

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

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

**RESPONSE TO MOTION TO STRIKE**

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

1. On November 15, 2013, Staff filed written testimony in this general rate case. Staff's report addressed the issue of availability fees collected in Lake Region's certificated service area. Availability fees are currently collected in the area by Lake Utility Availability 1 ("Lake Utility"), an unregulated affiliate of Lake Region. It is Staff's position that the funds derived from availability fees should be included in Lake Region's cost of service calculation as revenue.

2. On November 22, 2013, Lake Region filed its *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*. In its motion, Lake Region seeks to exclude any testimony or other evidence relating to availability fees in this case on the basis that the Commission lacks jurisdiction, the information is irrelevant, Staff's testimony is inadmissible, and that imputing this revenue to Lake Region would be unjust and unreasonable in the absence of an applicable rule. Staff disagrees with each of these contentions.

### **Commission Jurisdiction Over Availability Fees**

3. The Commission has jurisdiction over the charging, collection and enforcement of availability fees. In general, the Commission has jurisdiction over water and sewer corporations providing service within Missouri pursuant to Section 386.250, RSMo. Specific jurisdiction over availability fees is derived from Section 386.020(48), which defines service as:

"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;

In the case of availability fees, the service provided by Lake Region is a guarantee of water and sewer service availability to lot owners in Lake Region's certificated service territory. Lake Region owns the water works system and central sewer system that make it possible for customers to connect and receive water and sewer utility service in the future. Without these systems, the availability fees would not exist. Lake Region is the entity providing the guarantee of water and sewer service availability and incurring the associated opportunity cost of not providing water and sewer service to someone else on those lots while the lots remain undeveloped. The only service provided by Lake Utility is the collection of the fees for RPS Properties and Sally Stump.<sup>1</sup> Because it is Lake Region, a regulated utility, that is providing the service for which fees are

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<sup>1</sup> 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.

collected, the funds derived from these fees should be included in Lake Region revenue.<sup>2</sup>

4. If this availability fee revenue stream is not included in the cost of service for Lake Region, it should not exist at all. Either Lake Region is providing the service of availability, or Lake Utility is fraudulently charging property owners in the area for a service it cannot perform, neither practically nor by law. Lake Utility does not have a certificate to provide service in the area for which it collects fees, and it is evident that Lake Utility is providing no service other than a utility service in exchange for this revenue. Therefore, Lake Utility is providing a service in violation of Lake Region's exclusive rights granted by the Commission. If the Commission rules at any point that availability fees revenue should not be part of Lake Region's cost of service calculation, Staff would argue that the Commission's General Counsel be authorized to pursue an injunction against Lake Utility for holding itself out as providing a utility service to the public for gain.<sup>3</sup>

5. Finally, in Lake Region's previous rate case, the Commission reasoned that it should have jurisdiction over availability fees and like charges, stating:

Because the utility had, at different intervals, direct use of or access to this revenue stream, and because the fees can be defined as a commodity falling under the definition of utility service, **the Commission concludes that it should assert jurisdiction over availability fees.** And when the prior owners eliminated Lake Region's access to these fees, these acts had the potential to become a detriment to the ratepayers; albeit, these actions were done with Public Service Commission acquiescence or approval in many cases over many years.<sup>4</sup>  
(emphasis added)

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<sup>2</sup> From 1974 to 1998, the availability fees were collected by Lake Region. *Lake Region 2010 Report and Order*, p. 102, WR-2010-0111.

<sup>3</sup> The Commission's authority to bring a Complaint against Lake Utility is found in Section 386.390, RSMo, and the Commission's authority to pursue penalties and enforcement of its powers is found in Section 386.570 and 386.600, RSMo.

<sup>4</sup> *Lake Region 2010 Report and Order*, p. 103, WR-2010-0111.

Staff recognizes that the Commission is not bound by its previous decisions,<sup>5</sup> however, Staff believes the Commission's analysis on this point is reasonable. As the Commission pointed out, a commodity is something that is useful or serviceable, particularly articles of merchandise movable in trade such as goods or wares, or something that is bought and sold.<sup>6</sup> Lake Region has shown that availability fees revenues are something that can be bought and sold as it sold these revenues to a related party in 1998.<sup>7</sup> It is exactly this aspect of the commodity at issue that presents one of the best arguments for including availability fees revenue in the calculation of rates: Lake Region collected this revenue in the past and sold it another entity, to the detriment of ratepayers.<sup>8</sup>

### **Relevance of Availability Fees Information**

6. Staff's testimony related to availability fees is highly relevant to Lake Region's rate case. Lake Region has asked the Commission to grant an increase in rates. When evaluating a general rate case, the Commission must evaluate all relevant factors in setting just and reasonable rates.<sup>9</sup> Here, Lake Region seeks to prevent the Commission from evaluating any evidence relating to availability fees, the inclusion or exclusion of which in this case will have a significant impact on the final rate that customers pay. The position that availability fees are irrelevant to this case flies in

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<sup>5</sup> "...the PSC is not bound by *stare decisis* based on prior administrative decisions, so long as its current decision is not otherwise unreasonable or unlawful." See, e.g., *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003) ("an administrative agency is not bound by *stare decisis*"); *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 390 (Mo. App. W.D. 2005). *State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n of State*, 326 S.W.3d 20, 32 (Mo. Ct. App. 2010).

