

**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)	File No. WR-2013-0461
Rate Increase in Water and Sewer Service)	

**THE OFFICE OF THE PUBLIC COUNSEL'S OBJECTION AND RESPONSE
TO LAKE REGION'S MOTIONS TO STRIKE AND MOTION IN LIMINE**

COMES NOW the Office of the Public Counsel (Public Counsel) and for its Objection and Response to Lake Region's Motions to Strike and Motion in Limine states as follows:

1. On July 16, 2013, Lake Region Water & Sewer Company (Lake Region) filed a formal request with the Missouri Public Service Commission (Commission) to increase rates for it water and sewer utility services.
2. On November 15, 2013, the Staff of the Missouri Public Service Commission (Staff) and Public Counsel filed Cost of Service direct testimony to address Lake Regions' request.
3. On November 22, 2013, Lake Region filed the following: *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; Motion to Strike Portions of the Written Testimony of Ted Robertson, Witness for the Office of Public Counsel; and Motion in Limine* (collectively, the "Motions").
4. On November 22, 2013, the Commission issued its *Order Directing Filing* acknowledging Lake Region's Motions and stating that the Motions pertain to allegations regarding the charging, collection, and application of availability fees to Lake Region's revenue requirement. The Commission ordered any party who wishes to respond to Lake Region's Motions to do so no later than December 6, 2013.

5. Public Counsel now objects to Lake Region's Motions and requests that the Commission deny all three Motions as unjust and unreasonable as they violate Public Counsel's, as well as the Commission's, statutory authority to ensure that rates are just and reasonable. In support of its objection, Public Counsel offers the following response.

Introduction

6. Lake Region's Motions erroneously claim that evidence pertaining to availability fees is irrelevant and inadmissible. There is an undeniable nexus between the availability fees, rate base and utility rates. Given this nexus it is just and reasonable that the Commission ensure that customers gain all the benefit they are due from paying the availability fees. However, Lake Region seeks through pre-hearing motions to eliminate all discussion regarding availability fees in this case.

7. In its *Motion to Strike Portions of the Written Testimony of Ted Robertson*, Lake Region moves to strike specific portions of Mr. Robertson's testimony stating:

The testimony recorded in the above identified portions of Mr. Robertson's testimony relate to availability fee revenue and his recommendations on how that revenue should be applied to the Company's revenue requirement in this case.

Lake Region goes on to state:

The Commission has declared that it is unlawful for the Commission to impute revenue from the collection of availability fees for ratemaking purposes in the absence of a definitive rule promulgated pursuant to Section 536.021, RSMo 2000. In the absence of such a valid rule that governs the manner in which availability fees should be applied, if at all, as a factor in determining revenue requirement, any evidence regarding the charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting or enforcing the same would be meaningless to the Commission's decision and therefore unquestionably irrelevant to this proceeding. Testimony or other proof regarding the same should be stricken.

Lake Region also requested that the Commission "further order and declare that evidence in any form offered in this proceeding pertaining to the charging or collection of availability fees, the

revenue derived therefrom, the amounts thereof or the means of collecting, enforcing or applying the same is irrelevant and inadmissible.”

8. In 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*, Lake Region moves to strike specific portions Ms. Bolin’s testimony and portions of the Staff Report on Revenue Requirement and Cost of Service, particularly as these items discuss the use of availability fees in Staff’s calculation of its recommended revenue requirement in this case. Lake Region states:

Evidence of availability fees is irrelevant to or for the calculation of the Company’s cost of service and revenue requirement, or for any other valid purpose, in this proceeding. Moreover, Staff has admittedly utilized an estimate of availability fees in the calculation of the Company’s revenue requirement. 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. For these reasons all references to, applications or uses of availability fees in Ms. Bolin’s testimony, in the Staff’s Report or in any other Staff filing to date or hereafter should be stricken from the record and ruled inadmissible for any purpose in this matter.

