

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Lake Region Water and Sewer)	
Company's Application to Implement a General)	Case No. SR-2013-0459
Increase in Water and Sewer Service)	

In the Matter of Lake Region Water and Sewer)	
Company's Application to Implement a General)	Case No. WR-2013-0461
Increase in Water and Sewer Service)	

**LAKE REGION WATER & SEWER COMPANY'S
REPLY BRIEF**

Lake Region first frames this reply with several facts which cannot be repeated too often. Lake Region has provided good service to its customers. The Office of Public Counsel (OPC), the Commission and its Staff have problem water and sewer companies. Lake Region is not one of them. Lake Region is a good company and has been one for a considerable time.¹ As the Office of Public Counsel has pointed out in its own post hearing brief in these matters,

While Lake Region may be categorized as a small utility it has had no problems obtaining financing under its own name as evidenced by the recent financing case, Case No. WR-2013-0118. Nor is Lake Region operating under any undue financial or operational stress. For its size, it is a fairly strong well-run utility. . . .

A. Lingering Misconceptions

1. Commission jurisdiction over availability fees.

Both the Staff and the OPC have argued in their respective post hearing submissions that the Commission asserted jurisdiction over availability fees in the *2010 Rate Case*.² Each has

¹ **Tr. 301-304.**

² Italicized terms in this Reply shall have the same meaning as assigned to them in Lake Region's Post Hearing Brief. As it did in its Post Hearing Brief (hereinafter the "*Lake Region Brief*"), as a way of differentiating between the two sets of exhibits and transcripts that may be cited in this Reply Brief, Lake Region will use **bold face** to cite to the transcript in the instant case and to the exhibits admitted by the Commission in the instant case. (See *Lake*

quoted this portion of page 103 of the *2010 Report and Order*:

Because the utility had, at different intervals, direct use of or access to this revenue stream, and because the fees can be defined as a commodity falling under the definition of utility service, the Commission concludes that it should assert jurisdiction over availability fees.³

This then forms the premise for their arguments that Commission jurisdiction over availability fees is a foregone conclusion. By exalting this piece of selected text from the *2010 Report and Order*, both Staff and OPC offend the completeness of the Commission's decision, as confirmed or clarified in related and subsequent Commission orders.

On pages 5 through 9 of its Post Hearing Brief, Lake Region supplies the full context for this issue by quoting at length from the Commission's related orders that followed the *2010 Report and Order*. The Commission summed up concisely its determination on jurisdiction over the availability fees:

The determination that the Commission made was that it was going to assert jurisdiction over availability fees in future actions after undertaking a formal rulemaking process. The Commission specifically noted that it could not assert jurisdiction based upon the adjudicatory process in this single action. Public Counsel's objection is based upon a misreading of the Commission's order.⁴ [emphasis added]

The Commission has not asserted jurisdiction over availability fees. Its decision in the *2010 Report and Order* merely set the stage for the possible exercise of jurisdiction. The anticipated rule has not been adopted and therefore the Commission has not taken jurisdiction.

2. Lake Region's Ownership of Availability Fees.

In the fact section of its brief, Staff recites that "the availability fee revenue was initially

Region Brief at 3.)

³ Post-Hearing Brief of the Office of the Public Counsel (*OPC's Brief*) at 18; *Staff's Brief* at 9.

⁴ *Order Approving Tariff Filings In Compliance With Commission Order*, Case Nos. SR-2010-0110 and WR-2010-0111, issued August 25, 2010 at page 2, emphasis added.

in the possession and control of Lake Region.”⁵ Staff later argues that “[a]s an asset of the regulated utility, the availability fees are certainly within the Commission’s jurisdiction;”⁶ and “the availability fee revenue was for many years paid to Lake Region and its predecessor in interest.”⁷ OPC argues that the “shareholders specifically removed the payment of availability fees from Lake Region as a separate cash flow.”⁸

There is nothing in the record establishing that Lake Region ever took title to the revenue stream produced from the collection of availability fees. The fact recited by Staff in its brief is derived from Mr. Merciel’s surrebuttal testimony. He makes such a claim in reliance on the recorded declarations of restrictive covenants for Four Seasons Lakesites, excerpts of which are found in his Schedule JAM-2. OPC’s belief appears to rest on Mr. Merciel’s opinion on the facts.