<sup>6</sup> *Lake Region 2010 Report and Order*, p. 100, WR-2010-0111; see also, Black's Law Dictionary (6th) West Publishing Company, 1990, p. 274, WR-2010-0111.

<sup>7</sup> *Id.* at p. 55, para. 165-168.

<sup>8</sup> *Id.* at pp. 55-56, 102-103.

<sup>9</sup> *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979).

the face of reason. Lake Region's position that the Commission should not be allowed to consider evidence regarding such a significant factor for setting rates is effectively an attempt to usurp the Commission's authority.

7. Contrary to Lake Region's representation in its *Motion to Strike*,<sup>10</sup> Staff has not proposed including availability fee revenue as a means of erasing a possible rate increase. This inaccurate representation of Staff's proposal is prejudicial, as Staff's goal has never been to defeat possible rate increases. Instead, Staff has proposed including availability fee revenue in Lake Region's rates as a means of more accurately reflecting the utility's actual cost of service. If the Commission rules that availability fees are properly included in the calculation of rates in this case, Lake Region's owners could choose to redirect the availability fees revenue stream back to Lake Region, as it was in the past.<sup>11</sup> This would bring the Company into alignment with the cost of service on which its rates would be set, rates that fully represent the costs and revenues tied to the services the Company actually provides, and would ensure the funds collected from availability fees are appropriately available to Lake Region for operations and maintenance costs.

8. Separating these funds from the utility would have the effect of unjustly enriching the utility owners at the expense of ratepayers, which is most decidedly relevant to the Commission's duty to set just and reasonable rates. The service the lot owners receive - a guarantee of water and sewer service availability - is provided at the expense of Lake Region, which maintains the water and sewer infrastructure and incurs

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<sup>10</sup> *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*, p. 5, para. 10.

<sup>11</sup> As has been discussed in this Response, in Staff's testimony, and in the Company's *Motion to Strike*, Lake Region and Lake Utility share common ownership/management.

the opportunity cost associated with forgoing active customers for future customers. Both of these expenses are partially borne by the ratepayers who must fund the Company's maintenance of infrastructure and who are bearing a higher portion of the Company's costs than they would if undeveloped lots had active customers on them. In the Commission's role of balancing the needs of the Company and its ratepayers,<sup>12</sup> it would be unjust and inappropriate to allow the Company owners to separate from the calculation of utility rates any revenue received for a utility service.

### **Admissibility of Staff Testimony**

9. Lake Region argues in its *Motion to Strike* that Staff's testimony on availability fees is inadmissible because Staff has estimated the amount of revenue collected through availability fees. Lake Region states that, "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."<sup>13</sup> It appears this is Lake Region's only support for its objection that Staff's number for availability fees revenues is an estimate, and while this statement is not cited, Staff believes the Company is referring to the Commission's Order in Lake Region's previous case. Staff is not aware of any other order or authority on which the Company could base such an objection, and, as previously mentioned, the Commission is not bound by its previous decisions.<sup>14</sup> Furthermore, the Company seems

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<sup>12</sup> "Ratemaking is a balancing process. Although there are general guidelines and restrictions placed upon a regulatory body's discretion concerning rates, that discretion is very broad within those perimeters." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State of Mo.*, 765 S.W.2d 618, 622 (Mo. Ct. App. 1988).

<sup>13</sup> *Motion to Strike*, p. 2, para 4.

<sup>14</sup> "...the PSC is not bound by *stare decisis* based on prior administrative decisions, so long as its current decision is not otherwise unreasonable or unlawful." See, e.g., *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003) ("an administrative agency is not bound by *stare decisis*"); *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 390 (Mo.App. W.D.2005). *State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n of State*, 326 S.W.3d 20, 32 (Mo. Ct. App. 2010).

to want to rely upon some opinions of the Commission in its previous Order while calling others “error,”<sup>15</sup> and if an Order the Company itself opposes is the only basis on which the Company objects to Staff’s use of estimates in general, Staff suggests this point is particularly unpersuasive.