In its motion, Lake Region claims “The Commission lacks subject matter jurisdiction over the charging, collection and enforcement of availability charges or fees. Availability fees constitute a source of unregulated revenue.” However, later in its Motion, Lake Region admits that in fact the Commission has previously found that it has jurisdiction over availability fees, even though apparently Lake Region does not agree:

In the Lake Region 2010 Report and Order, the Commission in error concluded that it had jurisdiction over availability fees and like charges, but ruled that it was unjust and unreasonable to impute additional revenue to the Company derived from the availability fees.

Lake Region also asks the Commission to strike portions of the Staff Report on Revenue Requirement and Cost of Service. After going to great lengths to complain that Staff’s calculations are only estimates (which is freely admitted by Staff as well as Public Counsel

because no information has been forthcoming from Lake Region despite numerous attempts by both parties in both this case and the previous rate cases), Lake Region again requested that the Commission “further order and declare that evidence in any form offered in this proceeding pertaining to the charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting, enforcing or applying the same is irrelevant and inadmissible.”

9. In its *Motion in Limine*, Lake Region claims:

A motion in limine notifies the Commission of anticipated evidence, which could be objected to at hearing, whether on grounds of prejudice or relevance. *See e.g., Robbins v. Jewish Hosp. of St. Louis*, 663 S.W.2d 341, 348 (Mo.App.E.D. 1983).

But Lake Region’s Motion does more than just notify the Commission that availability fee evidence could be objected to:

WHEREFORE, Lake Region Water & Sewer Company respectfully requests that the Commission order the Office of Public Counsel, the Staff, its counsel and their witnesses not to, at any time, inquire into, elicit testimony, volunteer, be barred from inquiring into, eliciting testimony, volunteering, or injecting evidence or statements regarding or propound any questions in the presence of the Commission or its regulatory law judge(s) during any prehearing, public hearing, opening and closing statements and witness examinations relating directly or indirectly to the manner in which availability fees should be applied, if at all, as a factor in determining revenue requirement, the charging or collection of availability fees by any person, firm or entity, the revenue derived therefrom, the amounts thereof or the means of collecting or enforcing the same.

10. In its Motions, Lake Region seems to be saying that because the Commission determined in the previous rate cases that availability fees should not be imputed as revenue then no party, and not even the Commission itself, should be allowed to consider, question, or even think about, availability fees in any way ever again. This is completely unjust and unreasonable.

Right to Discovery and Right to Produce Evidence

11. The Commission's jurisdiction over Lake Region's rate increase request is established under the Missouri Revised Statutes (RSMo), Section 393.150. Sections 393.130 and 393.140, RSMo, require that the Commission ensure that all utilities provide safe and adequate service and that all rates for utility service are just and reasonable. Section 393.150.2, RSMo, makes it clear that the burden of proof to show that a proposed utility rate increase is just and reasonable rests on the utility seeking that increase.

12. The Office of the Public Counsel is an agency of the State of Missouri and pursuant to the statutory authority in Sections 386.700 and 386.710, RSMo, represents the public in all proceedings before the Public Service Commission and on appeal before the courts. This statutory authority includes the right to seek discovery and the right to produce evidence as necessary to ensure that customer rates for utility service are just and reasonable.

13. Section 386.450, RSMo, requires the Commission, upon a showing of good cause by Public Counsel, to order a public utility to produce papers or records of the utility for examination by Public Counsel. The Commission has stated that the statute does not require Public Counsel to show that the requested documents are relevant to any particular issue in a contested case.¹ The Commission has also stated that the statute allows the Commission to require the production of the requested documents even if there were no contested case in existence.²

14. This right is not conditioned on considerations of relevance under MO Rule Civ. Pro. 56.01(b)(1) and Commission Rule 4 CSR 240-2.090(1). The Commission has recognized that information sought by Public Counsel, if not relevant, may well lead to other information which

¹ *Order Regarding Public Counsel's Motion to Compel Discovery*, Case No. ER-2007-0002, March 15, 2007.