In its brief, Lake Region supplied the Commission with quote after quote from the restrictive covenants,⁹ initial and amended, and the Commission will not find any provision therein transferring availability fee revenue to Lake Region. Although provisions in those restrictive covenants anticipate that the availability fees would be tariffed by a regulated water company utility, it is undisputed that since the time Lake Region was certificated, availability fees have never been part of its approved tariffs even though the Staff knew about the existence of those fees when the Company first applied for authority, and Staff has known about those fees for the 40 or more years the Company has been serving customers.

In footnote 62 of its post hearing brief, Lake Region brought to Commission attention the testimony of Staff witness Greg Meyer in the Company’s certification case. In the Company’s

⁵ *Staff’s Brief*, p. 4, ¶5.

⁶ *Staff’s Brief* at 9.

⁷ *Id.* at 14.

⁸ *OPC’s Brief* at 26.

⁹ *Lake Region’s Brief* at 18-23.

certification case (Case No. WA-95-164) (**Tr. 216**), Mr. Meyer recommended that “the Developer and the Company need to enter into a written agreement whereby the Developer assigns the right to the Company to bill and receive availability fees.” (Meyer Rebuttal, p 6). Easily inferred from Mr. Meyer’s testimony is that as best as Staff was able to determine, the Developer still owned the rights to those fees, otherwise an assignment would be unnecessary. At the very least, there was at that time a serious question about the ownership of the availability fee revenue stream which Mr. Meyer preferred to resolve by a formal assignment.

Other substantial circumstances further support the proposition that the availability fees were never in Lake Region’s hands. In the sale to the Slates, it appears that the Developer considered the availability fees its exclusive property,¹⁰ and did so likewise in the litigation with Lake Region, Ms. Stump and RPS Properties, LP. Four Seasons Lakesites, Inc. (the Developer), still holds a security interest in RPS Properties, L.P.’s and Ms. Stump’s availability fees as defined in the Collateral Assignment and Security Agreement dated April 15, 2005 and the Availability Fee Assessment rights as defined in the Collateral Assignment and Security Agreement dated April 15, 2005.¹¹

Lake Region does not own the rights to availability fees charged to undeveloped lot owners within the Four Seasons Lakesites development. In fact, neither Staff nor OPC even allege that Lake Region owns the rights to availability fees today. Moreover, there is ample proof in this record that Lake Region **has never owned** the rights to those availability fees.

3. The Commission lacks jurisdiction over availability fees.

The hour is right to conclude the debate about the treatment of availability fees charged

¹⁰ Transcript pp. 242-247, 259-262, 277, 287, 342-346, 351-352, 355, 357, 423-424, 457-458, 518, 544, 635-636; Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement; OPC Exh. 2, Robertson Direct, pp. 3-5 (Lake Region’s response to Staff Data Request No. 44.1).

¹¹ *Joint Stipulation of Undisputed Facts*, January 31, 2014, at ¶55.

in Lake Region's service territory. The Commission lacks jurisdiction over availability fees as shown at pages 28-32 of Lake Region's Brief. The Commission may lawfully and validly render such a determination in this case and end the controversy "once and for all."

B. Staff's Brief.

1. Availability fees

a. Availability fees are not a Section 393.310 asset.

On page 8 through 9 and again on page 15 of Staff's Brief, Staff contends for the first time that the availability fee revenue stream was an asset of Lake Region which it could not transfer without approval of the Commission. Staff cites in support Section 393.190.1¹² and its prohibition on sale, transfer or encumbrance of a utility's "franchise, works or system" without approval of the Commission.¹³ This argument must be rejected.

