BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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| In the Matter of Lake Region Water & Sewer Company's Application to Implement a General Rate Increase in Water & Sewer Service | ) ) ) | File No. SR-2010-0110 Tariff No. YS-2010-0250 |
| In the Matter of Lake Region Water & Sewer Company's Application to Implement a General Rate Increase in Water & Sewer Service | ) ) ) | File No. WR-2010-0111 Tariff No. YW-2010-0251 |

# LAKE REGION WATER & SEWER COMPANY'S PART 2 BRIEF RESPECTING AVAILABILITY FEES

## I. Introduction

The remaining issues for briefing in this matter are:

**Should charges for availability fees collected from owners of undeveloped lots in LRWS's service territory and billed and retained by an affiliate company be classified as LRWS revenue or applied against rate base?**

**If the Commission finds charges for availability fees of undeveloped lots are not to be classified as LRWS revenue, or applied against rate base, then what costs should be identified and excluded from LRWS's cost of service?**

Lake Region Water & Sewer Company (LRWS or Lake Region[1]) does not charge or collect availability fees for the unused water and sewer system infrastructure in place at Shawnee Bend. The Company has no control over availability fee revenue. The Missouri Public Service Commission (Commission) lacks subject matter jurisdiction over the billing and collection of fees charged for the recovery of the costs of installing water and sewer infrastructure that is donated to public utilities. For these reasons, Lake Region contends that the answer to both of these questions is "no."

[1] As explained in the Background section of this brief, Four Seasons Lakesites Water & Sewer Company changed its name to Lake Region Water & Sewer Co. in March of 1999. Where the context requires, the terms "Lake Region" or "Company" shall also refer to the Company while it was named Four Seasons Lakesites Water & Sewer Company.

If the Commission rejects Lake Region's arguments pertaining to Commission jurisdiction, Lake Region submits that the Commission should treat availability fees in this case in the fashion it has treated availability fees historically, namely, if availability fee revenue is classified by the Commission as revenue of the Company, then the donated plant associated with those availability fees should be added to the Company's rate base. Alternatively, if availability fee revenue is excluded from Company revenues, the plant associated with those availability fees, if somehow in the Company rate base, should be excluded from rate base.

Staff has failed to validly identify costs to exclude from the Company's cost of service related to availability fees. It has proposed an unreasonable allocation of costs to Lake Region in its second and alternative recommendation to the Commission. The answer to the second issue is again "no."

## II. Background

In an order dated December 17, 1973, in Case No. 17,954, the Commission approved the application of Four Seasons Lakesites Water and Sewer Company for a certificate of convenience and necessity to construct, operate and maintain a water system on property located on Horseshoe Bend, Lake of the Ozarks. (LRWS Ex. 217). Under the terms and provisions of a declaration of restrictive covenants, as amended, filed by the developer, Four Seasons Lakesites Inc., ---then owned or controlled by Harold Koppler--- (see POA Ex. 1), undeveloped lots located in the subdivision certificated were subject to an obligation to pay availability fees. Those fees are referred to as "availability contract revenue" in the feasibility study prepared by Mr. Richard French for this project. (LRWS Ex. 13, page 9).

In Case No. WM-93-59, the Commission granted Ozark Shores Water Company (Ozark Shores) authority to acquire Four Seasons Lakesites Water and Sewer Company's water system

assets and approved Ozark Shores' application to provide water service in the Horseshoe Bend service area. Ozark Shores owned and still owns the rights to charge and collect the water system availability fees due from owners of the undeveloped lots on the undeveloped lots on Horseshoe Bend. (Tr. 359, 485)

In Case No. WA-95-164, the Commission granted the Company's application to provide water and sewer service on Shawnee Bend, Lake of the Ozarks. The developer of the area donated the water and sewer system infrastructure to the Company.[2] The property certificated was subject to recorded deed restrictions. Pursuant to the Third Amended and Restated Declaration of Restrictive Covenants recorded by the developer on August 20, 1996 at Book 431, Page 292 Camden County Recorder's Office, the owners of undeveloped lots were obligated to pay an availability fee for the *water system* in an amount provided for in a tariff approved by the Commission, or if not so provided, then in an amount set by the owner of the water system. (Merciel Rebuttal, Staff Ex. 15, Attachment No. 3, page 19). Payment of the availability fees for water and sewer system availability was also part of the contract obligations of each lot purchaser by virtue of the real estate contract for the lot. (Merciel Rebuttal, Staff Ex. 15, Attachment No. 7). (Tr. 276, Lines 4-7).

The purpose of the availability fees was to recover the investment made by Four Seasons Lakesites, Inc. ---the developer of the project--- in the water and sewer systems, not to subsidize the operations of the systems. (Staff Ex. 27, Affidavit of Peter N. Brown, paragraph 3)

In March of 1999, the Company officially changed its name to Lake Region Water & Sewer Co. (Merciel Surrebuttal, Staff Ex. 16, Attachment No. 2). This was done after the sale

[2] The developer continued to contribute plant to the Company as the development on Shawnee Bend progressed. By the end of 2002 the Company had recorded approximately $5,300,000 in water and sewer plant contributed by Four Seasons Lakesites. (LRWS Ex. 2, Summers Rebuttal, page 4). This appears to be the dominant number for the Shawnee Bend CIAC entry in the evidence.

of all outstanding stock in the company to Roy and Cindy Slates. (Staff Ex. 27, Affidavit of Peter N. Brown, Paragraph 2). Also at this time, Roy Slates filed a registration of the fictitious name of Lake Utility Development.

Sometime between 1999 and 2001, the Slates transferred all of the outstanding stock of the Company to Mr. Waldo Morris, as well as their rights to any availability fees. The Company's annual report for 2001 shows Mr. Morris as the sole voting shareholder. (Merciel Surrebuttal, Staff Ex. 16, Attachment No. 2)[3]

With respect to his shares in the Company, Mr. Morris entered a Stock Purchase Agreement with Ms. Sally J. Stump and Mr. Robert P. Schwermann on September 10, 2004. As part of that agreement, Mr. Morris agreed to assign to Ms. Stump and Mr. Schwermann all of his rights in availability fees that were acquired from Roy Slates and Cindy Slates. The stock transfer closed and the assignment of the availability fees was effected on October 13, 2004. (Staff Ex. 10, **HC** second page).