² *Id.*

is relevant.³ Therefore, the Commission has determined that Public Counsel and Staff can request any and all records they want in their investigation without any showing that it is otherwise discoverable or is relevant to a specific case even if it is no more admissible in a hearing in their hands than in those of any other party.⁴

15. Public Counsel's right to seek information from any utility and the right to inspect and obtain copies of any utility's records or documents is coequal to that of the Staff and is broader than the discovery authority permitted other litigants under Commission Rules.⁵

16. Sections 386.420, 386.440, 386.460, 386.470, and 393.140, RSMo, authorize the Commission to utilize their investigatory powers to issue subpoenas and compel the testimony of any person or the production of documents in any matter before the Commission.⁶ To say that the Commission lacks authority to be presented with evidence necessary to assist it with its fact-finding mandate would be to negate the statutory authority provided to the Commission by this state's General Assembly creating a tremendous impairment to the Commission's ability to carry out its statutory duties.⁷

17. This is not the first time Lake Region has shown its reticence to discuss the issue of availability fees and their affect on the rates to be paid by its customers. In fact, in its previous rate cases, Lake Region was so obstructive to any attempts to gain information regarding availability fees that Staff submitted a *Motion in Limine* for a determination from the Commission that availability fees paid by customers to an affiliate of Lake Region were properly

³ *Staff of the Missouri Public Service Commission, v. Union Electric Company, doing business as AmerenUE*, Case No. EC-2002-1, 2002 Mo. PSC LEXIS 31.

⁴ *Id.*

⁵ Section 386.450, RSMo; *In the Matter of Missouri-American Water Company's Tariff* (Case No. WR-2000-281, et al.) (2-2-2000).

⁶ Order Denying Motion in Limine, SO-2008-0289.

⁷ *Id.*

within the scope of that matter.⁸ In that case, the Commission determined that availability fees are more properly brought up during an evidentiary hearing when evidence is offered and objections are registered than in pre-hearing motions.⁹ There was no objection by Lake Region when the Commission ruled against Staff's pre-hearing motion to dictate what was proper to be brought up at the hearing. Therefore, it is unreasonable for Lake Region to now use its own pre-hearing motions to try to dictate what cannot be inquired into or discussed as a part of the Commission's statutory requirement to ensure that rates are just and reasonable.

18. Lake Region's Motions seek to impermissibly limit Public Counsel's right to produce evidence as well as to impermissibly limit Public Counsel's and Staff's right to seek information from any utility and the right to inspect and obtain copies of any utility's records or documents. The Motions also attempt to obstruct the Commission's ability to ensure that rates are just and reasonable. Therefore, Lake Region's Motions are unjust and unreasonable and should be denied.

Mr. Ted Robertson's Testimony

19. As stated above, the Commission's jurisdiction over Lake Region's rate increase request is established under Section 393.150, RSMo. Sections 393.130 and 393.140, RSMo, require that the Commission ensure that all utilities provide safe and adequate service and that all rates for utility service are just and reasonable. Section 393.150.2, RSMo, makes it clear that the burden of proof to show that a proposed utility rate increase is just and reasonable rests on the utility seeking that increase.

20. The issue Lake Region complains about concerns availability fees collected from owners of undeveloped lots within Lake Region's Horseshoe Bend sewer operation and Lake Region's

⁸ Motion in Limine, SR-2010-0110 & WR-2010-0111.

⁹ Order Regarding Staff's Motion in Limine, SR-2010-0110 & WR-2010-0111.

Shawnee Bend water and sewer operations. Availability fees are now paid to the current shareholders of Lake Region, though they previously were paid to prior owners/developers of the utility. Availability fees are currently being assessed to owners of undeveloped lots within the Shawnee Bend water and sewer operations. Availability fees were previously assessed to owners of undeveloped lots within the Horseshoe Bend sewer operation, but no availability fees are collected on undeveloped lots within that operation at this time.