Lake Region reasserts that the evidence is insufficient to conclude that Lake Region ever owned the rights to availability fee revenue. It could not transfer what it did not own. Additionally, availability fee revenue does not qualify as "part of [Lake Region's] franchise, works or system, necessary or useful in the performance of its duties to the public." The evidence establishes that Lake Region has adequately, reliably and consistently provided service to the public without availability fee revenue -- hence they are not used or useful in its provision of service and they were not when it was initially certificated.¹⁴ Moreover, the Staff has historically considered such revenue as **unregulated**. If the Commission were to accept Staff's

¹² Statutory citations in this Reply are to RSMo 2000 or its current supplement.

¹³ The Commission should note that this is the first time Staff has asserted that availability fee revenue is an asset used or useful in the performance of providing service to the public.

¹⁴ At page 14 of its brief, Staff argues that the lack of availability fee revenue poses a threat to Lake Region's viability. Staff's argument is refuted by the evidence. Lake Region has operated and served the public at highest standards its entire certificated existence without any availability fee revenue. The certain threat to Lake Region's viability is treating availability fee revenue, the rights to which are owned by the Developer and his assignees, as revenue of the Company.

argument, it would depart from another past policy implemented by the Staff and engage in a complete reversal of the manner in which this revenue has been classified at the Commission historically.¹⁵

Last, whether Lake Region has violated the requirements of Section 393.190 is the subject matter for a formal complaint, not a consideration in a rate case. The evidence shows that the revenue stream has been in the ownership of the Developer and the shareholders, or the Developer and former shareholders, for decades. The applicable limitation period for instituting a complaint about an “unlawful transfer” has definitely passed, and Staff’s laches in bringing such a complaint, in addition to other equitable defenses, such as collateral estoppel, will preclude the Commission from reaching back those decades to retroactively adjust the Company’s financial structure, rate base and rates under these belated theories.

b. The Financial Interests of Lake Region’s Shareholders.

On page 13, Staff asserts that the “only interest served by not considering the availability fees is that of the two shareholders [Vernon Stump and Robert P. Schwermann¹⁶] who doubtless do not want their dealings scrutinized too closely.” Although its shareholders are not parties to this rate case, are unrepresented, and offered no evidence in this matter about their financial interests in Lake Region or other investments, Staff’s assertion and innuendo should not be countenanced by the Commission and should be tested with a reply.

First, in the shadow of Staff’s comment is the implication that Lake Region’s shareholders have engaged in activities which would incriminate them civilly or criminally if

¹⁵ Staff and the Commission knew about the charging and collection of the availability fees when Lake Region sought certification in Case No. WA-95-164. The fees were not included as revenue of the Company and the Company was not required to tariff those fees. Had Staff or the Commission regarded the availability fees as a regulatory asset ---an asset “necessary or useful in the performance of its duties to the public”--- the Company would have been directed to at least tariff those fees **seventeen years ago**.

¹⁶ Staff is mistaken that Robert Schwermann is a shareholder in Lake Region. RPS Properties, LP and Dr. Stump are the shareholders in the Company.

openly examined. **There is absolutely no proof or even the slightest suggestion of illicit shareholder activity in this record.** Second, and just as important, the Commission has no power or authority to monitor, regulate, examine, approve or reject the business decisions or investments made by shareholders of utilities, particularly Lake Region.

Staff has targeted Lake Region's shareholders in an extraordinary, and apparently an unprecedented, manner. The tactic is especially surprising because Lake Region is an exemplary company providing excellent service at very reasonable rates, and not a "problem company." In every aspect the Company has been managed well under the oversight of its two shareholders. Is the reward for its excellence in provision of public service then a reduction in the Company revenue requirement by amounts representing sums it does not collect or control? Four years ago, in the *2010 Rate Case*, the Commission determined it was unjust and unreasonable to treat the availability fee revenue as Staff proposes. It would be unjust and unreasonable today.

