-2013-0461 et al.</u></b>

**ORDER DENYING EVIDENTIARY MOTIONS**

Issue Date: December 18, 2013

Effective Date: December 18, 2013

On July 16, 2013, Lake Region Water & Sewer Company ("Lake Region") filed its formal request to increase rates for its utility service. On November 15, 2013, Staff filed direct testimony, including allegations that estimated availability fees should be imputed to Lake Region as revenue when calculating the company's revenue requirement.<sup>1</sup> The Office of Public Counsel ("OPC") filed direct testimony alleging that availability fees should be considered as contributions in aid of construction and included as an offset to Lake Region's rate base.<sup>2</sup> Availability fees require the property owners of undeveloped lots to pay a fee as long as their lot remains undeveloped. Once a lot is developed, the owner of the property must connect to Lake Region's water and sewer system, and the fee is no longer charged.

On November 22, 2013, Lake Region filed a *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*, a *Motion to Strike Portions of the Written Testimony of*

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<sup>1</sup> Bolin Direct, p. 13; Staff Report, Revenue Requirement Cost of Service, p. 14-16.

<sup>2</sup> Robertson Direct, p. 3-8.

*Ted Robertson, Witness for the Office of Public Counsel, and a Motion in Limine* (collectively, the “Motions”). These Motions are in response to the direct testimony filed by Staff and OPC and contend that:

- the Commission does not have jurisdiction over availability fees,
- it is unlawful to impute those fees as revenue to Lake Region without a definitive administrative rule,
- evidence pertaining to the fees is irrelevant because the Commission’s previous report and order regarding Lake Region’s rates concluded that those fees should not be considered imputed revenue to Lake Region,
- certain references to availability fees in the testimony filed by Staff and OPC should be stricken, and
- Staff and OPC should be barred from conducting further discovery or presenting any evidence at a hearing regarding availability fees. Granting the *Motion in Limine* would prevent costly and needless discovery and hearing preparation by the parties that would serve only to duplicate the evidence presented in the previous rate case.

On December 6, 2013, Staff and OPC filed responses opposing the Motions.

Lake Region’s *Motion in Limine* seeks to bar Staff and OPC, including their counsel and witnesses, from conducting discovery or presenting evidence regarding availability fees. Lake Region asserts that evidence pertaining to those fees is irrelevant and inadmissible in this case because in the last rate case for Lake Region, the Commission’s Report and Order issued on August 18, 2010 concluded that under the circumstances of that case “it would be unjust and unreasonable to impute additional revenue to Lake Region derived from the availability fees already collected”.<sup>3</sup> Lake Region suggests that the Commission reject this evidence at an early stage in the proceedings in order to prevent the needless and costly preparation and presentation of meaningless evidence.

A motion in limine is ordinarily “used to exclude evidence in a jury trial which would be unfairly prejudicial or inflammatory. It is appropriate when the mere asking of an

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<sup>3</sup> Report and Order, *In the Matter of Lake Region Water & Sewer Company’s Application to Implement a General Rate Increase in Water and Sewer Service*, p. 107, issued August 18, 2010, File Nos. WR-2010-0111 and SR-2010-0110, 2010 WL 3378384 (Mo.P.S.C.).

improper question in front of a jury may be so prejudicial that a party will be denied a right to a fair trial.”<sup>4</sup> However, the Commissioners are not the same as a jury, as they possess the knowledge and experience that prevents them from being susceptible to the possible prejudicial impact of the evidence presented. Therefore, there is not the same need for the use of a motion in limine in this case as might exist in a jury trial.

In addition, Lake Region is attempting to foreclose consideration of the entire issue of availability fees prior to the hearing. However, courts have cautioned that a motion in limine “should not be employed indiscriminately. It is not a substitute for a summary judgment motion. Nor should it ‘ordinarily [be] employed to choke off an entire claim or defense’”.<sup>5</sup> Granting such a broad motion in limine would have the same practical effect as a motion for partial summary determination under Commission Rule 4 CSR 240-2.117. Narrowing the issues using the procedural mechanism requested by Lake Region would involve determining that the procedural requirements of the summary determination rule have been followed.<sup>6</sup> However, Commission procedure does not allow for the use of summary determination in a rate case.

Commission Rule 4 CSR 240-2.117(1)(A) states that “[e]xcept in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination ...” (emphasis added) Therefore, the use of summary determination is not permitted in rate cases such as this one. For all the reasons stated above, the Commission concludes that the *Motion in Limine* is not appropriate in these circumstances and should be denied.

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<sup>4</sup> *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 404 (Mo. Ct. App. 1994).

<sup>5</sup> *Lewis v. Buena Vista Mutual Ins. Ass’n*, 183 N.W.2d 198, 201 (Iowa 1971); *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 404 (Mo. Ct. App. 1994).

<sup>6</sup> See, *Hanna v. Darr*, 154 S.W.3d 2, 4 (Mo. Ct. App. 2004)

Lake Region also requests that the Commission strike portions of testimony pre-filed by Staff and OPC witnesses pertaining to availability fees. This testimony has not yet been offered by those parties for admission into the record and is still subject to a timely objection by Lake Region. Granting these motions would require a ruling on the relevance of the disputed testimony prior to the hearing and before the parties have filed both rebuttal and surrebuttal testimony. Considering that this issue involves disputed material facts and that the Commission is not bound by its past decisions<sup>7</sup>, the Commission concludes that it would be preferable for parties to make timely objections to offered evidence during the course of an evidentiary hearing, rather than attempting make such determinations at the present time. Consequently, the Commission will deny the motions to strike testimony.

It is important to note that in this order the Commission is not ruling on the substantive merits of Lake Region's objections to any evidence that may be presented by Staff or OPC regarding availability fees, but instead has concluded that as a procedural matter the Motions are not appropriate at this stage in the proceedings. Lake Region expresses the concern that duplication of the extensive record regarding the availability fee issue in the previous rate case could result in the expenditure of considerable resources and money by the parties. The Commission shares this concern, and will explore alternative methods with the parties to decrease case expenses and prevent unnecessary duplication.

**THE COMMISSION ORDERS THAT:**

1. 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*

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<sup>7</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).

*and Cost of Service Report, Motion to Strike Portions of the Written Testimony of Ted Robertson, Witness for the Office of Public Counsel, and Motion in Limine* are denied.

2. This order shall become effective immediately upon issuance.



**BY THE COMMISSION**

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff  
Secretary

R. Kenney, Chm., Stoll W. Kenney,  
and Hall, CC., concur.

Bushmann, Regulatory Law Judge