The entitlement to the availability fees was a matter of dispute between Lake Region, the shareholders of the Company –Mr. Waldo Morris --and the developer of the Shawnee Bend area, Four Seasons Lakesites Inc. at the time of the stock transfer in 2004. The dispute formed the basis of a petition filed in Camden County Circuit Court. The matter was settled by agreement in which the Developer retained the rights to a specified amount of the availability fees charged and collected by Ms. Stump and RPS Properties LP payable in installments. (Staff Ex. 23 **HC**)[4]

[3] The Commission has taken official notice of all of the Company's annual reports to the Commission for purposes of this case. Information about Mr. Morris and his ownership of shares in the Company can be found at page F-6 of the Company's 2001 annual report.

[4] Mr. Schwermann transferred his interest in the stock and availability fees to RPS Properties, LP, a family limited partnership. Ms. Stump and RPS Properties LP are currently the voting shareholders of the Company, without exception.

Under the business name of "Lake Utility Availability" Ms. Stump and RPS Properties submit bills for and collect the availability fees that were assigned to them. The fictitious name is registered with the Missouri Secretary of State's office. Billing for the fees is done with the help of Cynthia Goldsby, an employee of Camden County Public Water District No. 4.

*Declarations of Covenants and Restrictions*

Several generations of deed restrictions have been recorded with respect to real property located in the Company's certificated area. In references found in the documents admitted in the record, it appears that Four Seasons Lakesites, Inc.'s first such declaration of restrictions was recorded on December 2, 1969. It was thereafter amended by an instrument recorded on March 19, 1971[5] and on pages 22 -24 thereof, in section VIII, the Developer provided:

> VIII. Central sewage disposal system and water works system. The Owner of each lot agrees to pay to the owner or owners of the sewage disposal system and water works system to be constructed with the Development, a minimum monthly availability charge for water, water service and the accommodations afforded the owners of said lots by said water works system, commencing upon the availability of water in a water works system distribution main provided for the lot and continuing thereafter so long as water is available for use, whether or not tap or connection is made to a water works system distribution main and whether or not said owner actually uses or takes water; and, a minimum monthly availability charge for sewage disposal and treatment and the accommodations afforded the owners of said lots by said sewage disposal system commencing upon the availability for use of a sewage collection main provided for the lot which leads to an operating sewage treatment facility, and continuing thereafter so long as such sewage collection main is so available for use, irrespective of whether or not connection is made to or use made of said sewage collection main in connection with or for the purposes of any said lot. No charge will be made to the lot owners for the right to connect to the sewer and/or water system. Each lot owner will bear the cost of the service line from his building into the sewer and/or water main. The said owner or owners of said water works system and sewage disposal system will be a privately owned public utility authorized by a Certificate of Public Convenience and Necessity issued by the Sate of Missouri Public Service Commission to operate sewer disposal systems and/or water works systems, the aforesaid amounts of said availability charges, times and methods of payments thereof by said owners and other matters shall be as provided in Schedules or Rates and Rules, Regulations and Conditions of

[5] POA Ex. 1, pages 22-24.

> Services for Water Services and for Sewer Service filed and published by said public utility or utilities with said Missouri Public Service Commission, or any successor Regulatory Body of the State of Missouri, in accordance with law and passed to file or formally approved by said Commission as the then effective Schedule of Rates and Rules, Regulations and Conditions of Service of said public utility or public utilities. The amounts of said availability charges and other charges are subject to change hereafter by order of the said Missouri Public Service Commission or its successors in accordance with then exiting law and the structure of said availability charges are likewise and in the same manner subject to change from availability rates to another type of rate or rates. Unpaid charges shall become a lien upon the lot or lots to which they are applicable as of the date the same become due.

In July, 1996, Four Seasons Lakesites, Inc. executed a *Third Amendment and Restated Declaration of Restrictive Covenants* which was recorded August 20, 1996. (Merciel Surrebuttal, Staff Ex. 16, Attachment No.3.) On page 2 of that restatement, the Developer chronicles the multitude of amendments to the declarations previously recorded, and on page 3 "rescinds all prior instruments mentioned above inconsistent with the following Third Amended and Restated Declaration of Restrictive Covenants." On page 18 of this amendment and restatement, the Developer set out provisions pertaining to the water and sewer systems. The provision is nearly identical to the one quoted above with a significant difference Lake Region notes in bold face type:

> IX. WATER SYSTEM AND SEWAGE TREATMENT SYSTEM:
>
> A. The Owner of each lot agrees to pay the Owner of the water works system to be constructed within the Development, a minimum monthly availability charge for water, water service and the accommodations afforded the Owners of said lots by said water works system, commencing upon the availability of water in a water works system distribution main provided for the lot and continuing thereafter so long as water is available for use, whether ore not tap or connection is made to a water works system distribution main and whether or not said Owner actually uses or takes water. No charge will be made to the lot Owners for the right to connect to the water system. Each lot owner will bear the cost of the service line form his building into the water main. The said Owner or Owners of said water works system will be a privately owned public utility authorized by a Certificate of Public Convenience and Necessity issued by the

State of Missouri Public Service Commission ("PSC") to operate the water works systems.

The aforesaid amounts of said availability charges, times and methods of payments thereof by said Owners, and other matters, shall be as provided in Schedules of Rate and Rules, Regulations and Conditions of Services for Water Services, filed and published by said public utility or utilities which said Missouri PSC, or any successor Regulatory Body of the State of Missouri, in accordance with law and passed to file or formally approved by said PSC as the then effective Schedule of Rates and Rules, Regulations and Conditions of Service of said public utility or utilities, **or if not so provided, as determined by the Owner of the water works systems.** The amounts of said availability charges and other charges are subject to change hereafter by order of the said Missouri PSC or its successors, in accordance with then exiting law and the structure of said availability charges are likewise and in the same manner subject to change from availability rates to another type of rate or rates.

Unpaid charges shall become a lien upon the lot or lots to which they are applicable as of the date the same become due.

At the time this restatement was filed, a plan for a sewer treatment plant had been approved but it involved the installation of individual treatment facilities not a centralized facility. No provision for sewer system availability fees is made in this restatement.

On July 22, 2009, in an instrument recorded on July 29, 2009, the Developer amended the Third Amended and Restated Declaration of Restrictive Covenants particularly with respect to the water and sewer systems (the Water and Sewer Amendment). On page 5 and 6 of the Water and Sewer Amendment, the Developer provided [bold face emphasis is added]:

3. Water Systems.

3.1 Shawnee Bend Lots – Central Water System. The Owner of each Lot located on Shawnee Bend in a subdivision serviced by a central water system agrees to pay the owner of the central water system, **or its assigns or designees**, a monthly availability charge of Ten Dollars ($10.00) unless the Owner of the Lot is contractually obligated to Developer or Developer's assign to pay a different amount. This availability fee shall commence upon the availability of water in a water system distribution main provided for the Lot and shall terminate when the Owner connects his Lot to the water system distribution main. Each Lot Owner will bear the cost of the service line from his building to the water main. Unpaid availability fees shall become a lien upon the Lot the date they become due.