Throughout the life of this rate case, and as extended in the body of its brief, Staff has argued for regulatory tools or powers that are not authorized by statute or by rules promulgated according to statute. Staff has proposed: 1) that the Commission defy its order in the *2010 Rate Case* and without the ordered rulemaking apply and treat availability fee revenue not charged or collected by Lake Region as revenue of the Company; 2) for the first time in the history of this issue, that availability fee revenue charged in Lake Region's service territory be classified as an "asset used or useful in provision of public service" subject to the requirements of Section 393.310; 3) that the assignees of the availability fee revenue charged in Four Seasons Lakesites should be classified as "affiliate(s)" of Lake Region even though there is no "affiliate transaction" rule for water and sewer corporations; and finally 4) that the financial interests of Lake Region's shareholders (small utility company shareholders) should be subject to

examination to determine the reasonableness of a proposed rate increase. There is no Commission decision, statutory authority or rule of the Commission supporting any of these proposals. Each must be rejected.

c. Absence of a Rulemaking

At pages 10-12, Staff tries to explain to Lake Region and the Commission why the workshop docket ordered as a result of the *2010 Rate Case* was abandoned and the rulemaking process ordered in the same case was scrapped. As Lake Region anticipated and discussed in its own brief at pages 9 through 14, Staff contends, among other things, that 1) Lake Region failed to object to closure of the workshop dockets and thus tacitly agreed that no rule was required to cover the availability fee issues; and 2) by its order closing the workshops the Commission has excused Staff from developing the rule ordered in the *2010 Rate Case*.

Briefly, Lake Region was under no obligation to object to closure of the workshops. Nothing in the motions filed by the Staff indicated that it was seeking to alter, in whole or in part, the Commission's express orders and determinations in the *2010 Rate Case*.¹⁷ The motions filed and the orders of the Commission that followed speak for themselves. The Commission's orders and directives enumerated in the *2010 Report and Order* have not been altered or vacated.

On page 12 of its brief, Staff argues:

The truth is, very few utilities charge availability fees and the facts are significantly different from case-to-case. A rule of general applicability is inappropriate; instead Due Process requires contested case adjudication. In the present case, the availability fees have been unlawfully transferred from the utility to its shareholders, a unique fact pattern.¹⁸

In the *2010 Rate Case* the Commission was aware that very few utilities charge availability fees

¹⁷ If Staff had moved to re-open, vacate, amend or modify the *2010 Report and Order* Lake Region most certainly would have objected. Staff made no such requests.

¹⁸ Whether availability fees are regulatory assets was discussed, *supra*. A transfer of that revenue stream to Lake Region's use and control is not established in the evidence.

and the facts and circumstances of charging, collecting and tariffing them may differ with each. The Commission was keenly aware of the history, creation, collection, enforcement, transfer and assignment of the availability fees charged to undeveloped lot owners in Lake Region's service territory. In the *2010 Report and Order*, **the Commission rendered determinations and entered express findings that directly contradict Staff's statements on page 12 of its brief.**

As emphatically as the Commission pronounced those determinations and findings in the *2010 Rate Case*, there is no going back. As Lake Region points out on pages 13 and 14 of its brief, whether or not Staff was authorized to terminate an effort toward a rulemaking about availability fees, a case by case analysis of the issue simply reawakens the true problem: "[A]sserting jurisdiction over revenue derived from availability fees, . . . , cannot simply be based on an adjudication on a specific set of accrued facts." Applying availability fee revenue to Lake Region's cost of service would be "a substantial departure from past Commission decisions, policy and practice." That was the case in 2010 and that is still the case in 2014.

The Commission, by its own order, must refuse to exercise jurisdiction over availability fees. The Commission, by its own order, must refuse to classify availability fee revenue as Lake Region revenue or apply that revenue against its rate base. Otherwise, by its own declaration, the Commission deprives Lake Region of the fundamental processes due under constitutional law.¹⁹

d. Benefits and purposes of availability fees.

