

change, the proper application for any over-all rate increase is to implement an equal percentage increase for the customer and commodity charges.¹⁶⁸

118. Any increase in commodity charge provides an added economic incentive to customers with high inflow and infiltration to make necessary repairs and improvement to the collection systems.¹⁶⁹

J. Miscellaneous Tariff Issues

119. Lake Region's current returned check charge of \$15.00 is less than the actual cost incurred by Lake Region related to bank charges, account, tracking, monitoring and additional notices. The proper return check charge for Lake Region is \$25.00.¹⁷⁰

120. Lake Region's current tariff language does not include a method to allow Lake Region to disconnect a customer for any reason except upon the request of the customer. Lake Region's tariff lacks legally required language to allow the company to disconnect a customer for non-payment pursuant to Commission Rule 4 CSR 240-13.050.¹⁷¹

K. Availability Fees

The Creation of the Availability Fees

121. On December 2, 1969, Harold Koplar, the original developer of Four Seasons Lakesites, Inc., executed the original Declaration of Restrictive Covenants for the development that would eventually encompass Lake Region's service area.¹⁷² No copy of

¹⁶⁸ *Id.*

¹⁶⁹ Staff Exh. 3, Staff Rate Design Report, pp. 1-7.

¹⁷⁰ *Id.* at pp.6-7.

¹⁷¹ *Id.*

¹⁷² Transcript pp. 640-641; Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants. Transcript citations related to the restrictive covenants are found at pp. 219-227, 241, 275-277, 335-336, 380-396, 400-403, 461-462, 504-519, 532-532, 590-592, 637-643, 705-706.

the original Declaration of Restrictive Covenants was submitted to the Commission or admitted into the record.

122. On March 10, 1971, Harold Koplar, the original developer of Four Seasons Lakesites, Inc., executed the [First] Amended Declaration of Restrictive Covenants (“1st Covenants”) for the development that would eventually encompass Lake Region’s service area.¹⁷³

123. Article VI of the 1st Covenants establishes Lakesites POA, and the all property owners in the development automatically become a member in the Association when they purchase property.¹⁷⁴

124. Article VII of the 1st Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards.¹⁷⁵

125. Articles VII and VIII of the 1st Covenants pertain to the central sewage disposal system and water works.¹⁷⁶ These sections:

- a.) establish a “minimum monthly availability charge for water, water service and the accommodations afforded the owners of said lots by said water works systems” that would commence when water service was available and continue regardless whether the property owner takes water service from the central system to be constructed within the development;
- b.) allow for the construction of individual wells until such time as the central water system is constructed, after which the property owner must connect to the central system;

¹⁷³ Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

¹⁷⁴ Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

- c.) establish “a minimum monthly availability charge for sewage disposal and treatment and the accommodations afforded the owners of said lots by said sewage disposal system” that would commence upon the availability for use of a sewage collection main that leads to an operating sewage treatment facility and continue regardless whether the property owner connects to the central sewage to be constructed within the development;
- d.) allow for the construction of individual sewer systems, i.e. septic tanks and tile fields, until completion of the central sewer system, after which the property owner must connect to the central system;
- e.) provide that no charge will be made to the lot owners for the right to connect to the water and/or sewer systems; and,
- f.) provide that the owner or owners of the water works system and sewage disposal system will be a privately owned utility authorized by a CCN issued by the MoPSC and all availability charges, and times and methods of payment, shall be provided in schedules or rates and rules to be approved by the MoPSC.

126. Article VIII of the 1st Covenants further provides that the availability fees are to be paid to the owner or owners of the sewage disposal system and water works system and that any “unpaid [availability] charges shall become a lien on the lot or lots to which they are applicable as the date the same became due.”¹⁷⁷

127. The 1st Covenants constitute an agreement between the developer and the property owner. It also creates contractual duties that flow between the property owner and Lakesites POA. The 1st Covenants are not a contract or agreement between Lake Region and the property owner.¹⁷⁸

128. In addition to agreeing to the restrictive covenants upon the purchase of an undeveloped lot, the owner of each lot executed a separate water and sewer agreement,

¹⁷⁷ *Id.*

¹⁷⁸ While the 1st Covenants direct that payment of the availability fees will be made to the owners of the sewage disposal system and water works system, the owners of the sewage disposal system and water works system have no enforcement rights as they are not parties to the contract. In this instance, the developer and owner of the utilities were the same, but standing for enforcement of the contractual rights stems from the developer being the party to the contract, not the owner of the utility.

the provisions of which mirrored those in the 1st Covenants.¹⁷⁹

129. On January 14, 1986, the Second Amended and Restated Declaration of Restrictive Covenants was executed by the developer.¹⁸⁰ No copy of the Second Amended and Restated Declaration of Restrictive Covenants was submitted to the Commission or admitted into the record.

130. On July 2, 1996, Peter N. Brown, successive developer for Four Seasons Lakesites, Inc., executed the Third Amended and Restated Declaration of Restrictive Covenants (3rd Covenants).¹⁸¹

131. Article VII of the 3rd Covenants pertain to Lakesites POA, and the all property owners in the development automatically become a member in the Association when they purchase property.¹⁸²

132. Article VIII of the 3rd Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards and DNR.¹⁸³

133. Article IX(A) of the 3rd Covenants duplicates the provisions from prior declarations relating to the water system, but the water system only.¹⁸⁴ This duplication

¹⁷⁹ Lake Region Exhibit 13, Engineering Report in Case No. 17,954.

