

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

RESPONSE TO MOTION IN LIMINE

COMES NOW the Staff ("Staff") of the Missouri Public Service Commission ("Commission"), by and through counsel, and respectfully submits its Response asking that the Commission deny Lake Region Water & Sewer Company's ("Lake Region" or "Company") *Motion in Limine* as without merit.

On November 22, 2013, Lake Region filed a *Motion in Limine* requesting that the Commission order Staff and Public Counsel not to inquire into or mention (or several other iterations of these two things) the issue of availability fees in Lake Region's current rate case.¹ On the same date, Lake Region also 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 (Motion to Strike)*, which was incorporated by reference into Lake Region's *Motion in Limine*. Lake Region asserts in both motions that evidence pertaining to availability fees is irrelevant and inadmissible in this case.²

For reasons detailed in Staff's *Response to Motion to Strike*, filed concurrently with this *Response* and incorporated herein by reference, Staff argues that the issue of availability fees in this case is both relevant and admissible and that any attempt to exclude such evidence from this case is effectively an attempt to usurp the Commission's authority.³

¹ Although the Motion does not specify in its opening request that the proposed silence in regards to availability fees shall be for this case only, Staff assumes from the remainder of the Motion that this was Lake Region's intent. Staff does not believe Lake Region meant to ask for an order barring Staff and Public Counsel from ever again mentioning availability fees in any case for any company.

² *Motion in Limine*, p. 2.

³ When evaluating a general rate case, the Commission must evaluate all relevant factors in setting just and reasonable rates. *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979).

Other than Lake Region's incorporation of its *Motion to Strike*, the only support the Company puts forth in arguing that all evidence regarding availability fees be excluded from this case is its reliance on the Commission's final conclusions in Lake Region's previous rate case. As the Commission is aware, and as is well-known in practice before the Commission, previous Commission decisions are not binding on this current Commission.⁴ Commissioners have the prerogative to apply their own expertise and judgment to the facts before them and may reach whatever determination they deem just and reasonable, no matter what were the inclinations of a previous Commission. And, although Lake Region inaccurately presents the previous Commissioners' decision as controlling, even the Commissioners at the time did not intend that their decision to exclude availability fee revenue from rates should determine the issue in a subsequent case. At the Agenda of August 8, 2012, the Commission discussed its Order, specifically the sections relating to availability fees, and the votes were cast as two Yes, one "soft Yes", one No, and one "soft No." Furthermore, in discussing his Yes vote, Commissioner (now Chairman) Kenney explained:

We are requiring that they come back in three years, and we will have another opportunity to determine how to treat availability fees with respect to this specific entity. And hopefully within that three year period of time, we will have had the benefit of the docket we're going to open,⁵ and the Company will have the benefit of whatever it's doing for the next three years, and we will have had the benefit of observing that as well. I don't feel like we're putting our stamp of approval on anything; we're making the best of what was a complicated situation.⁶

Thus, to deny this Commission an opportunity to hear and consider evidence regarding availability fees would run contrary to the Commission's authority, which is not limited by previous Commission decisions, and would also run contrary to the expectation

⁴ "...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).

⁵ The history of the docket the Commission opened is included in *Staff's Response to Motion to Strike*.

⁶ Missouri Public Service Commission, Agenda, 8/8/2012, <http://psc.mo.gov/Archive.aspx> (last visited Dec. 15, 2013).

of the previous Commissioners, which was that they would have another opportunity to consider the issue of availability fees for this Company in its next rate case, which is this case.

WHEREFORE, for the reasons set forth in Staff's *Response to Motion to Strike* and set forth above, Staff requests the Commission deny Lake Region's *Motion in Limine* as without merit.

Respectfully Submitted,

/s/ Amy E. Moore
Deputy Counsel
Missouri Bar No. 61759

Tim Opitz
Legal Counsel
Missouri Bar No. 65082

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-4140 (Telephone)
(573) 751-9285 (Fax)
Amy.moore@psc.mo.gov

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/ Amy E. Moore