3.2 Horseshoe Bend Lots - Central Water System.[6] The Owner of each Lot located on Horseshoe Bend agrees to pay the owner of the water works system to be constructed within the Development on Horseshoe Bend a minimum monthly availability charge for water, water service and the accommodations afforded the Owners of said Lots by said water works system, commencing upon the availability of water in a water works system distribution main provided for the lot and continuing thereafter so long as water is available for use, whether or not tap or connection is made to a water works system distribution main and whether or not said Owner actually uses or takes water. No charge will be made to the Lot Owners for the right to connect to the water system. Each Lot Owner will bear the cost of the service line from his building into the water main. The said owner or owners of said water works system will be a privately owned public utility authorized by a Certificate of Public Convenience and Necessity issued by the State of Missouri Public Service Commission ("PSC") to operate the water works systems.

The aforesaid amounts of said availability charges, times and methods of payments thereof by said Owners, and other matters, shall be provided in the Schedules of Rate and Rules, Regulations and Conditions of Services for Water Services filed and published by said public utility or utilities which said Missouri PSC, or any successor Regulatory Body of the State of Missouri, in accordance with law and passed to file or formally approved by said PSC as the then effective Schedule of Rates and Rules, Regulations and Conditions of Service of said public utility or utilities, **or if not so provided, as determined by the owner of the water works system.** The amounts of said availability charges and other charges are subject to change hereafter by order of the said Missouri PSC, or its successors, in accordance with then existing law and the structure of said availability charges are likewise and in the same manner subject to change from availability rates to another type of rate or rates.

Unpaid charges shall become a lien upon the Lot or Lots to which they are applicable as of the date the same become due. Nothing in this paragraph shall be construed as a limitation on the rights of any such public utility to sell and assign in accordance with law its property and assets to a governmental subdivision of the State of Missouri.

* * *

4. Sewer Systems.

4.1 Shawnee Bend Lots - Central Sewer System. The Owner of each Lot in a subdivision located on Shawnee Bend serviced by a central sewer system agrees to pay the owner of the central sewer system, **or its assigns or designees** a monthly availability charge of Fifteen Dollars ($15.00), unless the Owner of the

[6] This refers to the water services provided by Ozark Shores on Horseshoe Bend. Ozark Shores is the owner of the rights to the availability fees charged to undeveloped lots on Horseshoe Bend.

> Lot is contractually obligated to Developer, or Developer's assign, to pay a different amount. This availability fee shall commence upon the availability of a sewer distribution main provided for the Lot and shall terminate when the Owner connects his Lot to the sewer system distribution main. Each Lot Owner will bear the cost of the service line from his building to the sewer main. Unpaid availability fees shall become a lien upon the Lot the date they become due.
>
> Prior to the extension of the central sewer system to such a Lot as described above, the Owner of the Lot may install an individual sewer system. Once the central sewer system is available to the Lot, the Owner must disconnect the individual sewer system and utilize the central sewer system.

The Developer expressly contemplated the filing of a fourth amended and restated declaration and further provided on page 8 that the "Water and Sewer Amendment will survive the execution and recording of the Fourth Amended and Restated Declaration."

The Fourth Amended and Restated Declaration of Restrictive Covenants was executed effective October 1, 2009 and recorded October 7, 2009.[7] On page 17, the Developer provided:

> 9. WATER AND SEWER SYSTEMS
>
> All provisions relating to Water and Sewer Systems and treatment are set forth in the Amendment to Third Amended and Restated Declaration of Restrictive Covenants Relating to Water and Sewer Systems dated July 22, 2009, recorded July 29, 2009 in Book 681, Page 760 in the Office of the Recorder of Deeds of Camden County, Missouri (the "Water and Sewer Amendment"). All provisions of the Water and Sewer Amendment shall survive the recording of this Declaration.[8]

In the same fourth amendment and restatement the Developer set out an amendment to the manner in which the declarations of restrictions could be modified. On page 38, the Developer provided:

[7] Staff Ex. 12, Cover Page.

[8] The charging and collection of availability fees for the central water system and central sewer system for Shawnee Bend lots are currently governed by the provisions just quoted. Lake Region knows of no other amendment to the declarations made by the Developer pertaining to water or sewer services. Conspicuously absent from the Water and Sewer Amendment is any reference to Missouri PSC involvement with respect to availability fee charging and collection on Shawnee Bend lots.

19.3 Term and Amendment. The provisions of this Declaration as amended from time to time shall affect and run with the land and shall exist and be binding upon all parties claiming an interest in the Development until January 1, 2015, after which time the same shall be automatically extended for successive periods of ten (10) years each unless the Owners of ninety percent (90%) of all Lots vote, at a special meeting of the Association called for that purpose, to terminate this Declaration. This Declaration may be amended at any time by the Developer at the request of or with the consent of the Board until such time as all Lots in the Development have been sold, at which time this Declaration may be amended by the affirmative vote of two thirds (2/3) of the Owners of all Lots in the Development entitled to vote. In the case of an amendment by two thirds (2/3) of the property owners, an amendment to this Declaration shall be duly executed by:

(a) the requisite of such Owners required to effect such an amendment; or

(b) the Association, in which latter case such amendment shall have attached to it a copy of the resolution of the Board attesting to the affirmative action of the requisite number of such Owners to effect such an amendment, certified by the Secretary of the Association.

*Developer's Lot Pricing and Contracts*

From Peter N. Brown the Commission will learn that the availability fees provided for in the declarations of restrictions and covenants were designed to recover Four Season Lakesites Inc.'s investment in the water and sewer systems and not to subsidize the operations of each system. The cost of the property when acquired by the developer was $300 to 350 per acre and was carried on the developer's books at that level, but at the time of the development of the area, the per acre market value was much greater.

The developer's plan was to recover the cost of providing water and sewer utilities from the lot purchasers by standby or availability fees. In addition to the obligations imposed on lot purchasers in the declarations, all or nearly all of the lot purchases are obligated **by contract** to pay the developer or the developer's assigns any standby or availability fees. (Staff Exhibits 27 and 28, affidavits of Peter N. Brown and his supplemental responses)

*Annual Reports of the Company*

The Commission has taken official notice of the annual reports filed with the Commission by Lake Region for the years 1972 to 2008. Pursuant to a May 5, 2010 Commission order, Staff filed a report,[9] with considerable additional information, (Annual Report Response) identifying any reporting by Lake Region, year by year, of the dollar amount of the collection of any availability fees. The Commission allowed Lake Region to respond to Staff's report. A few highlights of Staff's report and of Lake Region's response are important here.