21. In Lake Region's previous rate cases, the Commission decided that the purpose for the collection of availability fees was to recover the investment in the water and sewer systems:

161. The collection of availability fees, by the terms and timing of the original agreements, began prior to construction or completion of the water and sewer systems and were collected to make construction of the systems feasible.

162. The purpose for establishing the availability fees was to recover the investment in the water and sewer systems, not to maintain or repair the existing operations of the systems once they were constructed.¹⁰

The Commission also determined that it has jurisdiction over the availability fees:

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.¹¹

However, in Lake Region's last rate cases the Commission chose not to include the availability fees as revenue in the development of rates:

After considering all of the possible revenue scenarios, the relevant law, and the Commission's prior policy and practice on ratemaking treatment of availability fees, the Commission determines that the substantial and competent evidence in the record as a whole supports the conclusion that it would be unjust and unreasonable to impute additional revenue to Lake Region derived from the availability fees already collected.¹²

¹⁰ Report and Order, SR-2010-0110 & WR-2010-0111.

¹¹ *Id.*

¹² *Id.*

But, the Commission acknowledges that there is a nexus between the availability fees, rate base and utility rates:

164. Lake Region customers have benefited from the availability fees, because the contributed plant associated with those fees lowers rate base and lowers utility rates for the ratepayers.¹³

22. Given this nexus it is just and reasonable that the Commission ensure that customers receive all the benefit they are due from paying the availability fees. Paying availability fees without a concurrent lowering of rate base and thus utility rates would provide no benefit, and would actually be a detriment, to the customers. Therefore, it is necessary in the current case to determine exactly how much contributed plant is associated with the availability fees so that the rate base and therefore rates can be lowered appropriately.

23. This is exactly the point of Mr. Robertson's direct testimony.¹⁴ Mr. Robertson states that Public Counsel agrees with the Commission's previous decision that the purpose of the availability fees was to pay for the construction of the utility systems, agrees that the Commission has jurisdiction over the fees and also agrees that the fees are not necessarily revenues. However as Mr. Roberson states, Public Counsel's primary concern is that the actual amount of contributed plant associated with availability fees has not been properly identified so it can be included in the utility's rate calculations.

24. Mr. Robertson's testimony explains that in order to determine the amount of contributed plant associated with availability fees it is necessary that the amount of availability fees assessed and collected, current and past, be determined for all three utility operations. Once the amount of contributed plant associated with availability fees is determined, each operation's rate base should be lowered as a result.

¹³ *Id.*, including Footnote 212: citing Transcript, pp. 253, 357-358, 432-433, 455, 461 and also citing Footnote 211.

¹⁴ Direct Testimony of Ted Robertson, 11-15-2013.

25. However, Mr. Robertson points out that Public Counsel has not been able to determine the amount of contributed plant associated with availability fees. He points out that he currently has numerous data requests outstanding to Lake Region which, if answered completely, should provide him with the information necessary to make such a determination. But given the Motions, one can only assume that Lake Region has no intention of providing this information.

26. Section 393.150.2, RSMo, makes it clear that the burden of proof to show that a proposed utility rate increase is just and reasonable rests on the utility seeking that increase. The current owners of Lake Region were not the developers of the Horseshoe Bend or Shawnee Bend developments nor did they construct any of the utility's infrastructure prior to their purchasing the utility. But, availability fees are being collected to recover the investment in the water and sewer systems and the payment of those availability fees must be recognized as an offset to the utility's rate bases.

27. It makes no difference if availability fees are now paid to the current shareholders of Lake Region or some other affiliate entity rather than to Lake Region. As the Missouri Supreme Court recently stated: "Due to the inherent risk of self-dealing, the presumption of prudence utilized by the PSC when reviewing regulated utility transactions should not be employed if a transaction is between a utility and the utility's affiliate."¹⁵ Therefore, if Lake Region wishes to pass along to customers any costs related to or affected by its affiliate entities, Lake Region cannot rely on a presumption that these costs are prudent without providing actual documentation of how those costs were determined.