¹⁹ If the Commission determines to decide availability fee issues on a case by case basis, Lake Region contends that the Commission should treat availability fees in this case in the manner 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. The only other situations cited by Staff where availability fees are tariffed or considered in ratemaking are all distinguishable from the instant case. In those cases, the company consented to having availability fees included in its cost of service (**Tr. 270**). Additionally, the Commission has imputed revenues from availability fees only where the company owned the rights to that revenue (**Tr. 271**).

On page 13 of its brief, Staff states that “Lake Region is the only utility with availability fees whose ratepayers receive no benefit from them.” In the *2010 Report and Order*, **the Commission entered an express finding that directly contradicts Staff’s statement.** At Paragraph 164 on page 54 of the *2010 Report and Order* the Commission found “Lake Region customers have benefited from the availability fees, because the contributed plant associated with those fees lowers the rate base and lowers utility rates for the ratepayers.” That was the case in 2010 and that is still the case in 2014.

On page 16 of its brief, Staff writes:

Staff contends that lot owners are paying availability fees in order to support the utility system, which was built for the purpose of providing service to their lots.

* * *

The entity presently collecting the availability fees, Lake Utility Availability 1, is not providing anything to anyone in consideration for the money that is being paid to them by the lot owners and, because it is not a utility, cannot do so. If the availability fees are not going to Lake Region, as originally intended, there is no logical reason for the availability fees to exist.

Staff’s contention is not factually based. The parties, including the Staff, jointly stipulated that the following fact is indisputable:

The purpose for establishing the availability fees was to recover the investment in the water and sewer systems, not to maintain or repair the existing operations of the systems once they were constructed.²⁰

Lot owners remit availability fees to repay the Developer (and his assignees) for its investment in the water and sewer systems. Staff’s arguments based on a misunderstanding of the purposes for the fees have no merit and must be denied.

Lake Utility Availability 1 does not offer a service or product. It does not offer or provide “anything to anyone.” Mrs. Sally Stump and RPS Properties, owners of the registered

²⁰ *Joint Stipulation of Undisputed Facts*, January 31, 2014, at ¶42.

fictitious name “Lake Utility Availability 1,” are the ultimate assignees of the developer’s rights to charge the fees created and charged in consideration of installing the water and sewer systems. In the series of transactions in which the fees were transferred, consideration must have been exchanged, for at the present the Developer is still a recipient of the availability revenue it created, charged and collected for purposes of recovering “the investment in the water and sewer systems.” The Developer gave up the rights to collect the entirety of the fees in exchange for something the Developer valued. If, as Staff contends, Lake Utility Availability 1 cannot collect the availability fees because it is not a utility, the Developer is likewise disqualified from collecting those fees. Yet, in this case, the Staff carves out the portion of the fees the Developer receives in any of Staff’s recommendations. The Commission has never asserted regulatory authority over a real estate developer or the developer’s choice of methods by which to recapture infrastructure investment in a subdivision development. Recovering costs of installing water distribution lines and wastewater transmission or collection lines in a subdivision development does not render the developer a statutory public utility.

2. Capital Structure

a. The Shareholder Loan and the Utility Loan

On pages 21-22 of its brief, Staff cites to case authority which grants discretion to the Commission in approving either a hypothetical capital structure or the actual capital structure for a regulated utility. That discretion is not unbridled, however. The Western District Court of Appeals has ruled:

There are two circumstances in which a utility commission might disregard a utility's actual capital structure and adopt a hypothetical capital structure for ratemaking purposes.

The first occurs when the utility's actual debt-equity ratio is deemed inefficient and unreasonable because it contains too much equity and not enough

debt, necessitating an inflated rate of return. *Id.* This situation existed in *Communications Satellite Corp. v. Federal Communications Commission*, 611 F.2d 883 (D.C.Cir.1977) (COMSAT), in which the company was 100% equity financed. The Commission there imputed a 45% debt ratio which was admittedly a hypothetical construct. *Id.* at 898, 902. In approving the Commission's action, the United States Court of Appeals for the District of Columbia stated that the “authority of a public utility commission ... to assume hypothetical debt for a company derives from its jurisdiction over rates charged by the company, that they be ‘just and reasonable.’ ” *Id.* at 903.