¹⁸⁰ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

¹⁸¹ Transcript, pp. 618-619, 639-642, 709, 714; Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4. The 3rd Covenants were attested to by Susan Koplar Brown, Secretary of Four Seasons Lakesites, Inc. Mr. Brown is the son-in-law of the original developer, Harold Koplar.

¹⁸² Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants.

¹⁸³ Staff Exh. 15, Merciel Rebuttal, Attachment 3, Third Amended and Restated Declaration of Restrictive Covenants.

¹⁸⁴ Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4.

includes the provisions concerning availability fees.¹⁸⁵ This article includes the provision that owners of the water works system will be a privately owned utility authorized by a CCN issued by the MoPSC and all availability charges, and times and methods of payment thereof, shall be provided in schedules or rates and rules to be approved by the MoPSC, or if not so provided, as determined by the Owner of the water works system.¹⁸⁶

134. Article IX(C) of the 3rd Covenants provides for a plan for sewage treatment by individual treatment facilities, which must meet the specifications of Lakesites POA's DNR-approved plan or by "other methods of sewage treatment by the Development." It also provides that Lakesites POA will periodically maintain each individual treatment facility and each lot owner is required to pay a monthly maintenance fee to the POA for administering the plan. The 3rd Covenants do not mention or require any availability fees for sewer service to be paid to the developer or to Four Seasons Lakesites Water & Sewer Company.¹⁸⁷

135. The "Development," for purposes of Article IX(C) of the 3rd Covenants, refers to the Horseshoe Bend lots.¹⁸⁸

136. Article IX(E) of the 3rd Covenants provides that, barring certain exceptions, "all homes and other structures requiring sewage or waste water disposal facilities, shall conform to the plan for sewage treatment; no such home or structure may be occupied unless so connected to the sewage treatment facility and no septic tank, cesspool or other means of disposal of sewage on an individual lot may be used in the subdivisions."

137. There are multiple amendments to the 3rd Covenants.¹⁸⁹

¹⁸⁵ *Id.*

¹⁸⁶ Staff Exh. 15, Merciel Rebuttal, Attachment 3, Third Amended and Restated Declaration of Restrictive Covenants.

¹⁸⁷ Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4.

¹⁸⁸ *Id.* See in particular the definitions section and the Amendment to the 3rd Covenants dated July 23, 2009.

138. The amendment to the 3rd Covenants executed on July 23, 2009 contains specific provisions regarding the water and sewer systems.¹⁹⁰

139. Article IX in July 23, 2009 amendment removes and replaces the entire Article IX from the 3rd Covenants, and provides, *inter alia*.¹⁹¹

a.) **Shawnee Bend Lot Owners must “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;”

b.) The **water availability fee for Shawnee Bend Lot Owners**¹⁹² commences upon the availability of water in a water system distribution main provided for the Lot and terminates when the Owner of the Lot connects his Lot to the water distribution main.

c.) Unpaid water availability fees become a lien on the Lot the date they become due.

d.) **Shawnee Bend Lot Owners** must “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 Lot is contractually obligated to Developer, or Developer’s assign to pay a different amount.”

e.) **Horseshoe Bend Lot Owners** must pay the owner of the **water works** system a minimum monthly availability charge (amount not specified).

f.) The **Owner of the Horseshoe Bend water works system** will be a privately owned public utility authorized by a certificate of public convenience and necessity issued by the MoPSC to operate the water works system.

g.) The availability fees charged for the **Horseshoe Bend Water System** shall be provided in the Schedules of Rate and Rules. And, regulations and conditions for water services shall be approved by the MoPSC (or any successor) **and if not so provided will be determined by the owner of the water works.**

¹⁸⁹ Staff Exh. 15, Merciel Rebuttal, Attachments 3 and 4. See in particular the definitions section and the Amendment to the 3rd Covenants dated July 23, 2009.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Similar water provisions apply to Horseshoe Bend Lot Owners; however, Horseshoe Bend water service is provided by a different corporate entity (Ozark Shores) and water service to Horseshoe Bend is not at issue in this case.

h.) The **Horseshoe Bend sewer treatment** plan has essentially the same terms as outlined in Finding of Fact Number 136.

i.) Unpaid sewer fees for maintenance, owed to Lakesites POA, become a lien on the Lot and may be enforced by the Association.

j.) The water and sewer amendment shall survive the execution and recording of the Fourth Amended and Restated Declaration and shall remain in full force and effect and be incorporated into the Fourth Amended and Restated Declaration.

140. All references to regulation by the Commission in the 3rd Covenants apply to the Horseshoe Bend Water System, which is not at issue in this case since this system was sold and became Ozark Shores Water Company in 1992.¹⁹³

141. The 3rd Covenants constitute an agreement between the developer and the property owner. They also create obligations that flow between the property owner and Lakesites POA. The 3rd Covenants are not a contract or agreement between Lake Region and the property owner.

142. On October 1, 2009, the Fourth Amended and Restated Declaration of Restrictive Covenants (“4th Covenants”) was executed by Peter Brown, Vice-President of Four Seasons Lakesites, Inc.¹⁹⁴

143. Article 9 of the 4th Covenants states that all provisions relating to the water and sewer systems and treatment are set forth in the Amendment to the 3rd Covenants dated July 22, 2009 (executed July 23, 2009).¹⁹⁵ See Finding of Fact Numbers 138-140.

¹⁹³ See Finding of Fact Number 23.