28. If Lake Region is not willing or able to provide documentation as to the amount of contributed plant that is associated with availability fees, it is just and reasonable for the Commission to determine that all of the plant at the Horseshoe Bend and Shawnee Bend utility

¹⁵ *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371 (Mo. 2013).

operations constructed prior to the current owners' purchase of Lake Region is contributed plant associated with availability fees. As a result, the entire rate base associated with the plant at the Horseshoe Bend and Shawnee Bend operations constructed prior to the current owner's purchase of Lake Region should be removed from the rate base utilized to calculate the just and reasonable utility rates of customers.

29. Lake Region's Motions erroneously claim that evidence pertaining to availability fees is irrelevant and inadmissible. However, there is a clear nexus between the availability fees, rate base and utility rates. Mr. Roberson's testimony focuses purely on Public Counsel's concern that the actual amount of contributed plant associated with availability fees has not been properly identified so rate base and ultimately rates can be set accordingly. The inclusion of plant at the Horseshoe Bend and Shawnee Bend operations constructed prior to the current owners' purchase of Lake Region in rates depends solely on Lake Region meeting its burden to prove that its inclusion it is just and reasonable. Therefore, Lake Region's Motions are unjust and unreasonable and should be denied.

**Ms. Kim Bolin's Testimony and Staff's Revenue Requirement
and Cost of Service Report**

30. Again, the Commission's jurisdiction over Lake Region's rate increase request is established under Section 393.150, RSMo. Sections 393.130 and 393.140, RSMo, require that the Commission ensure that all utilities provide safe and adequate service and that all rates for utility service are just and reasonable. Section 393.150.2, RSMo, makes it clear that the burden of proof to show that a proposed utility rate increase is just and reasonable rests on the utility seeking that increase.

31. While Public Counsel has proposed a different position than Staff, Public Counsel certainly supports Staff's right to bring its position to the Commission for determination.

Section 393.150.2, RSMo, makes it clear that the burden of proof to show that a proposed utility rate increase is just and reasonable rests on the utility seeking that increase. This burden includes costs from and costs shared among affiliated entities.

32. Staff's proposal in the present case to impute revenue from availability fees is similar to the proposal before the Commission in the previous Lake Region rate cases. Given the limited information provided by Lake Region in regards to availability fees in the last cases (which Lake Region seeks to repeat in the current case), the Commission chose not to include the availability fees as revenue in the development of rates:

After considering all of the possible revenue scenarios, the relevant law, and the Commission's prior policy and practice on ratemaking treatment of availability fees, the Commission determines that the substantial and competent evidence in the record as a whole supports the conclusion that it would be unjust and unreasonable to impute additional revenue to Lake Region derived from the availability fees already collected.¹⁶

33. In 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* Lake Region states:

The Commission has declared that it is unlawful for the Commission to impute revenue from the collection of availability fees for ratemaking purposes in the absence of a definitive rule promulgated pursuant to Section 536.021. In the absence of such a valid rule that governs the manner in which availability fees should be applied, if at all, as a factor in determining revenue requirement, any evidence regarding the charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting enforcing or applying the same would be meaningless to the Commission's decision and therefore unquestionably irrelevant to this proceeding. Testimony or other proof regarding the same should be stricken.

So, Lake Region's argument is because the Commission made a determination in the previous rate cases based on the information available to it at the time, it is unlawful to bring the issue before the Commission ever again or even to attempt to determine if additional evidence is now available which would make a different determination just and reasonable today.

¹⁶ Report and Order, SR-2010-0110 & WR-2010-0111.