10. Though Staff acknowledges the Commission’s statement regarding Staff’s estimate in the previous Order’s Findings of Fact, Staff found three very good reasons to estimate availability fees in its Direct testimony in this case. First, the Order states that the Commission deemed Staff’s estimate at the time unreliable.<sup>16</sup> It does not say that estimates by their nature are unreliable. Second, the Commission did not, in fact, decide that Staff’s estimate was inadmissible and, on the contrary, seems to have used its finding that Staff’s estimate was unreliable merely as a factor determining the weight of Staff’s evidence, saying:

Staff’s judicial admission of its inability to verify its estimates as being true and accurate must be taken into consideration when determining how much availability fee revenue has, in fact, been collected on an annual basis in order to decide how much to impute.<sup>17</sup>

Finally, Staff has not yet pursued additional information on availability fees revenues from Lake Region or Lake Utility because Staff believed it had the information it needed to produce a reasonable estimate of availability fees revenues for its Direct testimony.

11. Estimates are not uncommon in rate cases, for many reasons, and, as with all contested cases, the Company has the opportunity to dispute any of Staff’s

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<sup>15</sup> “The Commission has previously opined that estimates of availability fees . . . are unreliable and incompetent as evidence. For these reasons all references to, applications or uses of availability fees . . . should be stricken from the record and ruled inadmissible for any purpose in this matter.” *Motion to Strike*, Pp. 2-3. “In the *Lake Region 2010 Report and Order*, the Commission in error concluded that it had jurisdiction over availability fees and like charges. . .” *Motion to Strike*, p. 5.

<sup>16</sup> *Lake Region 2010 Report and Order*, p. 63, para. 202, WR-2010-0111.

<sup>17</sup> *Id.* at 91.

calculations and testimony in the Company's Rebuttal testimony. It is, after all, the Company's burden to prove the rates it requests are just and reasonable.<sup>18</sup> If the results of Staff's audit are not reasonable, whether estimates or not, the Company should show why. Also, if the Commission determines that availability fees should remain an issue in this case, Staff will have ample opportunity to respond to any assertions the Company makes regarding how it believes Staff should have calculated this revenue stream. And of course, if any party's final position by the close of the hearing in this case is based on an estimate of this or any other number, the Commission will have the opportunity to decide what amounts it deems appropriate to include in rates, as it always does.

12. Lake Region also argues that Staff's testimony on availability fees is inadmissible as hearsay. First, Staff does not acknowledge, as Lake Region suggests, that Staff's calculations of availability fees is hearsay. Staff's calculation of the revenue derived from availability charges is based on the known number of unimproved lots, known number of new connections in the operating area, and the known annual amount charged for the availability fees for water and sewer.

13. To the extent that this information is determined to be hearsay, it falls within the expert testimony exception to the hearsay rule. The admissibility of expert testimony is governed by Section 490.065, RSMo., which states, in relevant part:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in

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<sup>18</sup> "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . water corporation or sewer corporation." Section 393.150.2, RSMo.



forming opinions or inferences upon the subject and must be otherwise reasonably reliable.<sup>19</sup>

The Missouri Court of Appeals has provided further guidance on this statute, stating:

This statute does not prohibit an expert from relying on hearsay. Instead, it recognizes the generally accepted principle that an expert necessarily acquires his knowledge and expertise from many sources, some of which are inadmissible hearsay. Merely because an expert relied on information and opinions of others does not automatically disqualify his testimony. As long as such sources serve only as a background for his opinion and are not offered as independent substantive evidence ... he should not be precluded from testifying.<sup>20</sup>

14. In this case, Staff's experts relied on information that was made known to them in the course of the investigation in the Company's previous rate case. Staff's methods and calculations are well established and are relied on in the regular course of performing their work. Staff contends that the information used in its revenue estimates is not hearsay. However, if it is determined to be hearsay, an exception applies, and therefore, Staff's testimony regarding its calculations of availability fees revenue is admissible.

### **Absence of Rulemaking**

15. Lake Region has contended in its *Motion to Strike* that it would be unlawful for the Commission to impute revenue from availability fees in the absence of a rule promulgated pursuant to Section 536.021, RSMo. Lake Region bases this argument on the closure of the workshop docket the Commission established at the end of Lake Region's previous rate case. While Lake Region is technically correct in its assertion that the Commission ordered a workshop docket for the purpose of developing a rulemaking to address availability fees and that the workshop docket closed without producing a rule, the details Lake Region leaves out are vital to

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<sup>19</sup> Section 490.065(3), RSMo.

<sup>20</sup> *Peterson v. Nat'l Carriers, Inc.*, 972 S.W.2d 349, 354 (Mo. Ct. App. 1998).

understanding why Staff and the Company find themselves addressing the availability fees issue in a rate case once again. These details are also the very reason the Commission should reject any argument that the absence of an applicable rule is a valid reason to bypass the Commission's authority to hear and determine the question of availability fees treatment.

16. As was decided in Lake Region's last rate case, the Commission opened Case Nos. SW-2011-0042 and WW-2011-0043 in order to determine how to treat revenue derived through the use of availability fees.<sup>21</sup> In response to Staff's *Request for Extension of Time*<sup>22</sup> on December 22, 2010, the Commission issued an *Order Granting Extension of Time*, which directed Staff to file a proposed schedule for workshops by July 11, 2011.<sup>23</sup> On June 16, 2011, the Commission initiated the consolidation of these dockets into an existing docket, WW-2009-0386,<sup>24</sup> which had been opened for the purpose of investigating solutions to problems facing Missouri's small water and sewer public utilities.

17. More than a year later, on November 1, 2012, Staff filed a *Motion to Close Case* in WW-2009-0386, to which none of the docket participants objected.<sup>25</sup> In that *Motion* and in its subsequent *Summary of Working Docket in Support of Case Closure*,

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<sup>21</sup> "During the recent ratemaking proceeding for Lake Region Water and Sewer Company, the Commission announced its intention to change, on a prospective basis, its practices and policies with how it treats revenue derived through the use of availability fees and other similar fees for capital recovery of infrastructure investment in sewer and water companies." *Order Directing Notice of Working Case and Directing Filing*, SW-2011-0042 and WW-2011-0043.

<sup>22</sup> Staff requested one previous extension on September 23, 2010.

<sup>23</sup> "The January 7, 2011, deadline for the Staff of the Missouri Public Service Commission to file a proposed schedule for workshops, along with any other proposals it has regarding the procedure to follow in these workshop dockets, is extended until July 11, 2011." *Order Granting Extension of Time*, SW-2011-0042 and WW-2011-0043.

<sup>24</sup> *Order Consolidating Investigations*, SW-2011-0042 and WW-2011-0043.

<sup>25</sup> Lake Region participated in the working docket. *Summary of Working Docket in Support of Case Closure*, WW-2009-0386.

Staff explained that, while meetings conducted over the course of that docket resulted in identification of several problem areas and several proposed solutions, the participants<sup>26</sup> in this docket were unable to reach a consensus on the majority of the issues identified.<sup>27</sup> Because of this and because the docket had become inactive, Staff requested that the docket be closed, saying:

While many . . . problems are common within the industry, each individual water and sewer company presents its own unique situation and solutions are easier to reach by focusing on the individual company. Therefore, Staff states that, at this time, those problems are better addressed in the context of a company's rate case or other company-specific filing with the Commission, as opposed to maintaining an open workshop that is not active or productive to address those problems.<sup>28</sup>

18. On January 23, 2013, the Commission issued an *Order Granting Motion to Close File*, citing Staff's explanation of the working docket activities and Staff's assertion that the unresolved issues in the docket were better addressed in the context of a company's rate case or other company-specific filing.<sup>29</sup> The Commission granted Staff's request to close the docket, saying, "Having reviewed Staff's verified report, the Commission finds Staff's request to close this file reasonable and will grant it."<sup>30</sup>

19. As is evident from reviewing the entirety of this record, the closure of the working docket was not actually a failure to produce a necessary rule but rather a determination that, based on the inability of parties with competing interests to reach a consensus, a rulemaking was not the most effective avenue for addressing the issues raised in the docket. This is an appropriate result of a reasonable effort to address

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<sup>26</sup> Participants included the Missouri Department of Natural Resources, the Missouri Attorney General's Office, the Office of the Public Counsel, Staff, and various representatives of Missouri water and sewer utilities. *Summary of Working Docket in Support of Case Closure*, WW-2009-0386.

<sup>27</sup> *Id.*, p. 2, para. 5., WW-2009-0386.

<sup>28</sup> *Motion to Close Case*, para. 8, WW-2009-0386.

<sup>29</sup> *Id.* at pp. 1-2 .

<sup>30</sup> *Id.* at p. 5.

complicated problems. It is perfectly appropriate to begin a workshop with the intent of reaching consensus on a rule, only to find that consensus cannot be reached, which naturally leads back to the need for a contested case, as we have here. The effort to establish a rule clearly shows us that this rate case is exactly the appropriate forum for the Commission to answer the question of availability fees treatment in rates.

**WHEREFORE**, Staff respectfully submits this *Response* to Lake Region Water & Sewer Company's *Motion to Strike* and requests the Commission deny the *Motion* and issue such other order as it deems necessary.

Respectfully Submitted,

**/s/ Tim Opitz**

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### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of December, 2013.

**/s/ Tim Opitz**