

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 1<sup>st</sup> day of  
September, 2010.

In the Matter of Lake Region Water & Sewer	)	File No. <b>SR-2010-0110</b>
Company's Application to Implement a General	)	Tariff No. YS-2011-0082
Rate Increase in Water and Sewer Service	)	

In the Matter of Lake Region Water & Sewer	)	File No. <b>WR-2010-0111</b>
Company's Application to Implement a General	)	Tariff No. YW-2011-0081
Rate Increase in Water and Sewer Service	)	

**ORDER REGARDING MOTIONS FOR REHEARING, MOTION FOR  
RECONSIDERATION AND REQUEST FOR CLARIFICATION**

Issue Date: September 1, 2010

Effective Date: September 1, 2010

On August 27, 2010, Lake Region Water and Sewer Company (Lake Region") and the Office of the Public Counsel ("Public Counsel") filed motions for rehearing. Public Counsel also seeks clarification of the Commission's August 18, 2010 Report and Order. And the Commission's Staff filed a motion for reconsideration. Rehearing may be granted, if in the Commission's judgment, there is sufficient reason.<sup>1</sup>

**Executive Compensation and Rate Case Expense**

Public Counsel is the only party claiming error with the Commission's decisions regarding executive management compensation and rate case expense. Those issues were fully elucidated in the Report and Order and Public Counsel provides no sufficient reason for the Commission to grant a rehearing on these two issues.

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<sup>1</sup> Section 386.500.1, RSMo 2000.

## Availability Fees

Public Counsel and Lake Region both take issue with one point regarding the Commission's decision that imputing revenue from availability fees in this case would be unjust and unreasonable. Public Counsel also seeks clarification with regard to the Commission's decision in this regard. And, although the respective arguments are different, both motions address one point in common concerning the Commission's conclusions of law as to whether availability fees are a "commodity" under Section 386.020(48), Cum. Supp. 2009, which defines "service." For the Commission to have subject matter jurisdiction over availability fees, these fees must somehow fall under a definition of a regulated utility service. But, the parties not only take the discussion regarding the definition of the word commodity out of context, they fail to observe that the Commission specifically, and separately, concluded that under the facts of this case giving availability fees ratemaking treatment by either imputing revenue or classifying it as contributions in aid of construction would be unjust and unreasonable.

As stated in the Report and Order, Staff's subject matter experts have consistently testified, in this and in past cases, that availability fees are not a regulated utility "service." The Commission has also concluded in past cases that availability fees are not a regulated utility "service." While the Commission examined the facts in this case and discussed how the fees might possibly fall under the statutory definition that included the word "commodity," the Commission never made a finding of fact or conclusion of law that availability fees were, in fact, a commodity. The Commission stated in its Report and Order:

While 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. (Emphasis added).

The parties have taken this statement completely out of context. The order immediately goes on to say:

To make this determination in this matter would be a substantial departure from past Commission decisions, policy and practice. And, although the Commission is not bound by *stare decisis* the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which **courts and litigants** may properly resort for guidance.” (Emphasis added). It has been established that Lake Region has indeed relied upon this Commission’s past decisions and the directions it received from the Commission’s Staff for guidance with how availability fee revenue was not regulated revenue and would not receive ratemaking treatment. And, Missouri Courts have applied the doctrine of quasi-estoppel to prevent agencies from taking positions contrary to, or inconsistent with, positions they have previously taken.<sup>2</sup>

Indeed, the Commission painstakingly delineated how rulemaking is necessary for re-defining service, reclassification of revenue streams and a complete reversal of its statement of general applicability that implements, interprets or prescribes law, policy, procedure and practice after at least 37 years of following one practice, based upon its interpretation and applications of the law. The Commission provided additional clarification regarding the declaration of its intent to address its jurisdiction over availability fees prospectively where found appropriate in the future in its order approving Lake Region’s compliance tariffs.<sup>3</sup>

On August 19, 2010, the Commission opened the workshops to lead to that rulemaking. And, on August 24, 2010, after issuing formal notice, the Commission

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<sup>2</sup> The legal citations from the quoted language have been omitted from this order, but are fully delineated in the Commission’s August 18, 2010 Report and Order.

<sup>3</sup> See pages 103-107 of the Report and Order.

specifically directed its Staff to perform an exhaustive review of all current water and sewer regulations and prepare a comprehensive set of definitions, uniform and in conformity with Section 386.020(48), Cum. Supp. 2009. As that order pointed out, the Commission has definitions for sewer service in its rules that may not conform with the statutory definition of service and that are inapposite to the arguments made by Public Counsel and Staff in this case that availability fees could constitute a utility “service.” Those rules specifically define sewer service as being only the removal and treatment of sewage.<sup>4</sup> During the workshop/rulemaking process the Commission will examine proposed definitions and finally determine whether availability fees are a commodity or if they fall under one or more of the other categories listed in the statute.

### **Racquet Club Stipulation**

Public Counsel offers one additional argument in its motion for rehearing. During the pendency of this case, Lake Region, Four Seasons Racquet and Country Club Condominium Property Owners Association, Inc. (“Racquet Club”) and Staff entered into a stipulation involving the installation of flow meters to measure the water flow from the Country Club Hotel system and the Racquet Club system that ultimately enters Lake Region’s wastewater treatment plant. The meters were to determine whether there is ground water infiltration into the system and whether the Racquet Club is subsidizing the Hotel in relation to the way service is measured and billed. Public Counsel did not oppose the stipulation and by operation of Commission rules waived any right to a hearing on the stipulation.

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<sup>4</sup> Commission Rules 4 CSR 240-3.300(3) and 60.101(3)(M). The Commission’s rules on water utilities are devoid of definitions.

Public Counsel argues that the request for an extension of time to install the meters, filed on August 24, 2010, after the Report and Order had been issued on August 18, 2010, creates a “live issue” of potential customer rate subsidization thereby “cutting off any chance of Public Counsel bringing its position on that issue before the Commission.” It should be noted, however, that the motion for the extension was filed before the effective date of the Report and Order (August 28, 2010), and that when Public Counsel objected it did not request a stay of the Commission’s order for further proceedings. Further, the Commission responded by opening a separate case solely for the purpose of allowing Public Counsel to address this issue and should any material issues arise that require some adjustment in rates, the Commission can order Lake Region to return for a rate making proceeding earlier than the three-year deadline already directed. Public Counsel also has the option of filing a complaint. Public Counsel, being provided with an abundance of process, has not provided a sufficient reason for the Commission to rehear this case on this basis.

#### **Staff’s Motion for Reconsideration**

Finally, the Commission’s Staff argues that the Report and Order does not appear to reflect what the Commissioners discussed at its Agenda meetings. The Commission is fully aware of the content of its orders and the decisions it issues in those orders. Staff’s motion is meritless.

#### **THE COMMISSION ORDERS THAT:**

1. All motions for rehearing are denied.
2. The Staff of the Missouri Public Service Commission’s motion for reconsideration is denied.

3. To the extent the Commission's August 18, 2010 Report and Order required clarification, it is so clarified in the body of this order.

4. This order shall become effective immediately upon issuance.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'S. Reed', is positioned above the printed name of the Secretary.

**Steven C. Reed  
Secretary**

( S E A L )

Clayton, Chm., Gunn, and Kenney, CC., concur;  
Davis and Jarrett, CC., dissent.

Stearley, Senior Regulatory Law Judge