The second circumstance that justifies adopting a hypothetical construct occurs when the utility is part of a holding company system. In such situations, the utility's book capital structure and capital costs may not be a true reflection of the system's capital costs with respect to a particular operating company. Double leveraging represents one approach utilized by regulatory agencies to account for a utility's status as a subsidiary in a holding company system. *New England Telephone and Telegraph, supra*, 390 A.2d at 39. Moreover, it is only the parent's *alleged* use of its low cost debt to purchase stock in its subsidiary that serves as the principle behind the application of double leveraging. *Id.* at 41.

State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri, 706 S.W.2d 870, 878 -879 (Mo.App. W.D. 1985).

Lake Region is not part of a holding company system. To validly use a hypothetical capital structure in this case Lake Region's actual debt-equity ratio should show too much equity and not enough debt, necessitating an inflated rate of return.

The reasons for Staff's proposed 75% debt and 25% equity hypothetical capital structure in this matter are condensed in one paragraph on page 22 of Staff's Brief:

The factual circumstances surrounding Lake Region show that the Shareholder Loan is effectively a component of the company's capital structure.²¹ The ownership, loan history, practical effect of default, and past treatment of the loan by the Company combine to indicate that Lake Region's assets are relied on for performance of the Shareholder Loan.

To the contrary, the history of the Shareholder Loan, the practical effect of default at the shareholder level and the financing approval obtained by Lake Region since the effective date of

²¹ Staff contends that Lake Region is financed with 100% debt after giving consideration to the outstanding “acquisition” or “Shareholder” loan.

the *2010 Report and Order* establish that Lake Region's assets are not relied on for performance of the Shareholder Loan.

A description of the initial Shareholder Loan, and a history of its refinancing, including the refinancing of 2013,²² and also the release of the Negative Pledge Agreement,²³ were addressed in pertinent part on pages 43 through 47 of *Lake Region's Brief*. The Commission will determine from a review of the Shareholder Loan that **no assets of Lake Region are pledged** as collateral. The **issued shares of Lake Region are collateral** for the Shareholder Loan.

With respect to the practical effect of default on the Shareholder Loan, the lender's limited recourse is taking possession of the pledged shares in Lake Region. At that point it would have voting control over the shares and could elect directors and officers. In that manner, the lender could supervise the operation and management of the Company. It would have no authority to seize or sell the assets of the Company and furthermore, it would be against the lender's economic interest to attempt a collapse of the Company. Even in a Shareholder Loan default, the Company would still be managed by Camden County Public Water District #4. The lender would expect continuity in the Company operations. Lake Region would still have customers taking service from a well managed company, and have an income stream to pay its debts and expenses. Moreover, the bank could not lawfully sell any part of Lake Region's "franchise, works or system" without Commission approval. *See*, Section 393.130.²⁴

²² The current form of the Shareholder or "acquisition" Loan and guaranties and pledges connected to the loan were made a single exhibit and admitted at hearing as **Lake Region Exhibit 7**.

²³ Staff contends that the lender's release of the Negative Pledge Agreement does not "diminish [its] interest in the value of the company's assets." *Staff's Brief* at 23. Lake Region contends, and OPC agrees, that the release of the Negative Pledge Agreement clearly indicates "to the lender the shareholders' intent that Lake Region's assets are not to be pledged as collateral for the shareholder acquisition loan." *OPC Brief* at 6. Lake Region assets are divorced completely from the Shareholder Loan and not at risk in the event of default.

²⁴ If Lake Region defaulted on the debt approved by the Commission in Case No. WF-2013-0118, the same result would obtain. The lender could not lawfully seize or sell the assets of the Company without Commission approval.