¹⁹⁴ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. The 2009 Annual Registration Report from Four Seasons Lakesites, Inc., dated June 11, 2009, lists Peter Brown as being the president. His wife, Susan, is Vice-President.¹⁹⁴

¹⁹⁵ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009; Staff Exh. 15, Merciel Rebuttal, Attachment 5, Fourth Amended and Restated Declaration of Restrictive Covenants.

144. Recital E in the 4th Covenants indicates the Declarant may amend the Declaration at any time until all the lots in development have been sold.¹⁹⁶

145. All of the lots developed by Four Seasons Lakesites, Inc. on Shawnee Bend have been sold.¹⁹⁷

146. Section 19.3 of the 4th Covenants allows the property owners to seek amendment of the Declaration subject to certain conditions.¹⁹⁸ Those conditions include:¹⁹⁹

- a.) The Declaration is binding until January 15, 2015, after which it is automatically renewed unless the owners of 90% of the lots vote to terminate the Declaration.
- b.) The Declaration may be amended at any time by the Developer at the request or with the consent of the Board until such time as all lots are sold, at which such time the Declaration may be amended by the affirmative vote of two-thirds of the owners of all of the lots entitled to vote.
- c.) In the case of amendment by two-thirds of the property owners the amendment shall be executed by the requisite lot owners or the POA.

147. The current owners of Lake Region have no control over the provisions in the Declaration of Restrictive Covenants executed by the property developer or any amendments to the Covenants.

148. The 4th Covenants constitute an agreement between the developer and the property owner. It also creates obligations between the property owner and Lakesites

¹⁹⁶ *Id.*

¹⁹⁷ Recital F (October 1, 2010) indicates that not all lots have been sold. Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. However, Peter N. Brown, by an affidavit dated April 29, 2010, states that all of the lots developed by Four Seasons Lakesites, Inc. on Shawnee Bend have been sold. Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

¹⁹⁸ Staff Exh. 12, Fourth Amended and Restated Declaration of Restrictive Covenants, from Grantor Four Seasons Lakesites, Inc., dated October 1, 2009. The covenants have been amended or supplemented a minimum of 47 times. Also, additional covenants and restrictions apply to specific subdivisions of the development. *Id.*

¹⁹⁹ *Id.*

POA. The 4th Covenants are not a contract or agreement between Lake Region and the property owner.

149. The 3rd and 4th Covenants do not represent that the Commission would determine or tariff rates for availability fees.

150. With respect to the water systems, the 3rd and 4th Covenants provide that if the Commission does not provide or approve regulations and conditions for services, they will be determined by the owner of the system.

151. There is no provision or language in the 1st, 3rd or 4th Covenants that identifies an intent or purpose for charging or collecting availability fees.²⁰⁰

152. The specimen land sales contract utilized by Four Seasons Lakesites, Inc. also contains provisions regarding the charging of availability fees. Paragraph 9 (B) and (C) provide:

- a.) all lots in the development will be served by a central water system;
- b.) the buyer agrees to pay availability fees until the central water system is completed to the point that a main water line runs in front of the buyer's property;
- c.) the availability fee for water is \$10.00 per month;
- d.) the availability fee for water shall be paid to the seller of the seller's assignee, Lake Region Water & Sewer Co.;
- e.) the buyer agrees to pay all cost for connecting buyer's home to the central water system;
- f.) all lots in the development will be served by a central sewer system;
- g.) the buyer agrees to pay a monthly availability fee to the seller or seller's assignee until such time as the buyer constructs a home on the property; and,

²⁰⁰ See 1st, 3rd and 4th Covenants. Transcript, p. 731.

h.) once the buyer constructs a home, the buyer shall pay the sewer system operator a one-time connection fee and monthly fee for sewer service.²⁰¹

153. It is unclear whether this specimen contract was actually used by the developer; or what time period it might have been used; or if it had been used, whether it is still used by the developer. No actual contracts that had been executed between a property owner and the developer were offered into evidence.²⁰²

154. There is no provision or language in the specimen contract that identifies an intent or purpose for charging or collecting availability fees.

155. The specimen land sales contract constitutes an agreement between the developer and the property owner. The land sales contract is not a contract or agreement between Lake Region and the property owner.

Purpose of Availability Fees

156. In Commission Case Number 17,954, the original certification case, the Commission received into evidence an engineering report and the testimony of James W. French, registered professional engineer.²⁰³

157. The engineering report and testimony demonstrate that the economic feasibility of constructing the water and sewer system for what would ultimately become the service area for Lake Region was dependent upon the use of availability fees charged to the purchasers of the undeveloped lots.²⁰⁴

²⁰¹ Staff Exh. 53, Four Seasons Lakesites, Inc. Sales Contract.

²⁰² *Id.*; No copies of an executed land sales contract were introduced into evidence. Transcript, pp. 708-709, 713-715.

²⁰³ Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954.

²⁰⁴ Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954; *In the Matter of the Application of Four Seasons Lakesites Water and Sewer Company for a Certificate of Public Convenience*

158. A copy of a separate availability fee agreement is attached to the engineering report.²⁰⁵ The availability fee agreement contains provisions mirroring the terms for water and sewer service outlined in the 1st Covenants as described in Finding of Fact Numbers 122-128.²⁰⁶

159. The Commission's Report and Order in Case No. 17,954, effective December 27, 1973, ("1973 Order") granting Four Seasons Lake Sites Water and Sewer Company (Lake Region's predecessor in interest) its CCN for water service, acknowledges the use of availability fees and distinguishes the agreement for those charges from the rates and charges proposed for rendering metered and unmetered water service.²⁰⁷

160. The 1973 Order requires Lake Region's predecessor in interest to file tariffs including the rates for metered and unmetered water service. The Commission's order does not requiring the tariffing of availability fees.²⁰⁸

161. The collection of availability fees, by the terms and timing of the original agreements, began prior to construction or completion of the water and sewer systems and were collected to make construction of the systems feasible.²⁰⁹

162. 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.²¹⁰

and Necessity to Construct, Operate and Maintain an Intrastate Water System, Case No. 17,954, Report and Order, Issued December 17, 1973, Effective December 27, 1973.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954.

163. People who purchase lots who are subject to paying the availability fees receive a benefit from paying the availability fees. That primary benefit is access to required utility service, in this instance potable water and sewage treatment, without having to sustain additional costs of installing a well or a septic system. A secondary benefit for paying the fees is the avoidance of having a lien placed on the property by operation of the terms of the land sales contract or the restrictive covenants. Having the infrastructure in place also facilitates the sale of lots by complying with deed restrictions.²¹¹

164. Lake Region customers have benefited from the availability fees, because the contributed plant associated with those fees lowers rate base and lowers utility rates for the ratepayers.²¹²

²¹⁰ Transcript, pp. 281-282, 335, 343-346, 364-365, 562, 565, 692-702 (see in particular pp. 700-702). Staff Witness Featherstone testified that Staff's theory that the cost of original infrastructure was recovered in the price of the lots, and not from availability fees, was based upon an assumption. (Transcript, p. 461). Four Seasons Lakes Sites POA, Inc. Exh. 1, First Amended Declaration of Restricted Covenants; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010; Lake Region Exh. 13, Engineering Report in Case No. 17954; Lake Region Exh. 14, Transcript of Hearing in Case No. 17954; Lake Region Exh. 15, Report and Order in Case No. 17954. While the Commission's Staff has levied many accusations regarding the purpose of the availability fees being to repair and maintain existing infrastructure, as opposed to recovering the investment in infrastructure, Staff has not provided any evidence to support its theories. Moreover, Staff's testimony has been contradictory; for example, without supporting evidence, Staff witness Featherstone testifies that he believes availability fees would be used to offset maintenance and repair and future replacement construction (Transcript, pp. 415, 468, 731-732). Mr. Featherstone appears to contradict himself when he further testified: The original infrastructure, "to the extent there has been construction and additions" was donated to Lake Region, while: "Replacements to that infrastructure, that would have been paid for by the Lake Region utility and ultimately paid for by the Lake Region customers," i.e., not from availability fees. (Transcript, p. 459). Staff Witness Merciel also contradicts Mr. Featherstone when he testifies that "you can't tell what they're (the availability fees) supposed to be for" (Transcript, p. 482). Staff's latest argument (in its post-hearing brief) refers to a 2003 civil case involving Lake Region and one of its previous owners, Waldo Morris. That argument will be addressed in the conclusions of law section.

²¹¹ Judicial admission by Public Counsel: "Standby and availability charges are fees which are exacted for the benefit which accrues to property by the virtue of having water available to it even though the water might not actually be used at the present time." Transcript, p. 20. The deed restrictions require accessing the utility infrastructure and compliance with paying the availability fee allows for sale of the lots. Transcript pp. 249-250. Alleviates the need for the property owner to drill a well or install a septic system. Transcript, pp. 357-358. The chief benefit of having the infrastructure in place is the availability of potable water distribution and permanent sewer treatment – lot owners gain this benefit from paying availability fees. Transcript 458-459, 741-742 (Featherstone) Mr. Featherstone's prefiled testimony contradicts his testimony at hearing. Transcript, p. 734. There is an economic benefit to pay the fees to avoid a lien on the property. Transcript, p. 499.

²¹² Transcript, pp. 253, 357-358, 432-433, 455, 461. See also Footnote 211.

Assignment or Transfer of Ownership of the Availability Fees

165. On August 17, 1998, Four Seasons Lakesites, Inc. (Developer) and Four Seasons Water & Sewer Co. assigned the availability fees to Roy and Cindy Slates.²¹³

166. The 1998 and 1999 Annual Reports for the company confirm that the company's stock was also transferred to the Slates, but no Stock Purchase Agreement was offered or entered into evidence.²¹⁴

167. Following the August 17, 1998 assignment, neither Four Seasons Group, Inc. nor Four Seasons Lakesites, Inc. were involved with the billing or collection of availability fees assessed to the properties in water and sewer companies' service areas.²¹⁵

168. On July 27, 1999, Lake Region filed its annual report for the year ending December 31, 1998. Availability fees are listed as being "other income" and total \$52,648.²¹⁶ This is consistent with timing of the assignment of the fees to the Slates. The 1998 Annual Report was the last year availability fees were reported.²¹⁷

169. On April 12, 2000, Roy and Cindy Slates assigned the availability fees to Lake Region Water & Sewer Company.²¹⁸

²¹³ 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).

²¹⁴ *Id.*; Lake Region Exh. 7, Annual Report of Lake Region Water and Sewer Company for the year ended December 31, 1998; Lake Region Exh. 8, Annual Report of Lake Region Water and Sewer Company for the year ended December 31, 1999; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

²¹⁵ Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010. As previously noted, on October 9, 1998, Lakesites W&S changed its name to Four Seasons Water and Sewer Company ("Four Seasons W&S"), and On May 16, 1999, Four Seasons W&S changed its name to Lake Region. Staff Exh. 7, Cost of Service Report, pp. 1-7; Staff Exh. 13, Featherstone Direct, p. 8. Note: Staff reports the name change occurring in this case; however, the docket entries do not reflect a name change application; *In the Matter of Four Seasons Water and Sewer Company for Name Change to Lake Region Water and Sewer Company*, Case No. WO-99-0469, Order Recognizing Change of Corporate Name and Filing of Adoption Notice, Effective May 16, 1999.

²¹⁶ See Footnotes 213 - 215.

²¹⁷ *Id.*

²¹⁸ *Id.*

170. On April 12, 2000, Lake Region Water & Sewer Company assigned availability fees to Waldo I. Morris.²¹⁹

171. On October 13, 2004, Waldo I. Morris (President of Lake Region Water & Sewer Co.) and Robert P. Schwermann and Sally J. Stump executed a “Contract Regarding Availability Fees” (“Fee Contract”).²²⁰

172. Part of the Fee Contract included consummating and closing a Stock Purchase Agreement (dated September 10, 2004) in which Robert P. Schwermann and Sally J. Stump purchased all of the stock in Lake Region for three million dollars.²²¹ The Stock Purchase Agreement was not offered or entered into evidence.

173. The Fee Contract was accompanied by a separate “Assignment of Availability Fees” agreement specifying that for the amount of \$1.00, and “other good and valuable consideration,” Mr. Morris assigned the availability fees to Robert P. Schwermann and Sally J. Stump.²²²

174. Robert P. Schwermann and Sally J. Stump hold the availability fees as tenants in common.²²³

175. On October 8, 2003, a lawsuit was initiated by Four Seasons Lakesites, Inc., contesting the ownership of the property rights for the availability fees; Civil Case No. CV103-760CC. The defendants in that lawsuit included Lake Region and Roy and Cindy Slates, and Waldo Morris, the former owners of Lake Region. On April 15, 2005, a

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement. Transcript, p. 612, 643-644.

²²² *Id.*; Transcript, pp. 245, 259-261, 612-613.

²²³ Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement.

confidential settlement was reached regarding who owned the property rights to the fees. Because the ownership of Lake Region had changed hands again, this settlement included the assignment of availability fees from Waldo Morris to Robert P. Schwermann and Sally J. Stump. Sally J. Stump and RPS Properties, L.P. received the right to collect the availability fees as a result of that settlement; however, terms were put in place as to which party received what portion of the availability fees.²²⁴

176. Four Seasons Lakesites, Inc. holds a security interest in RPS Properties, L.P.'s and Sally 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. This security interest includes all accounts, accounts receivable, payment intangibles, contract rights, chattel paper, instruments and documents and notes; all proceeds relating thereto; and all of the foregoing, which are related to or arising from such Availability Fees and the Availability Fee Assessment Rights.²²⁵

²²⁴ Civil Case No. CV103-760CC. The Commission took administrative notice of this case during the evidentiary hearing. The lawsuit also involved a "Demand for Delivery of Possession" wherein the ownership of a certain tract of property was in dispute. Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010; (HC – Paragraphs 12, 13, 15 to be made public by this order). Staff Exh. 23, Confidential Settlement Agreement in Circuit Court Case CV-103-760CC executed between Four Seasons Lakesites, Inc., Lake Region Water and Sewer Company, Sally J. Stump and RPS Properties, L.P. on April 15, 2005. (HC – no terms of the agreement are disclosed). See also Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010; Transcript, pp. 245, 247, 250, 697, 707-708,

²²⁵ Lake Region Exh. 10, UCC Financing Statement: Four Seasons Lakesites, Inc.'s Security Interest in Availability Fees owned by Sally Stump and RPS Properties, L.P. Beginning with Lake Region's 2005 Annual Report, filed on August 1, 2006, a new entry appears in Annual Reports in the category of "Payments for Services Rendered by Other than Employees." The new entry is entitled Lake Utility Availability, Management. Lake Region Water and Sewer Company, Water and Sewer Annual Report, Small Company, to the Missouri Public Service Commission for the year ending December 31, 2005. This line item books costs associated with debt service cost for the amount of money the shareholders borrowed to purchase Lake Region. *Id.* See also Staff's Response to Commission Request for Annual Report Analysis, filed on May 28, 2010, and Lake Region's Response to June 1, 2010 Order of the Commission, filed June 8, 2010.

Collection and Amount of Availability Fees

177. According to the terms of the sales contract and the restrictive covenants (described in Findings of Fact Numbers 121-155) availability fees are levied on the owners of undeveloped lots. Once lots are developed, the owner of the property must connect to the water and sewage systems and availability fees are no longer charged once the connection is made and water and sewer service are being provided.²²⁶

178. Availability fees are not paid by Lake Region's water and sewer service customers.²²⁷

179. Lake Region must provide service to any property owner requesting service within Lake Region's service area, even if the property owner does not pay or is in arrears on paying the availability fees.²²⁸

180. The number of annual bills for availability fees will vary while lots are sold and developed and will continue to vary annually until all lots are sold and developed.²²⁹

181. The actual amount of availability fees collected will vary based upon the property owners fulfilling their obligation to pay.²³⁰

182. The actual amount of availability fees collected annually will vary based upon when the property owners pay the fees.

²²⁶ The undeveloped lots contain no structures, no service lines to connect a structure to a main and there is no actual exchange of water or sewage discharge between a structure and a water or sewer main. Transcript, pp. 534-535.

²²⁷ Transcript pp. 557-558.

²²⁸ Transcript, pp. 489-490, 614.

²²⁹ See the annual reports for Lake Region and its Predecessor Company that report varying amount of fees collected. See Lakesites POA Exhs. 3 and 5. See also "Staff's Response to Commission Request for Annual Report Analysis," filed on May 28, 2010.

²³⁰ See the annual reports for Lake Region and its Predecessor Company that report varying amount of fees collected. See also "Staff's Response to Commission Request for Annual Report Analysis," filed on May 28, 2010.

183. Depending on how quickly property owners develop their lots, some may pay availability fees for a very small number of months and some may pay the fees for years.

184. Availability fees collected during the years of 1974 through 2004 that were reported by Lake Region's predecessors vary in amount. Fees collected were reported for the years 1974 through 1985, 1987 through 1992, and 1995 through 1998.²³¹

185. The total amount of availability fees that were collected and reported during the years of 1973 through 2004 that can be verified by the company's annual reports is \$1,571,749.²³²

186. The total amount of availability fees that were collected and reported during the years of 1973 through 2004 were collected by the previous owners of the company, i.e. Harold Koplar, Peter N. Brown, Roy and Cindy Slates, and Waldo I. Morris.

187. The total amount of availability fees that were collected and reported during the years of 1974 through 2004 that can be verified by the Lake Region's predecessor's annual reports is inaccurate because: (1) data is missing for the years of 1986, 1993, 1994, 1999, 2000, 2001, 2002, 2003, and 2004; (2) there is no breakdown of the dollars collected to know whether the fees were collected for water or sewer customers on Shawnee Bend versus Horseshoe Bend; and (3) based on the timing of the certification cases and the transfer of assets cases, availability fees collected between the years of 1974 and 1992 are comprised primarily, if not totally, from fees collected in relation to the Horseshoe Bend water system, which is irrelevant to this matter.

188. The availability fee income that is reported appears on line F-42 of the annual reports for "Other Income and Deductions."²³³

²³¹ *Id.*

²³² *Id.*

189. Since the sale of Lake Region's stock and the assignment of availability fees to Robert P. Schwermann and Sally J. Stump, and the settlement agreement executed in Civil Case No. CV103-760CC, Sally J. Stump and RPS Properties, L.P. have the right to collect the availability fees.²³⁴

190. RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 bills for and collects "availability fees" from land owners of undeveloped lots within the service area of the Lake Region. Lake Utility Availability 1 is a fictitious name.²³⁵

191. For convenience, management fees are paid into the same account in which the availability fees are deposited. That account is titled Lake Utility Availability Fees and is owned by RPS Properties and Sally Stump.²³⁶

192. Billing statements for the availability fees bear the caption "Lake Utility Availability" and display the same address and phone number as a copy of a customer bill for water and sewer service from Lake Region.²³⁷

193. Cynthia Goldsby is currently a billing clerk employed by Camden County Public Water Supply District Number 4.²³⁸

194. Ms. Goldsby's hourly wage is paid by Camden County PWSD4 and is \$12.90.²³⁹

²³³ See the annual reports for Lake Region and its predecessor companies.

²³⁴ Staff Exh. 10, Contract Regarding Availability Fees; Assignment of Availability Fees and Closing Statement; Staff Exh. 27, Affidavit of Peter N. Brown, dated April 29, 2010.

²³⁵ Transcript, pp. 261-266, 279-280, 323-327, 609, 650; Staff Exhibit 11, Registration of Fictitious Name – Lake Utility Availability, Filed with the Secretary of State on December 1, 2004, expired December 1, 2009; See also Registration of Fictitious Name – Lake Utility Availability 1, Filed with the Secretary of State on August 24, 2005, expires August 24, 2010; Staff Exh. 7, Cost of Service Report, pp. 1-7.

²³⁶ Transcript, p. 358, 417-418. There has been no objections from the original registrant of the fictitious name Lake Utility Availability made to the current registrant of the fictitious name Lake Utility Availability 1 to the use of the abbreviated name. Transcript, p. 650.

²³⁷ Staff Exh. 15, Merciel Rebuttal, Attachment No. 6.

²³⁸ Staff Exh. 26, Affidavit of Cynthia Goldsby, executed May 24, 2010.

195. As part of Ms. Goldsby's job responsibilities, she handles billing and collection of the availability fees, but she is unaware as to which entity or entities for which she conducts these activities.²⁴⁰

196. RPS Properties, L.P. makes no payments for Ms. Goldsby's services.²⁴¹ RPS Properties, L.P. makes no payments to the Camden County PWSD4 for Ms. Goldsby's services.²⁴²

197. Ms. Goldsby currently sends bills for annual availability fees to 1,345 individuals or entities owning Shawnee Bend properties.²⁴³

198. The annual availability fees for both water and sewer for each entity billed is \$300.²⁴⁴

199. RPS Properties, L.P. and Sally Stump began collecting availability fees in 2005, but they retain only a portion of the availability fees pursuant to the April 15, 2005 settlement agreement in Civil Case No. CV103-760CC.²⁴⁵

²³⁹ Staff Exh. 26, Affidavit of Cynthia Goldsby, executed May 24, 2010.

²⁴⁰ Transcript pp. 257-258, 282-287, 307-314; Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010.

²⁴¹ Staff Exh. 22, Affidavit of Brian Schwermann, executed May 23, 2010. (HC – Paragraphs 4 & 5 to be made public by this order).

²⁴² *Id.*

²⁴³ Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010; Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010. (HC – Paragraph 8 to be made public by this order). Lakesites POA introduced evidence of the number of undeveloped lots in the Porto Cima subdivision of the Shawnee Bend Peninsula. These numbers presented by Lakesites POA demonstrate the annual fluctuation in the number of unimproved lots; however, these numbers, absent an accurate count of the actual bills levied for availability fees are of no value in determining the actual amount of availability fees billed for and collected on an annual basis. See Lakesites POA Exhs. 3 and 5.

²⁴⁴ Staff Exh. 25, Affidavit of Cynthia Goldsby, executed May 13, 2010; Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010 (HC – Paragraph 9 to be made public by this order); Staff Exh. 20, Affidavit of Sally Stump, executed June 1, 2010.

²⁴⁵ Staff Exhibit 23, Confidential Settlement Agreement in the Circuit Court Case Between Four Seasons Lakesite and Lake Region Water & Sewer Company's Sally Stump and RPS Properties. (HC– no confidential material disclosed).

200. Based upon the confidential affidavits introduced into evidence identifying the total amount of availability fees collected, and the amount RPS and Sally Stump cannot retain pursuant to the settlement agreement in Civil Case No. CV103-760CC (the specific terms of which the Commission will not disclose), the annualized amount of revenue actually received from the availability fees by RPS and Sally Stump can be definitively calculated. However, for reasons more fully articulated in the conclusions of law, those actual numbers will not be disclosed ²⁴⁶

201. On November 13, 2006, John Summers (General Manager of Lake Region) received an e-mail from Roberta Grissum of the Commission's Staff, instructing Ozark Shores (one of the companies managed in conjunction with Lake Region) to file an amended Annual Report for the calendar year of 2005. The e-mail directs Ozark Shores to include only regulated revenues in its annual reports. The e-mail was giving Ozark Shores specific instructions to remove any revenue the company collected as availability fees and any expense associated with collecting those fees from its annual report because Staff classified these fees as unregulated revenue. Mr. Summers has continued to follow the practice of not including availability fees on the annual reports after receiving Staff's instructions. ²⁴⁷

²⁴⁶ Staff Exh. 21, Affidavit of Brian Schwermann, executed May 13, 2010 (HC – Paragraphs 10 & 17 NOT to be made public by this order); Staff Exh. 22, Affidavit of Brian Schwermann, executed May 24, 2010. (HC – Paragraph 6 NOT to be made public by this order). Staff Exh. 23, Confidential Settlement Agreement in Circuit Court Case CV-103-760CC executed between Four Seasons Lakesites, Inc., Lake Region Water and Sewer Company, Sally J. Stump and RPS Properties, L.P. on April 15, 2005. (HC – no terms of the agreement are disclosed) (NOT to be made public – Protective Order in place).

²⁴⁷ Lake Region Exh. 9, E-mail dated November 13, 2006 from Roberta Grissum to John R. Summers; Transcript, pp. 360-362.

202. Staff's calculations regarding the amount of the availability fees being collected are estimates that are not reliable, that have not been verified and that assume that Lake Region is the entity collecting the fees.²⁴⁸

Historical Treatment of Availability Fees

203. The Commission has had a number of cases come before it in the past that have dealt with issues concerning availability fees. Those issues involved determinations regarding whether the fees constitute regulated utility services and how to treat the revenue derived from fees.

204. In Case No. WR-92-59, where Lakesites Water & Sewer Company (Lake Region's predecessor) sought an increase in rates, the availability fees were removed from the general revenue stream and the rate base was reduced a certain amount as an offset for the reduction in general revenue related to the availability fees. This case was settled with a unanimous agreement from the parties that the Commission approved.²⁴⁹

205. In Case No. WR-99-193, where Ozark Shores sought an increase in rates, the parties agreed to add availability fees into the general revenue stream of the company and add additional rate base to the company as an offset. The availability fees are included in utility rates and are not tarified. This case was settled with a unanimous agreement from the parties that the Commission approved.²⁵⁰

²⁴⁸ Transcript, pp. 523-524. Judicial admission of Staff Counsel in opening statement for the True-Up Proceeding: "Staff's total amount of availability fee revenue is based upon its estimated number of undeveloped lots in the Shawnee Bend region. Staff has been unable to be [sic] verify this number to be true and accurate from Lake Region, Lake Utility Availability and/or Lake Utility Availability One." Transcript, p. 687. The actual amounts of availability fees collected by the current owners of Lake Region are provided in the Affidavits from Brian Schwermann.

²⁴⁹ Case No. WR-92-59, *In the Matter of Four Seasons Lakesites Water and Sewer Company's Tariff to Increase Rates Pursuant to Their Informal Rate Procedure*, Report and Order, issued November 27, 1991, Order Approving Tariff, Issued may 15, 1992; Transcript, pp. 559-561.

²⁵⁰ Case No. WR-99-183, *In the Matter of Ozark Shores Water Company, Inc. for a Small Company Rate Increase*, Order Approving Tariff, issued December 10, 1998, Effective December 11, 1998 ; Transcript, pp.

206. Peaceful Valley Service Company, a wholly owned subsidiary of Peaceful Valley Property Owners Association, collects availability charges as general revenue to reserve access to its water service and the fees are tarified. Peaceful Valley's tariff provision applies to availability charges that are generated through a contract between the property owner and the company, or from a contract between a property owner and a developer that was assigned to the utility company. The treatment of the availability fees stemmed from a unanimous agreement from the parties that the Commission approved ²⁵¹

207. I.H. Utilities formerly collected availability fees as general revenue and these charges were tarified in rates. The fees originated in a contract between the developer and the property owner that was later assigned to the company. I.H. Utilities no longer collects the fees and they are no longer tarified in rates.²⁵²

208. Staff's subject matter experts have consistently testified in their expert capacity that availability fees are not utility services.²⁵³

359-360, 491-492, 559-561. This case was referenced as Case No. WR-98-990 during Mr. Stump's testimony; however, Lake Region clarified the proper case number in its brief as being Case No. WR-99-183.

²⁵¹ Transcript pp. 491-497, 502-507, 529-532, 538; Tariff JW-2002-0105, P.S.C. Mo. No. 2, 1st Revised Sheet # 6; Staff Exh. 15, Merciel Rebuttal, Attachment 2.

²⁵² Transcript pp. 532-533.

²⁵³ Transcript pp. 432 (Featherstone), 496-498, 534-535 (Merciel): Staff Exh. 15, Merciel Rebuttal, p. 6. "As a technical expert, I believe that "service" is provided to a water customer when that customer is connected to the water system and has use of the water, which is the utility's product/commodity furnished to the customer, as desired. Similarly, a "service" is provided to a sewer customer when that customer is connected to the sewer system, in that any time the customer discharges sewage it will be taken and properly treated by the sewer utility. The availability charge is different because it applies when the utility "service" is available to the property owner by virtue of the existence of pipelines in front of the property, but the property owners does not connect and actually receive utility 'service.'" *Id.*

In the Report and Order in *Orler v. Folsom Ridge, LLC* 2007 WL 2066385, 16 (Mo.P.S.C.) (Mo.P.S.C.2007), the Commission determined that fees paid to reserve service is not the provision of water or sewer service and does not involve a use, accommodation, product or commodity, based upon Mr. Merciel's testimony in that case (Transcript from WC-2006-0082 & WO-2007-0277, pp. 1093-1096). See also the testimony of Gregory Meyer in WA-95-164: "An availability fee is established by a developer and is charged to a lot owner when that lot has the capability of receiving water and sewer service. In order words, the water and sewer mains and production and treatment facilities have been constructed, but no service is being provided as of yet." OPC Exh. 2, Robertson Direct, pp.6-7.

209. The Commission has previous found that availability fees are not utility services.²⁵⁴

210. The Commission's Staff has always been aware of the availability fees being charged to the property owners in the Shawnee Bend area.²⁵⁵

Costs Associated with Billing and Collection of Availability Fees

211. Staff did not audit the actual costs associated with billing and collection for the availability fees. Staff treated RPS Properties and Sally Stump d/b/a Lake Utility Availability 1 as a fourth entity to estimate an allocation of costs related to the management and payroll associated with billing and collection of the fees.²⁵⁶

212. Lake Region examined the cost associated with billing 1200 individuals or entities for availability fees each year. Based upon total billing of 38,000 bills per year, Lake Region's billing clerk spends 3% of her time associated with billing for availability fees. There is a cost of 50 cents for each bill associated with stamps and paper. There is a cost for the management of providing the billing and collection service of 3/10th of one percent or \$600 a year for that function. In total, a reasonable cost for providing the billing and collection service for 1200 bills for availability fees is \$2,000 annually.²⁵⁷

L. Executive Management Fees

213. Lake Region does not have any employees.²⁵⁸

²⁵⁴ *Id.* Similarly, in *In re Central Jefferson County Utilities, Inc.* 2007 WL 824040, 11, (Mo.P.S.C.) (Mo.P.S.C.2007), the Commission determined that it lacked jurisdiction over the developers charging connection fees for services, even when the developers and the utility company were owned by the same individuals, because these were separate corporate entities.

²⁵⁵ Transcript, pp. 525-526.

²⁵⁶ Transcript, pp. 446-454.

²⁵⁷ Transcript, pp. 566-568.

²⁵⁸ Staff Exh. 9, Harris Surrebuttal, pp. 1-16; Transcript, pp. 122-213.

214. Lake Region contracts with the Camden County Public Water Supply District Number Four (“Water District”), to operate and manage the day-to-day operations of the Lake Region and Ozark Shores Water Company (“Ozark Shores”).²⁵⁹

215. The Water District staff performs normal day-to-day administrative and operational functions for all three entities and consists of a General Manager, two accountant-administrative assistants and seven field operators.²⁶⁰

216. The work of the employees is structured to share in their efforts to perform the necessary tasks required of operating water and sewer companies. Economies are gained and benefits recognized by all three entities when the work of the employees is spread out among Lake Region, Ozark Shores and the Water District.²⁶¹

217. Lake Region does not have its own office space.²⁶²

218. Lake Region shares office space with Ozark Shores and the Water District. This is an older building that is not excessive in its size or décor.²⁶³

219. There are economic benefits to the sharing of office space versus having to acquire stand-alone office space.²⁶⁴

220. There are common facilities and equipment (vehicle equipment, wells for the water services and a water storage tank) that are owned by either the Water District or Lake Region or Ozark Shores that are used by all three of these entities to provide each with respective utility services.²⁶⁵

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*