

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Lake Region Water & Sewer)	File No. SR-2010-0110
Company's Application to Implement a General)	Tariff No. YS-2010-0250
Rate Increase in Water & Sewer Service)	

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

LAKE REGION WATER & SEWER COMPANY'S
LIMITED APPLICATION FOR REHEARING

Comes now Lake Region Water & Sewer Co. (Lake Region), by and through its attorneys, and pursuant to Section 386.500 RSMo and 4 CSR 240-2.160, moves and applies for limited rehearing of the Commission's Report and Order entered in this case on August 18, 2010 (hereinafter "the Order"). In support, Lake Region submits the following to the Commission:

1. On August 18, 2010 the Commission entered the Order authorizing and permitting Lake Region to file tariff sheets sufficient to recover the revenue approved in the Order. The Commission also entered a ruling concerning its jurisdiction over availability fees. The Order bears an effective date of August 28, 2010. This application is therefore timely under Section 386.500 and 4 CSR 240-2.160.

2. By this application, Lake Region does not seek rehearing concerning the authority granted to the Company to implement the rate relief outlined in the Order. Lake Region limits its request for rehearing strictly to the Commission's conclusion that it may assert jurisdiction over availability fees in general, and over the availability fees referred to in the evidence in particular.

3. With regard to its conclusion that the Commission may assert jurisdiction over the charging and collection of availability fees, the Order is unlawful, unjust and unreasonable and just grounds exist for the Commission to rehear the jurisdictional issue.

4. After examining the definition of “service” set out in Section 386.020(48), at page 101 of the Order the Commission writes that

[w]hile the Commission has not done so in the past, availability fees could be construed to be a “commodity” and thus fall under the definition of a “service” despite its expert Staff’s testimony to the contrary.

In classifying the fees a “commodity,” the Commission has stretched the meaning of the word far beyond its plain and ordinary meaning, if not the meaning ascribed to that word by the legal dictionary cited on the preceding page of the Order.¹ Availability fees may have usefulness, but are not an item in commerce that is “serviceable.” Charging and collection of any fee involves movements of checks and cash but the definition of “commodity” is not broad enough to include them. There is no trade in the raw checks or the cash. The fee is charged for immovable fixtures to real estate currently unused but ready for use. To conclude that availability fees, or the infrastructure for which they are being charged, may have the same attributes as wheat, corn, milk or pork bellies is unreasonable.

5. The Commission’s Order has the potential of sweeping many other streams of revenue that are useful to public utilities within the scope of regulation. The unintended consequences of the decision are monumental. For example, if the stream of revenue derived from collection of availability fees is a “commodity” then charges levied by a bank for

¹ Compare the definition of “commodities” in *Black’s Law Dictionary* (5th Ed.), 1979, at Page 248:

Those things which are useful or serviceable, particularly articles of merchandise movable in trade. Good, wares, and merchandise of any kind; movables, articles of trade or commerce. . . . This word is a broader term than merchandise, and in referring to commerce may include almost any article of movable or personal property.

“servicing” the utility’s debt or checking accounts is a “commodity” over which the Commission has now arguably asserted regulatory control.

6. The jurisdictional conclusions are contrary to the Commission’s previous declarations of what amounts to “sewer service” as announced in the Commission’s previous orders--- which have been cited by Lake Region in its brief and argument and will not be repeated here--- but is also opposed by the Commission’s own definitions as promulgated in its rules and regulations. As defined in 4 CSR 240-3.300(3), “Sewer service means the removal and treatment of sewage.” That definition is repeated in 4 CSR 240-60.010(3)(M): “Sewer service ---- Removal and treatment of sewage.”² As shown in its own rules, the Commission has never envisioned availability fee revenue, or having sewer infrastructure available but not yet used, as “sewer service.”

7. At pages 102-103, the Commission theorizes that it should assert jurisdiction over availability fees on grounds unrelated to its statutory powers:

There is another factor at play when determining its jurisdiction over the availability fees. In past cases where availability fees, standby fees, reservation fees or connection fees were collected, and where the Commission determined it lacked jurisdiction over those fees, the fees were always kept completely separate from the entity providing utility service. The fees were never part of the regulated public utility. Even if the ownership of the corporate entity collecting the fees was identical to the ownership of the utility, the revenue was never comingled with, or directly available to, the utility.

The record in this case demonstrates the utility had possession of the fees at their inception. The fees were paid to directly to the utility between 1974 and 1998. After that, the availability fee revenue stream was sold to Roy and Cindy Slates. Availability fee revenue was combined with the utility during of the sale of the stock and fees to Waldo Morris, but only long enough to split it off for Mr. Morris as a separate revenue stream. This was repeated when the stock and fees were sold to the current owners of Lake Region. Because the utility had, at different intervals, direct use of or access to this revenue stream, and because the

² There is no comparable definition for “water service” in the Commission’s rules but Lake Region contends that given the definition of “sewer service” duly promulgated by the Commission, the meaning of “water service” is similarly restricted to “the treatment and distribution of potable water.”

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.

8. The Commission's reasoning gives great weight to the fact that Lake Region **may** have owned the rights to receive availability fee revenue.³ It should be noted that although there is evidence that Lake Region's books showed entries for availability fee revenue related to water and/or sewer systems on Shawnee Bend in the years 1995-1998, there is no evidence in the record establishing that Lake Region owned the rights to those fees. The rights to that revenue were subsequently and many times exchanged between other parties as if Lake Region had only unlikely claims to its receipt.

9. Examining whether Lake Region owned the rights to availability fee revenue at any time during its regulatory history still begs the question of whether the revenue was "regulated." A public utility that simply charges and collects revenue for services the Commission has no authority to regulate does not expand the Commission's jurisdiction over that revenue.

10. The Commission's analysis also suggests that its jurisdiction over availability fees is based not on the fee itself, but on how and by whom the fee is collected. Apparently, if the rights to receive availability fee revenue remain with the developer of a subdivision project or any assign of the developer, **excepting the shareholders of the water or sewer utility serving the subdivision or the utility itself**, the Commission will decline jurisdiction. If availability fee revenue is regarded as "unregulated" in the hands of the developer, it does not change its stripes when assigned to anyone. If it is not a commodity or payment for a commodity when received by the developer, it is not a commodity or payment for a commodity when assigned to someone

³ The record will support that all of the availability fees reported in the Lake Region Annual Reports from 1973-1992 were strictly associated with the water infrastructure on Horseshoe Bend which was sold to Ozark Shores Water Company. As recently as 2005, the Commission Staff classified Ozark Shores' availability fee revenue as "unregulated revenue." See ¶201, page 62 of the Order.

else. Jurisdiction of the Commission does not turn on the devices selected by a developer for the return on utility infrastructure investment in improved real estate.

11. As the Western District Court of Appeals explained in another case in which the Commission was found to have exceeded its statutory authority and jurisdiction:

The PSC “is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto.” *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (Mo. banc 1943). “Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute.” *State ex rel. Mo. Cable Telecomms. Ass’n v. Mo. Pub. Serv. Comm’n*, 929 S.W.2d 768, 772 (Mo.App.1996).

State ex rel. Cass County v. Public Service Commission, 259 S.W.3d 544, 547 -548 (Mo.App. W.D. 2008). Lake Region submits that out of some sense of necessity, the Commission has erroneously reached the determination that it may exert authority over availability fees; a determination contrary to its enabling legislation or any power reasonably incidental thereto.

CONCLUSION

On the basis of the above and foregoing, Lake Region respectfully requests that the Commission grant this limited application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via email, on this 27th day of August, 2010, to:

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