With respect to Lake Region's past treatment of the Shareholder Loan and any representations made or testimony provided in the *2010 Rate Case* as to its effect on the Company capital structure, they are no longer factors in evaluating Lake Region's current capital structure. Lake Region subsequently applied for and received Commission approval for a loan in its own name (the "utility loan") made in May of 2013.²⁵ In this financing case, Lake Region intentionally modified its capitalization blend to create a more transparent and verifiable financial structure.²⁶ This was a significant intervening event which altered Lake Region's capital structure and to which the Staff unjustifiably gives no recognition in the instant case.

The "utility loan" in the amount of \$1.4 million was used to repurchase common equity from Lake Region's shareholders. This fundamentally changed the capital structure mix for Lake Region, and the funding sources available to the shareholders to support their equity share investment. Additionally, after the issuance of the utility loan, Lake Region's actual capital structure was restructured from approximately 100% equity, down to approximately 40% equity and 60% debt. Again, the proceeds of the utility debt were used to repurchase Lake Region's equity shares from the equity partners of Lake Region. This produced a transparent and verifiable actual capital structure for Lake Region.

Whatever the opinions may have been about Lake Region's capital structure in the *2010 Rate Case*, whether expressed by Staff or Lake Region, they are stale and inconsequential because of the change in Lake Region's capitalization effected by Commission approval of and the issuance of the utility loan.

b. Leveraging

²⁵ This debt was approved by the Commission in Case No. WF-2013-0118 on February 13, 2013.

²⁶ **Lake Region Exhibit 2, Summers Rebuttal, at 10.**

On page 25 of its brief, Staff argues: “In cases in which a company uses extreme amounts of leverage, as is the case with Lake Region, Staff does not want to ignore the extremely leveraged state by allowing an equity ratio that is not consistent with how the company is truly capitalized.” Lake Region does not use an “extreme amount of leverage.” The amount of leverage approved by the Commission in Lake Region’s financing case (Case No. WF-2013-0185) is both reasonable and fair. Staff’s concern with over leveraging is self manufactured. It is the Staff that is artificially boosting Lake Region’s debt, based upon a loan to which Lake Region is not a party and in which its assets are free from peril, to contend that the Company is highly leveraged.

C. Office of Public Counsel’s Brief.

1. Lake Region’s rate base should not be reduced by estimates of availability fees.

A Commission determination that it lacks jurisdiction over availability fees, or alternatively, that it cannot assert jurisdiction over availability fees without first a comprehensive review of the matter in the context of a rulemaking procedure would render OPC’s arguments academic. Lake Region reasserts its previous arguments on this issue. For purposes of argument only, Lake Region addresses a few points of OPC’s brief.

OPC advocates a reduction in Lake Region’s rate base for its Shawnee Bend water and sewer systems in the aggregate amount of \$1,037,173 (\$331,330 -- Shawnee Bend Water, \$705,843—Shawnee Bend Sewer).²⁷ OPC’s recommended reductions are purely estimates. They are not accurate. OPC notes this flaw and tries to explain:

Throughout this case, Lake Region and its shareholders consistently refused to provide information that would allow the parties to identify accurately,

²⁷ OPC Brief at 5, 24)

without estimation, the amount of contributions in aid of construction (i.e. donated investment) is [sic] associated with the individual utility's plant in service or the actual amount of availability fees billed and collected by the utility, the utility shareholders or the developer of the sewer system over the years.

Public Counsel did not present its estimates of availability fees billed and/or collected as actual amounts because only Lake Region and its shareholders have access to that information. However, Lake Region has the burden to prove that the amount of rate base it proposes to include in rates is just and reasonable. Lake Region did not provide any evidence to refute Public Counsel's calculations or methodology even though it was given ample opportunity. Therefore, the Commission should find that Public Counsel's calculations are reasonable estimates of availability fees billed and/or collected.²⁸

It is more accurate to state, and OPC will not deny, that information concerning the collection of availability fees can be obtained from a former shareholder in Lake Region and a current shareholder. It is also accurate to state that information pertaining to the collection of availability fees can be obtained from the Developer.