34. But, Lake Region does not hold itself to the same standard that once the Commission speaks it is then unlawful to attempt to provide argument or evidence to the contrary. For example, in its motion Lake Region admits that the Commission has previously found that it has jurisdiction over availability fees. Because Lake Region apparently does not agree, it now argues “The Commission lacks subject matter jurisdiction over the charging, collection and enforcement of availability charges or fees. Availability fees constitute a source of unregulated revenue.” So, Lake Region itself now argues against the findings of the Commission in the previous rate cases. Given Lake Region’s position regarding Ms. Bolin’s testimony on Staff’s position, one would think that Lake Region would find its own argument to be unlawful. But apparently that is quite a different matter.

35. The complaints of Lake Region even go into the preliminary findings presented in Staff’s Revenue Requirement and Cost of Service Report. After going to great lengths to complain that Staff’s calculations are only estimates (which is freely admitted by Staff as well as Public Counsel because no information has been forthcoming from Lake Region despite numerous attempts by both parties in both this case and the previous rate cases), Lake Region requests that the Commission “further order and declare that evidence in any form offered in this proceeding pertaining to the charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting, enforcing or applying the same is irrelevant and inadmissible.”

36. It is galling to Public Counsel that Lake Region would impede the collection of data regarding availability fees and then complain that Staff’s calculations are only estimates.

37. But, Lake Region has a self-serving reason to try to hide information regarding availability fees from Staff, Public Counsel and ultimately the Commission. Lake Region knows

perfectly well that the Commission has found a nexus between the availability fees, rate base and utility rates. As the Commission stated in the previous rate cases, “contributed plant associated with those fees lowers rate base and lowers utility rates for the ratepayers.”¹⁷ So, as more information regarding the amount of availability fees that has been paid comes to light, Lake Region runs the risk of having its rate base and ultimately its rates (not to mention its return on that rate base) lowered as well. That is a risk that Lake Region is now fighting tooth and nail to quash through the filings of its Motions. This self-serving fight is unjust and unreasonable and the Motions should be denied.

Conclusion

38. Public Counsel objects to Lake Region’s Motions to Strike and Motion in Limine and requests that the Commission deny all three Motions as unjust and unreasonable as they violate Public Counsel’s, as well as the Commission’s, statutory authority to ensure that rates are just and reasonable.

39. Lake Region’s sweeping Motion in Limine and related motions to strike testimony seem to be saying that because the Commission determined in the previous rate cases that availability fees should not be imputed as revenue, no party, and not even the Commission itself, should be allowed to consider, question, or even think about, availability fees in any way, shape or form ever again. This is completely unjust and unreasonable.

40. Lake Region’s Motions seek to impermissibly limit Public Counsel’s and Staff’s ability to present their case to the Commission and their right to seek information from any utility and inspect and obtain copies of any utility’s records or documents. Lake Region’s Motions erroneously claim that evidence pertaining to availability fees is irrelevant and inadmissible. The

¹⁷ Report and Order, SR-2010-0110 & WR-2010-0111.

Motions also attempt to obstruct the Commission's ability to ensure that rates are just and reasonable.

41. Section 393.150.2, RSMo, makes it clear that the burden of proof to show that a proposed utility rate increase is just and reasonable rests on the utility seeking that increase. It is the Company's burden to prove the value of the rate base it proposes to use in the setting of rates.

42. There is an undeniable nexus between the availability fees, rate base and utility rates. Given this nexus, it is just and reasonable that the Commission ensure that customers receive all the benefit they are due from paying the availability fees.

43. Lake Region has a self-serving reason to try to hide information regarding availability fees from Staff, Public Counsel and ultimately the Commission. As more information regarding the amount of availability fees paid by the customers comes to light, Lake Region runs the risk of having its rate base and ultimately its rates (not to mention its return on that rate base) lowered as well. This self-serving fight is unjust and unreasonable and the Motions should be denied.

WHEREFORE, Public Counsel respectfully submits its Objection and Response.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 6th day of December 2013:

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