In Staff's Annual Report Response it attached an Appendix I with three separate Tables. Table 1 will be spotlighted in this brief. Setting aside Staff's estimated amount of availability fees for 1986, Table 1 shows that total availability fees reported in the annual reports of Lake Region since 1972 is $2,238,127. All of the availability fee revenue is reported as *non-regulated income* on line F-42, not $2,388,127 as reported by Staff. *All availability fee collection totals listed on Table 1 from 1974 through 1992 relate to the water infrastructure on* ***Horseshoe Bend****.* Four Seasons Lakesites Water & Sewer Company sold the Horseshoe Bend water infrastructure to Ozark Shores in 1992 or 1993. See Case No. WM-93-59. Ozark Shores owns the rights to the availability fees collected on Horseshoe Bend and charges for those fees. (Tr. 359, 485). Ozark Shores continued to report the availability fees as non-utility income in its annual reports until 2005 when it was instructed by Commission personnel to file an amended annual report excluding unregulated services/activities. (Tr. 359-360) The Staff email containing this instruction was admitted as evidence at hearing. (LRWS Ex . 9.)

[9] The Staff's response to the Commission's May 5 Order was filed on May 28, 2010. On June 1, 2010 the Commission directed Lake Region to respond and the response was timely filed June 8, 2010.

The only availability fees related to the Shawnee Bend water and/or sewer operations which may have been owned by Lake Region are the amounts shown on Table 1 for the years 1995 through 1998 totaling $190,403.[10] In 1998, the stock of Lake Region was sold to Roy and Cindy Slates along with the rights to the availability fees. From 1998 forward, Lake Region's annual reports do not contain reports of availability fee revenue. (Tr. 356-357) (LRWS Ex. 8).

*Treatment of availability fees historically by the Commission*

During his direct examination on March 31, 2010, Dr. Vernon Stump testified:

**Q Let me ask you this: In past cases before the Commission or with the Staff, has the Staff made offsets to costs when availability fees are included in company revenues?**

A Yes, sir. Yes, they have.

**Q And do you have -- can you identify the cases that you know of where that treatment was given to availability fees?**

A Yes, I can. In Case No. WR-92-59, which was a rate case with Lakesites Water & Sewer Company, at that time, the Staff removed the availability fees from the revenue stream, and they also reduced the rate base a certain amount as an offset for the reduction of the availability fees.

**Q Now, with respect to -- are there other cases where those -- that kind of treatment was made?**

A Only that in -- in the next rate case that Ozark Shores had in -- I believe that was in '97, '98 and '99, it took a couple of years to get that done, the availability fees were then added back into the revenue stream of the company. But the Staff also added additional rate base to the company.

**Q And do you remember what case number that was?**

A I have that case. And it is Case No. WR-98-990.[11]

[10] Whether Lake Region ever owned the rights to the availability fee income is doubtful. As stated in Company's response to Data Request 115, the Company has no documents ever showing a transfer of these rights from the developer to the utility. In the sale to the Slates, it appears that the Developer considered the availability fees its exclusive property, and did so in the litigation with Lake Region, Ms. Stump and RPS Properties, LP.

[11] It has since been determined that this case number was joined with work papers prepared for purposes of Case No. 99-183, the actual case number of the rate case to which Dr. Stump refers.

**Q So what I'm understanding from your – your statements today is that there are two cases that you know of where the Staff removed availability fees and reduced rate base. But then in the next case, they added the availability fees back into revenue and increased the rate base?**

A That's correct.

Tr. 560-561.

In his true up rebuttal testimony, Mr. John Summers added to Dr. Stump's account of past treatment of availability fees.

**Q. What has been the traditional treatment of availability fee revenue and associated plant?**

A. I have attached JRS Schedule 2 which shows past treatment of these items in both certificate cases and rate cases. In each of the four instances over the past 39 years the Commission has been consistent in using proper ratemaking technique of matching costs and revenues. In every case the Commission either included both availability fee revenue and the associated plant or they excluded both the availability fee revenue and the associated plant. Never before has the Commission attempted to make the one sided entry proposed by Staff and Mr. Featherstone in this case.

*Case No. 17,954*

In Case No. 17,954 the Company sought authority from the Commission to provide regulated water service on Horseshoe Bend. Staff Witness Gary Bockman testified during the hearing on this case that "The feasibility study is one of the better ones that I've seen." (LRWS Ex. 14, Page 35) The only issue Mr. Bockman raised with the feasibility study was that he believed every customer should be metered and there should be no unmetered flat rate customers.[12] In addition, on Tables 4 and 6 of the feasibility study the availability fees were clearly identified as revenues available to the Company. (LRWS, Ex. 13, page 22) Per Tables 6 and 7 the regulated rates were designed to recover the operating and maintenance expenses. All

[12] Lake Region understands that the developer agreed to this since every Ozark Shores Water Company and Lake Region Water & Sewer Co. water customer is metered today.

plant investment was allowed and none was treated as contributed plant. The availability fees were included in revenue to recover the capital costs of the investment. The Commission chose not to tariff the fees.

*Case No. WR-92-59*

In Case No. WR-92-59[13] involving Horseshoe Bend the Staff excluded the availability fees from revenue and made adjustments to reduce plant, which had not previously been treated as contributed, in order to match revenue to rate base. The net effect was to allow recovery of the capital costs through the availability fees without actually regulating or tariffing the availability fees.

*Case No. WA-95-164*

In Case No. WA-95-164 (Shawnee Bend Certification Case) Staff designed rates to recover the operating and maintenance expenses, treated the plant investment as contribution and excluded the availability fees from the calculation. The net effect was to allow recovery of the capital costs through the availability fees without regulating or tariffing them.

*Case No. WR-99-183*

In Case No. WR-99-183, the Ozark Shores rate case (Horseshoe Bend), Staff included the availability fees as revenue and did not make the adjusting entries to reduce rate base just as was done in the original case involving Horseshoe Bend service area, which was Case No. 17,954 above. The Contribution in Aid of Construction in the case was from customer connection fees per Ozark Shores' tariff.

## III Discussion

### A. Commission Jurisdiction

[13] For additional information , please note that a copy of the Report and Order and related work papers in Case No. WR-92-59 were attached collectively as Schedule 3 to Lake Region's response to the Commission's May 19, 2010 Order.

It is so elementary an axiom that it requires no citation of authority that the Commission is a creature of the legislation that enables it and it has no powers beyond what are granted by statute. Although the Public Service Commission Law is classified as a remedial enactment, it cannot be validly interpreted to give the Commission powers beyond those expressed therein.

> Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the [Public Service Commission Law], either expressly, or by clear implication as necessary to carry out the powers specifically granted, *State ex rel. City of West Plains v. Public Service Comm'n,* 310 S.W.2d 925, 928 (Mo. banc 1958). Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, "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 the statute, *State ex rel. Kansas City v. Public Service Comm'n,* 301 Mo. 179, 257 S.W. 462 (banc 1923).

*State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. 1979); *see also, State ex rel. Cass County v. Public Service Commission,* 259 S.W.3d 544, 547 -548 (Mo.App. W.D., 2008).

If the Commission lacks statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties. *Carr v. North Kansas City Beverage Co.,* 49 S.W.3d 205, 207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dept. of Social Services, Div. of Family Services*, 809 S.W.2d 153, 156 (Mo. App. 1991).

The Commission's jurisdiction is set out in Section 386.215 RSMo 2000, and in particular,

> The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:
>
> (6) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnection or refusing to reconnect public utility service and billing for public utility service.

The term "service" is also statutorily defined.

> **"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;

Section 386.020 (48) RSMo Cum. Supp. 2009.

The Commission is without subject matter jurisdiction over the billing and collection of availability fees. Having water or sewer system facilities available to an undeveloped subdivision lot does not constitute a "service" as defined in Section 386.020. This is certain particularly in this matter in which availability fees are charged to owners of undeveloped or vacant properties. An owner of an undeveloped property consumes no service from a water or sewer company. Staff witness James Merciel has testified on more than one occasion that availability of utility infrastructure is not, in his opinion, (if not in fact) a utility "service." (Tr. 497). [14] His testimony in this regard was mentioned by the Commission in its report and order in Case No. WC-2006-0082 and WO-2007-0277.[15] where the Commission held at page 57-58:

> As defined in Section 386.020(47): "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 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." The reservation of a tap-on is not the provision of water or sewer service and does not involve a use,

[14] Moreover, the Commission accounting department is on record that the revenue from availability fees is "unregulated." (LRWS Ex. 9.)

[15] *Cathy Orler et al. v. Folsom Ridge LLC* consolidated with *In the matter of the Application of Folsom Ridge LLC and Big Island Water and Sewer Association, Inc. for an Order Authorizing the Transfer of Certain Water and Sewer Assets to Big Island Water Company and Big Island Sewer Company, and in Connection Therewith Certain Other Related Transactions.*

> accommodation, product or commodity. Indeed, Mr. Merciel, from the Commission's Staff, testified at hearing that other Commission regulated companies charge similar reservation/maintenance fees, that these are untariffed charges and that these fees do not constitute a charge for utility service.

The Commission has ruled similarly in another case.

In Case No. SO-2007-0071[16] Central Jefferson Utilities (Central Jefferson) requested authority from the Commission to transfer certain of its water and sewer assets to Jefferson County Public Sewer District. The assets were water and sewer mains and other equipment used to provide water and sewer service to Raintree Plantation Subdivision which was developed by Raintree Plantation, Inc. (Raintree) Raintree donated the water and sewer mains to Central Jefferson. To recover its costs from installing the water and sewer mains, Raintree required the buyers of each lot to pay a connection fee for connecting to the water and sewer mains. Raintree's connection fee was collected pursuant to an "Intrastate Exemption Statement" executed by Raintree and the purchaser of the lot. Raintree's connection fee totaled $1,100.00 and was composed of a $700.00 fee for sewer service, $300.00 fee for water service and a $100.00 fee for fire hydrant. The owners of Central Jefferson and the owners of Raintree were the same individuals. As part of the transfer the Sewer District and Raintree entered a Sewer and Water Service Fee Agreement in which the Sewer District agreed to collect certain connection fees and then pay them through to Raintree. The Sewer and Water Service Fee Agreement was not favored by the Commission. At page 36 of the Report and Order the Commission concluded however:

[16] *In the Matter of the Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*

> While the Commission lacks jurisdiction and authority over the Sewer District and Raintree, and has no standing to challenge the "side dealings" surrounding this transaction, the Commission expresses its extreme displeasure with the Sewer and Water Service Fee Agreement executed between these parties. This agreement funnels connection fees from the property owners back to Raintree for the questionable consideration of enforcing a contract with Aquasource, a duty Raintree already has, and for ill defined contributions that Raintree has made to Central Jefferson for various engineering and legal expenses. Simply put, this transaction does not pass the "smell test." Perhaps another party with standing will have the opportunity to challenge this transaction considering the proximity of the corporate entities and owners of Raintree and Central Jefferson.

In the case now before the Commission the result should be exactly the same. Here a developer by contract and by provisions of real property deed restrictions has imposed on buyers of undeveloped property within the subdivisions served by Lake Region an obligation to pay fees to recover the costs the developer incurred for installing water and sewer infrastructure. Like Raintree, that developer donated the water and sewer plant to the regulated utility. Like Raintree, the developer is beyond the jurisdiction and authority of the Commission. The developer's transactions in the buying and selling of rights to availability fees is likewise beyond the authority of the Commission to control.

The Commission lacks subject matter jurisdiction over the billing and collection of fees designed to recover the costs of a developer's investment in water and sewer assets that have been donated to a private utility. The Commission has no authority to consider Staff's proposals concerning an allocation of such fees in this case. Any evidence offered in this case respecting availability fees charged and collected on Shawnee Bend is irrelevant and should be stricken. The availability fees charged to undeveloped lot owners on Shawnee Bend within the Company's service territory is not a proper issue before the Commission and it should have no influence on the Commission's decision respecting the Company's request for rate relief.

### B. Indisputable Facts and Restatement of the Issue

If the Commission rejects the Company's jurisdictional arguments, then it is Lake Region's position that Staff's proposals cannot be accepted.

At the outset, there are facts no longer in dispute that should be underlined in this section of Lake Region's brief. The Company does not derive any income or revenue from availability fees. The Company has no rights to the availability fees. The availability fees affecting lots in the Company's Shawnee Bend service area are paid to persons who are entitled to those fees pursuant to a set of recorded deed restrictions that have been amended many times or by virtue of contract obligations that accrued at closing on the lot sale. The Company's customers do not pay availability fees to Lake Region. Even Mr. Robertson of the Office of Public Counsel agrees. (Tr. 557-550) They pay only the rates and charges in the Company's tariffs as approved by the Commission. If any Company ratepayer happens to be paying an availability fee it is entirely because the ratepayer made an independent decision to purchase an undeveloped lot subject to the deed restrictions assessing the fee or subject to the contractual obligations the developer imposes at closing, or both. The Company has no power to enforce the payment of the availability fee against the lot owner even if the lot owner is also a Company ratepayer.

Under the provisions of the current set of declarations of restrictions, the owners of the properties subject to the availability fee have the means through their property owners' association or independently to terminate the billing and collection of availability fees. Lake Region has no control over that decision. [17]

[17] Ms. Nancy Cason testifying on behalf of the POA admitted that Commission regulation of the availability fees did not enter into her decision or her husband's decision to purchase their lot(s). She learned about them after the sale closed. (Tr. 395). She also testified that the major objection of the POA is **payment** of the availability fees. (Tr. 404). Under the current amendment of the declarations, she and other lot owners may, with the property majority, modify the restrictions. This Commission, having no authority to enter equitable decrees, is powerless to relieve the lot owners from the duties imposed by their contracts with the Developer or by the declarations. The POA's objections to paying the availability fees are opposed by hornbook principles. "[A] purchaser is bound with

The legal rights to the availability fees on Shawnee Bend have been assigned by the developer of that area to RPS Properties, LP and Sally Stump who are the shareholders in LRWS. For convenience, RPS Properties and Ms. Stump use the business name --- a registered fictitious name --- of Lake Utility Availability with respect to billing and collection of those fees.

The issue was presented to the Commission in this way:

> **Should charges for availability fees collected from owners of undeveloped lots in LRWS's service territory and billed and retained by an affiliate company be classified as LRWS revenue or applied against rate base?**

The statement of the issue is itself objectionable. The mention of an "affiliated company" is a distortion of the facts and veils the true issue:

> **Should revenue from availability fees that are owned, billed and collected by Lake Region's shareholders, not the Company, be classified as Company revenue for rate making purposes?**

There is nothing in this record to indicate that an "affiliated company" bills and retains availability fees. The evidence is unassailable that the two shareholders of Lake Region ---one an individual, the other a family limited partnership --- have the rights to bill and collect the availability fees due and owing from undeveloped lot owners on Shawnee Bend.[18] Shareholders are separate and distinct from the corporation whose shares they may hold. An owner of corporate shares does not become an affiliate of the corporation which he or she partially owns

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constructive notice of all recorded instruments and the recital therein lying within the chain of title." *Hammrick v. Herrera,* 744 S.W. 2d 458, 461 (Mo.App.W.D. 1987). Restrictive covenants are to be strictly construed and doubts as to their validity are resolved in favor of free use of the property but a land restriction upon subsequent grantees is ordinarily valid particularly where the restriction has been recorded. *See, Hall v. American Oil Company,* 504 S.W.2d 313, 317 (Mo.App.St.L.D. 1974). "[O]ne who signs a contract is presumed to know and understand its terms, and a mere failure to read or inform himself of such terms, in the absence of fraud, is no defense." *Day v. National Fire Insurance Co.,* 264 S.W. 467, 468 (Spr. Ct. App., 1924).

[18] During opening statements, counsel for the staff seemingly referred to Lake Utility Availability as a "sham entity." (Tr. 107-108). This is of course refuted by the record. "Lake Utility Availability" is nothing more than a business name, not an entity, used by Ms. Stump, an individual, and RPS Properties LP. Given the name's long history of public registration with Missouri authorities, and the openness with which it has been used by the current Company shareholders for billing, it cannot be seriously argued that its use is counterfeit or a device of trickery.

simply by virtue of stock subscription.[19] The law in this state sets up formidable walls of legal distinction between shareholders and the corporation they may own.

Ordinarily, a corporation is regarded as a separate entity, distinct from the members who compose it. The corporate entity will be disregarded when it appears the corporation is controlled and influenced by one or a few persons and in addition, that the corporate cloak is utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud. However,

> [i]t must appear not only that the corporation is controlled and influenced by one or a few persons, but, in addition, it is necessary to demonstrate that the corporate cloak is utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud. Furthermore, the corporate entity will not be disregarded where to do so would promote an injustice or contravene public policy.

S*ampson Distributing Co. v. Cherry*, 346 Mo. 885, 890-891, 143 S.W.2d 307, 309 (Mo.1940).

Lake Region serves the public convenience under regulation by the Commission. The record shows that it provides safe, reliable and adequate service. Customers are not just satisfied but pleased by that service. Providing potable water and sanitary permanent sewer service is a public good, and cannot seriously be labeled as wrongful. Lake Region's corporate cloak has not been manipulated by its owners and to disregard its corporate organization promotes injustice to its shareholders. The personal assets of the shareholders of Lake Region --- assets which in this instance were acquired after negotiation and pursuant to a stock purchase contract that was independent and apart from the regulated utility--- cannot lawfully be the source of revenue support for Lake Region's provision of water and sewer service to its customers. The effect of doing so offends basic constitutional protections.

[19] Moreover, there is no evidence in this record upon which to argue that Ms. Stump and RPS Properties, LP, either jointly or separately, constitute a "water corporation" or "sewer corporation" as those terms are defined in Section 386.020, RSMo Cum. Supp. 2009.

The rights to charge and collect the availability fees under review in this case constitute the independently owned and validly acquired property of the Company shareholders. To the extent the Commission may in fact, or constructively, classify the availability fee revenue as Company revenue, it takes the shareholders' private property for public use without just compensation in violation of the 5th Amendment to the US Constitution and Article I, Section 26 Mo. Constitution (1945, as amended). Furthermore, the shareholders are not parties to this rate case. Utilizing revenue to which they are entitled from their own ventures in order to subsidize the Company's regular operations deprives them of their property without due process of law in violation of the 14th Amendment to the US Constitution and Article 1, Section 10, Mo. Constitution (1945, as amended).

**C. Staff's Proposals**

The proposal advanced by the Staff, and one which Office of Public Counsel has endorsed, was first articulated in Staff's surrebuttal evidence. This issue, which according to Staff, involves the treatment of in excess of $300,000 annually, was not vital enough to include in its direct case which was filed on January 14, 2010, although Staff and OPC were aware of information adequate enough to explore the issue in advance of the direct case. At the conclusion of the initial hearing on March 31, 2010, the Commission recognized this irregularity.[20]

1. Staff's first recommendation

[20] "[T]he issue of availability fees was at least made aware—made available for all parties at [December 10, 2009]. They should have been aware of that being an issue in this case. Mr. Robertson filed direct testimony which bore on that issue, and responsive testimony came in. And I believe that it was fair for the rebuttal testimony to address those issues, although the Commission is a little bit surprised they weren't part of the direct caser of the other parties because it's been clear throughout the testimony of Mr. Merciel and others that this issue of availability fees has been out there for years and there was responsive ---responses to [data request 44.1] , which should have made that issue plainly available. And although the Commission is not going to strike based upon the procedural objection, the Commission is a little displeased the issue wasn't more fully developed in the direct testimony." (Tr. 660-661)

Staff's first recommendation was to "offset Lake Region's operating system revenue requirements by the Availability Charges collected, calculated in this case." (Staff Ex. 16, Featherstone Surrebuttal, page 9). Mr. Featherstone estimated those availability charges to be $360,000 annually and he explained that "[i]f the above Availability Charges are used as an offset" to the revenue requirement "there would be no rate increase." (Staff Ex. 16, Featherstone Surrebuttal, page 10). Staff did not recommend an offset to costs such as increasing the Company rate base by the amount of donated plant associated with the availability fees. The Commission must reject Staff's proposal.

*Staff's recommendation of Imputing Availability Fee Revenue to the Company does not comply with the ratemaking process employed by the Commission and would create confiscatory rates.*

As Mr. Summers testified during the true up phase of this case:

**Q. Is Mr. Featherstone's approach of imputing availability fee revenue correct?**

A. No, it is not. The Staff has assumed throughout this case and continues to assume that Lake Region and its customers have some rights to the availability fee revenue. These fees are not owned by the Company; the Company has no right to them and there is no relationship between the availability fees and the Company other than the Developer made the fees contingent upon a water and/or sewer pipe running in front of the property. The fees result from a contractual agreement between the Developer and the purchaser of the property. This is not a revenue stream originated or authorized by the Commission and I am unaware of any authority this Commission has to regulate real estate transactions***. If the Staff is allowed to impute revenue from assets not owned by the Company and to which the Company has no access it negates the entire ratemaking process this Commission has used since its inception.***

[emphasis added] (LRWS Ex**.** 12, Summers TU Rebuttal, page 3).

Mr. Summers went on to testify about the unreasonable effects of imputing the availability fee revenue as recommended by the Staff, including an unjust shift of utility costs to noncustomers of the Company. At page 4 of his rebuttal during true up Mr. Summers testified:

Imputing the revenue without adjusting the rate base for the plant associated with the revenue goes against every principle of matching costs and revenues in the

> ratemaking process. The customers were given the benefit of lower rates by virtue of the Developer donating the plant. The Staff now wants to give the customer the revenue stream that was created by the Developer to recoup the investment in the donated plant. ***The effect is that the plant is donated twice to the Company. Just as importantly, this proposal would mean that the owners of undeveloped lots on Shawnee Bend, most of which are non-lakefront properties, who take no water or sewer service from the Company, pay the way for the owners of million dollar lakefront homes.***
> [emphasis added]

Furthermore, imputing revenues is merely a fictitious entry made only on the Staff's version of Lake Region's books and would serve to hold the Company rates at an artificially low level. Imputing the revenue does not mean receipt of the revenue. With Company rates held artificially low by imputing a revenue stream, eventually the *actual* cash flow generated by the Company will not be adequate for the Company to provide safe and adequate service. (LRWS Ex. 12, Summers TU Rebuttal, Page 6).

Moreover, the use of artificial revenue in this manner renders the rates confiscatory.

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.

*Bluefield Waterworks & Imp. Co. v. Public Service Commission of W. Va.*, 262 U.S. 679, 690, 43 S.Ct. 675, 678 (U.S.1923).

*Staff's recommendation is inconsistent with Staff's and the Commission's past treatment of availability fees.*

Lake Region invites the Commission to review the Background section of its brief for the chronology of Commission cases which have given treatment to availability fees. On the basis of its report and order in Case No. 17,954, the Commission can readily conclude that when the Company was first certificated, the developer intended for the availability fees (at that time for the water system on Horseshoe Bend) to be regulated and probably tariffed. The record

indicates that the Commission, not the developer, determined that the availability fees were not to be tariffed or regulated.

The Commission's treatment of availability fees has been consistent throughout the years until the surrebuttal phase[21] of the current case. Staff's direct case filed on January 14, 2010 included the plant with an offset for all donated plant and did not include availability fees *just as Staff did in Case No. WR-95-164.* Since that time, Staff has disregarded, without explanation, the Commission's approved treatment of availability fees.

Had Staff's current proposal been used by Staff or the Commission in any of the previous four rate cases described in the Background portion of this brief, **the tariffed rates to customers would have been at or near zero** and the entire cost of operating and maintaining the systems would have fallen on the undeveloped lot owners who were not taking water and/or sewer service. The rates in the current case would also be at or near zero on Shawnee Bend including the areas in which there are no availability fees.

The Company has argued before and again contends that Staff's proposal is not tied to any principle recognized in the ratemaking process. Rather, Staff ignores obedience to principle in order to achieve its desired result that the Company's rates for service will never be higher than those approved in 1997. It has invented a method, unknown until now, by which to obtain that result. Staff's device is a de facto "Lake Region Reserve Fund," not authorized by statute or regulation, which is annually infused with shareholder-owned, not Company-owned, availability fees. Although the shareholders will own and pay taxes on those availability fees, Staff will nonetheless employ them as a fictional Company reserve in order to cap Company rates at the level set in 1997, when the availability fees were not used in the ratemaking process. Staff's Lake Region Reserve Fund has an indefinite duration and therefore, it can be applied by Staff to

[21] Mr. Merciel supplied rebuttal testimony on the issue but Staff's proposals did not surface until surrebuttal.

deny relief in future rate cases for years to come. Staff's proposal invites the Commission to exercise powers over the assets of utility shareholders that are far beyond its province.

Staff's first recommendation, which is to include availability fees billed and collected by the shareholders as Company revenue, should be rejected. In the absence of a corresponding offset to costs, such as the addition to rate base of the plant associated with the availability fees, this proposal discards previous Commission decisions on the topic, results in an unfair shift of costs to persons not customers of the Company, and very importantly, artificially reduces the Company rates to confiscatory levels in violation of the 14th Amendment to the US Constitution.

2. Staff's second (alternative) recommendation

Staff's second recommendation is framed as an alternative to the first. Mr. Featherstone testified that,

> should the Commission not include Availability Charges in rates, . . ., then it is critical to assign all costs relating to Availability Charges. Staff would propose to assign costs relating to the administration of the Availability Charges to that activity if those revenues are not included in the revenue requirement calculation to determine water and sewer rates in these two cases.

(Staff Ex. 16, Featherstone Surrebuttal, page 11). Mr. Featherstone reallocated the executive management fees he recommended in his direct testimony so that a third was assigned to Lake Region for billing and collection of availability fees. The amount of those fees was $18,600.

Lake Region does not bill or collect availability fees. Therefore, Lake Region shows no costs on its books for the billing and collection of availability fees. Mr. Featherstone made no effort to determine any actual costs, if any, incurred by the management of Lake Region related to availability fees. (Tr. 454). The figure of $18,600 has no basis in fact and is patently unreasonable.

Dr. Stump pointed out the unreasonableness of the reallocation at hearing and offered a compromise:

> **Q If you were to be asked to do so, do you have a manner in mind about how those costs might be reallocated?**
>
> A If -- if I was going to look at reallocating those costs, I would first look at what service or what -- what does Lake Utility do, what work do they do. They send out 1200 bills a year, and they collect 1200 bills a year. So I'd look at what would -- what would be the effort to collect those bills.
>
> And to do that, as was testified earlier, there is a clerk in -- at the water district's office that does that particular function. My best estimate is that overall, she sends out about 38,000 bills a year. 1200 of those are for the availability. And that calculates to about 3 percent of -- of her time.
>
> So I would -- would say that it would be fair to estimate 3 percent of her time for providing that function. I would say that, certainly, there's a cost of probably 50 cents a bill for -- for stamps and buying paper. There is a cost for the management of providing that service. If you relate that cost to the functions that Ozark Shores provides and the functions that Lake Region provides, they are a utility company. They – they read meters. They repair lines. They operate wells. 16 They operate sewage treatment plants. They provide emergency service. They provide a pretty substantial function where, again, Lake Utility collects the bills.
>
> If you compare the time spent by the clerk to collect those bills versus all of the staff, that translates down to maybe three-tenths of a percent of management time is related to that function. And comparing that to the -- the amount that we have requested for management fees, it would probably be about $600 a year for that function. So if we add those functions all together, I think a reasonable cost for providing that service is in the $2,000 a year range.
>
> **Q And compared to what the Staff has proposed, how much of a difference is there?**
>
> A The Staff is proposing a little in excess, I believe, of 18,000. And if you -- if you look at that on a -- on a per bill basis, as a small company, effectively, they're sending out a hundred bills a month. **And $1500 a month for collecting a hundred bills is a pretty – pretty nice contract.**
> [emphasis added]

Staff was also inconsistent in the allocation of executive management fees in this case. The Water District provides limited management for the billing and collection of

water rates for Northern Illinois Investment Group (Northern Illinois) which has approximately 39 customers. No costs for billing those customers appears in Lake Region's general ledger just as there are no costs associated with the billing of availability fees in that ledger. Unlike his alternative recommendation on availability fees, Mr. Featherstone recommended no allocation of cost to Lake Region for the Water District's billing of the Northern Illinois' customers. (Tr. 743-744). Staff provides no reason for treating availability fee billing and collection any differently than the customer billings for Northern Illinois. Lake Region contends that there should be no different treatment. No costs for availability fee billing and collection should be allocated to Lake Region just as there is no cost allocated for the billing and collection of Northern Illinois' customers. Staff's alternative recommendation should be rejected by the Commission.

## IV. Developer Recovery of the Costs of Donated Plant

In a response filed in compliance with recent Orders directing filings issued by the Commission, Staff claimed that with the availability fees collected to date, "[t]he $5.3 [sic] contributed plant has been fully recovered." Lake Region believes it proper to close this brief with an important clarification.

On May 27, 2010, the Commission directed the Staff to file a reply to Lake Region's May 26, 2010 response (Lake Region's Response). On June 7, 2010, the Staff filed its reply (Staff's Reply). In Paragraph 14. A. of Staff's Reply on page 9 Staff asserts that "[t]he $5.3 [sic] contributed plant has been fully recovered." Staff's statement is simply incorrect. Staff could not possibly have examined the Company's books and records to arrive at such a conclusion. As shown on Staff's filing of May 28, 2010, the Company reported $2,388,127 of availability fees for 1973 – 2010. Staff knows, or should now be well aware, that all of the availability fees

reported in the Company Annual Reports from 1973-1992 were strictly associated with the ***water infrastructure on Horseshoe Bend*** which was sold to Ozark Shores Water Company. In this section of its reply, Staff appears to argue that $2,197,724 of availability fees, which Staff knows have been used in ratemaking for Ozark Shores Water Company, should now be used again to offset the infrastructure costs of the Lake Region systems located on a completely different peninsula. Staff acknowledges in the Conclusion found in Paragraph 16 on page 15 of its reply: "As Horseshoe Bend does not have availability fees associated with its service area there are no additional revenues to consider for this operating system." As shown in Staff's May 28, 2010 filing, the only amounts on the Company's books for availability fees related to water and/or sewer systems on Shawnee Bend were those for the years 1995-1998 totaling $190,403.

Another flaw afflicts Staff's calculations on recovery of plant costs. Staff had assumed in each of its theories on how plant costs have been recovered that the recovery of the contributed plant investment can be made at zero capital cost. The Commission is well aware that every dollar invested has an associated capital cost which must be taken into consideration in formulating this figure. Mr. Summers calculated conservatively that if capital costs are factored into the equation, more than 50 years is involved in recovery of the developer's capital investment in the water and sewer infrastructure on Shawnee Bend. (LRWS Ex. 12, Summers TU Rebuttal, page 11-12).

## V. Conclusion

The Commission lacks subject matter jurisdiction over billing and collection of fees charged for the availability of water and sewer system infrastructure. Assuming the Commission disagrees, the Staff's proposals to classify availability fee revenue billed and collected by Lake Region's shareholders, pursuant to lawful agreements between them and third parties, should be

rejected as: 1) an infringement on the constitutional rights of the Company and its shareholders; and 2) inconsistent with previous Commission guidance on and treatment of availability fees. Staff's alternative proposal should also be rejected because it is an unreasonable allocation of costs to Lake Region.

Respectfully submitted,

**/s/ Mark W. Comley**

Mark W. Comley Mo. Bar 28847
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266 (voice)
(573) 636-3306 (facsimile)
comleym@ncrpc.com

Attorneys for Lake Region Water & Sewer Co.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via email, on this 16th day of July, 2010, to:

Jaime Ott at jaime.ott@psc.mo.gov;
Craig Johnson at craigsjohnson@berrywilsonlaw.com;
Lisa Langeneckert at llangeneckert@sandbergphoenix.com;
Office of Public Counsel at opcservice@ded.mo.gov; and
General Counsel's Office at gencounsel@psc.mo.gov.

**/s/ Mark W. Comley**