Throughout this case, OPC (and Staff in nearly like degree) has labored under several false assumptions:

1. Lake Region is not entitled to object to invalid data requests and should respond to requests for information in its files, its shareholders' files or former shareholder's files.
2. Lake Region is in charge of all the records showing the amounts of availability fees the Developer or its assignees have collected.
3. OPC is excused from using its statutory investigatory powers in obtaining information from Lake Region's shareholders, the Developer or other parties that may have information relating to the development of OPC's evidentiary presentation.

The records of the discovery process and the Commission's orders rendered during that process in this matter will reflect that Lake Region supplied responses to unobjected to data

²⁸ *OPC Brief* at 22- 23.

requests on a timely basis; timely and lawfully objected to some data requests and other discovery devices; and after rulings by the Regulatory Law Judge on its objections Lake Region complied with any and all orders overruling its objections and directing disclosure. Lake Region supplied all information the Staff or OPC sought by means of authorized and unobjectionable discovery measures.²⁹

Furthermore, Lake Region has shouldered the burden of proving its rate base in two previous Commission cases. In each case, the Commission approved the amount Lake Region proved up.³⁰ Lake Region is under no duty to assist OPC in gathering information from parties outside this rate case and is under no duty to assist OPC in marshalling the evidence for OPC's own purposes. OPC has not explained why its statutory investigatory powers, along with customary process in summoning witnesses for testimony or for identification of documents (process OPC may utilize like any other party to a Commission contested proceeding), were inadequate to its needs. Lake Region cannot be faulted for the lack of accuracy in OPC's calculations.

OPC's proposed reduction in the rate base for Lake Region's Shawnee Bend water and sewer operations is based upon estimates of availability fees collected, and because of those estimates the proposal is patently unreasonable. OPC argued for this same proposal in the *2010 Rate Case* and the Commission rejected it. The Commission should do so again.

2. Return on Equity and Legal Fees

These issues are adequately addressed in Lake Region's initial brief and will not be repeated in reply.

²⁹ To the best of Lake Region's knowledge, RPS Properties also complied fully with all subpoenas served upon it in this case as modified by order of the Commission. No evidence or suggestion to the contrary was submitted at or before hearing.

³⁰ **Lake Region Exhibit 3, Summers Surrebuttal, at 6.**

D. Conclusion

In closing, Lake Region emphasizes several points from its initial brief.

Lake Region does not charge or collect availability fees. The restrictive covenants that create those availability fees constitute a contract between the developer and the lot owners. Lake Region is not a party to that contract. Lake Region's approved tariffs, not the restrictive covenants, govern the Company's operations, services, quality of service and rates for service.

The Staff's and OPC's recommendations share this in common: Each rests on the assumption that Lake Region, despite the inarguable fact that it has no rights to the availability fee revenue, can by some means wrest the revenue from its rightful owners and in turn infuse it into its operations. If it cannot do so, Lake Region will suffer a shortfall shouldering its cost of service. If one or the other of the Staff's or OPC's recommendations is adopted, Lake Region's rate revenue will not cover its agreed cost of service. To believe that Lake Region has rights to collect availability fee revenue is perfect fiction, and to presume it has such rights and adjust Lake Region's rates for service based on that presumption is punitive. Mr. Summers' prediction that Lake Region would lose financial viability and risk statutory receivership is not fanciful.

The rights to charge and collect the availability fees under review in this case constitute the independently owned and validly acquired property of a real estate developer, a Company shareholder and an individual. To the extent the Commission may in fact, or constructively, classify the availability fee revenue as Company revenue, it takes 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, RPS Properties and Sally Stump 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).

The Commission should approve Lake Region's request for rate relief in accordance with the positions it has argued herein and in its initial brief.

Respectfully submitted,

/s/ Mark W. Comley

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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 7th day of April, 2014, to Kevin Thompson at kevin.thompson@psc.mo.gov; Tim Opitz at timothy.opitz@psc.mo.gov; General Counsel's Office at staffcounsel@psc.mo.gov; Christina Baker at christina.baker@ded.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley