

Exhibit No.:
Issues: Availability Charges
Witness: James A. Merciel, Jr.
Sponsoring Party: MO PSC Staff
Type of Exhibit: Surrebuttal Testimony
Case No.: WR-2010-0111
& SR-2010-0110
Date Testimony Prepared: March 12, 2010

MISSOURI PUBLIC SERVICE COMMISSION

UTILITY OPERATIONS DIVISION

SURREBUTTAL TESTIMONY

OF

JAMES A. MERCIEL, JR.

LAKE REGION WATER & SEWER COMPANY

**CASE NO. WR-2010-0111 &
SR-2010-0110**

Jefferson City, Missouri
March 2010

Staff Exhibit No. 16
Date 3/30/10 Reporter NW
File No SR-2010-0110+WR

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

In the Matter of Lake Region Water & Sewer)	Case Nos. SR-2010-0110
Company's Application to Implement a General)	and WR-2010-0111
Rate Increase in Water and Sewer Service.)	

AFFIDAVIT OF JAMES A. MERCIEL, JR.

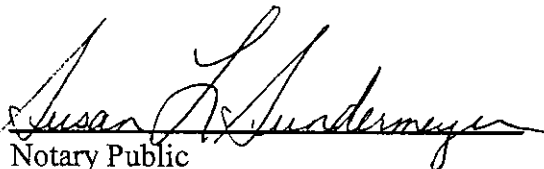
STATE OF MISSOURI)
) ss
COUNTY OF COLE)

James A. Merciel, Jr., of lawful age, on his oath states: that he has participated in the preparation of the following Surrebuttal Testimony, in question and answer form, consisting of 8 pages, to be presented in the above case; that the answers in the following Rebuttal Testimony were given by him, that he has knowledge of the matters set forth in such answers; and that such answers are true to the best of his knowledge and belief.



James A. Merciel, Jr.

Subscribed and sworn to before me this 12th day of March 2010.



Notary Public



SUSAN L. SUNDERMEYER
My Commission Expires
September 21, 2010
Callaway County
Commission #06942086

1
2
3
4
5
6
7
8
9
10
11
12
13

SURREBUTTAL TESTIMONY

OF

JAMES A. MERCIEL, JR.

LAKE REGION WATER & SEWER COMPANY

**CASE NO. WR-2010-0111 &
SR-2010-0110**

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Q. Please state your name.

A. My name is James A. Merciel, Jr.

Q. Are you the same James A. Merciel, Jr. who filed rebuttal testimony in this case?

A. Yes.

Q. What is the purpose of this surrebuttal testimony?

A. The purpose of this surrebuttal testimony is to respond to certain statements made by Lake Region Water and Sewer Co. (LRWS) witness John R. Summers in his rebuttal testimony, filed on February 19, 2010. Mr. Summers' testimony, as addressed herein, is responding to direct testimony filed by Office of the Public Counsel witness Ted Robertson on January 14, 2010, with respect to availability fees, or sometimes referred to as availability charges.

Q. With regard to Mr. Robertson's direct testimony citing Staff witness Gregory R. Meyer in Case No. WA-95-164, Mr. Summers states, on page 3, lines 12 and 13 of his testimony, "It is clear that Mr. Meyer believed that the fees are unregulated." Do you agree with this statement?

Surrebuttal Testimony of
James A. Merciel, Jr.

1 A. No. Mr. Meyer's testimony in Case No. WA-95-164, referenced in direct
2 testimony of Ted Robertson of the Office of the Public Counsel beginning on page 6, line
3 16, and continuing through page 9, line 32, discusses inclusion of revenue from
4 availability fees as utility revenue. Mr. Meyer's testimony, referenced on page 7, lines 21
5 through 25 of Mr. Robertson's testimony, states his belief that the rights to collect
6 availability fees should be assigned by the developer to the utility. Additionally, in its
7 *Suggestions in Support of Unanimous Stipulation and Agreement* that it submitted in this
8 same case, referenced on page 12, lines 18 through 25 in Mr. Robertson's testimony, the
9 Staff reiterated this position that availability fees revenue should be treated as utility
10 revenue. So, while Mr. Summers states his belief that the Staff considers availability fees
11 as "unregulated charges," the Staff, very clearly, considered in that case, and continues to
12 believe, that revenue associated with utility availability fees should be treated as utility
13 revenue, and taken into consideration by the Commission in approving rates.

14 Q. On page 4, lines 4 and 5 Mr. Summers states that "...[t]he most logical
15 reason..." for a developer to impose availability fees is "...to recoup a portion, if not all,
16 of the costs of the infrastructure the developer contributed to the utility." Do you agree
17 with this statement?

18 A. No. I do not agree this is the most logical reason. As discussed in my
19 rebuttal testimony filed on February 19, 2010, beginning on Page 7, line 13 through page
20 11, line 23, there are several reasons and possible uses of availability fees. For
21 developers to expect to recover capital costs from availability fees, they would have to
22 expect that homes will not be constructed upon a substantial number of lots, or at least
23 not for several years, because availability fees do not apply to lots upon which homes are

Surrebuttal Testimony of
James A. Merciel, Jr.

1 constructed. I believe that the most logical reason for developers to create availability
2 charges is simply to assist in supporting the utility operations.

3 Q. On page 4, lines 17 through 20, Mr. Summers states "If the availability
4 fees are to be included in the utility's rate structure in any manner, the plant costs
5 associated with those fees should not be classified as contributions but rather as rate base
6 upon which the utility may earn a return." Do you agree with this statement?

7 A. I do not agree that this is the only manner availability fees revenue should
8 be used, again as discussed in my testimony and Mr. Meyer's testimony as stated in the
9 previous answer. Further, this type of treatment is not at all the same as what Mr.
10 Summers describes as the "most logical reason" for developers to create availability fees.
11 The situation termed by him as the "most logical" is that developers would recover
12 capital costs they incurred in constructing and contributing assets to the utility. But, the
13 situation he describes where availability fees are "included in the utility's rate structure in
14 any manner" contemplates an offset to investment by the utility, not contribution by the
15 developer. Further, this scenario is not practical for offsetting investment in source of
16 supply and treatment facilities, since utilities would construct plant for existing customers
17 plus a reasonable amount for growth. For example, hypothetically, a treatment facility
18 with capacity to serve 2,000 customers would not be constructed if there were only 500
19 existing customers and growth of 50 customers per year.

20 I would, however, agree that if a utility were set up such that the original capital
21 costs of all of its water distribution pipelines and collecting sewer pipelines were indeed
22 investment by the utility, or "rate base," then availability fee revenue could be used in
23 this manner to offset rate base. While a treatment facility would not exist with a large

Surrebuttal Testimony of
James A. Merciel, Jr.

1 amount of excess capacity, pipelines available for a large number of lots that are for sale
2 or already sold could indeed exist. However, LRWS is not set up this way, since its
3 extension rules in its water tariff and sewer tariff provide for the pipelines to be paid for
4 or contributed by developers or others.

5 Q. Have any regulated water or sewer utilities ever applied either of these
6 types of the methods outlined by Mr. Summers?

7 A. To my knowledge, no. The only treatment of other availability charge
8 situations with respect to regulated water utilities has been to include availability charge
9 revenue as ordinary utility revenue, including LRWS's affiliate Ozark Shores Water
10 Company, as described on page 12, line 1 through 15 of my rebuttal testimony, and in
11 Mr. Meyer's testimony referenced above, specifically referenced on page 7, lines 2
12 through 32 of Mr. Robertson's testimony.

13 Q. On page 5, lines 7 through 10, Mr. Summers states "The fact that the Staff
14 actually proposed, and the Commission approved, rates to fund the \$45,031 which are
15 currently in effect supports the Company's position that these fees are unregulated and
16 not to be used in the ratemaking process." (\$45,031 being the Staff's estimate of utility
17 expenses in Case No. WA-95-164). Do you agree this is accurate with regard to the
18 Staff's position at that time?

19 A. No. I do not believe that the Staff had a good estimate to use for
20 availability fees, on a pro-forma basis, to use in Case No. WA-95-164, mainly because it
21 was a very early time to predict subdivision development and lot sales since the land
22 development in the Company's certificated area approved in this case was new, and
23 relatively few subdivision lots were sold or even existed. The Staff was interested in

Surrebuttal Testimony of
James A. Merciel, Jr.

1 recommending adequate and reasonable utility rates for the Commission's approval at the
2 time.

3 Q. On page 6, line 26 through 29, Mr. Summers states, referring again to
4 Case No. WA-95-164, "Staff did not include the fees in their proposed rate structure and
5 has never performed such a review which suggests that Mr. Merciel's position ---that
6 these fees do not constitute a charge for utility service --- is being followed." Do you
7 agree with this statement?

8 A. No. The Staff's absence of any pro-forma availability fee revenue in its
9 proposed rate structure is addressed above. Further, whether or not a rate review was
10 actually conducted, how one or more might have been conducted and documented, or any
11 determinations the Staff might have made in one particular case has no bearing on the
12 Staff's position with regard to availability fees.

13 Q. Has the Staff attempted to identify revenues and expenses associated with
14 availability fees in this case?

15 A. Yes. The Staff has attempted to identify such revenues and expenses with
16 respect to availability charges in this rate case, through data request. This includes
17 requesting specific expenses related to lot owners who pay availability fees. However the
18 Company has refused to supply much of the information that would allow a review of
19 these revenues and pertinent information by objecting to data requests. Thus, the Staff is
20 using what it believes to be a reasonable estimate of availability fee revenue, as described
21 in the surrebuttal testimony of Staff witness Cary Featherstone.

22 Q. In his question and answer on page 7, lines 1 through 18, Mr. Summers
23 speaks, among other things, about lot owners making decisions with regard to connecting

Surrebuttal Testimony of
James A. Merciel, Jr.

1 to the utility systems, or continuing to pay availability fees. Do you agree that the lot
2 owners have such choices in the use of their lots and payment of required fees?

3 A. I agree that the lot owners have choices with regard to the use of their lots,
4 and also that they agreed to the restrictive covenants that are on file and applicable to
5 their lots. However, in this particular situation involving LRWS, the restrictive
6 covenants state, as pointed out beginning on page 14, line 13 of my rebuttal testimony,
7 that the availability fees are to be paid to the owner of the water system or sewer system,
8 or assigns. Though the arguments surrounding this issue is largely a matter requiring
9 legal analysis, these documents are intended to be read by lot owners and persons
10 considering purchasing lots. A reading of them by most people, including myself as a
11 technical person, in my opinion conveys a concept of utility availability fees that will be
12 paid to the appropriate utility, water and/or sewer, to support the utility systems. The
13 utility in question is LRWS, which is a regulated utility. In my opinion, many folks
14 would reasonably conclude that if they agree to pay such charges that the funds would be
15 used to support the utility within the jurisdictional oversight of the Commission, and not
16 simply be paid to some unrelated party with nothing returned for such payment. Further,
17 the version of the Declaration of Restrictive Covenants that was apparently in effect at
18 the time in Case No. WA-95-0164, referenced as an attachment to Mr. Meyer's testimony
19 by Mr. Robertson on page 10, lines 32 through 35, provided that "The amounts of said
20 availability charges and other charges are subject to change hereafter by order of said
21 Missouri Public Service Commission or its successors..."

22 Q. Do you believe it to be improper for LRWS to separate availability fee
23 revenue from utility revenue?

Surrebuttal Testimony of
James A. Merciel, Jr.

1 A. Yes. As stated in the above answer and elsewhere in my testimony and
2 that of others in this case and previous cases related to LRWS, I believe that availability
3 fees are inherently tied to utility operations, or arguably utility capital funding. In the
4 specific case of LRWS, this belief is reinforced by the Restrictive Covenants which is as
5 outlined above and elsewhere, a document intended for anyone to read. I, therefore,
6 strongly disagree with any position that LRWS is in no way involved with availability
7 charges, collections, associated revenue, or expenses associated with them.

8 Q. Do you believe that LRWS has always separated availability fees revenue
9 from utility revenue?

10 A. No. As was stated in my rebuttal testimony on page 17, lines 18 through
11 20 and by Attachments 6 and 7 in that testimony, I believe LRWS billed and collected
12 availability fees.

13 Q. How did you learn of the previous owners' separating collection of
14 availability fees from utility revenue?

15 A. While the Staff was discussing some history of LRWS with the company,
16 and I was researching some available records, I saw documentation of separate fictitious
17 names or entities created by previous owners. I have learned that, contrary to a statement
18 made by me in rebuttal testimony, previous owners of LRWS set up fictitious names or
19 entities that were likely for the intentional purpose of billing and collecting availability
20 fees separate from the utility's billing. The Staff also believes that one previous owner of
21 LRWS made an assignment of the availability fees to the current owners of LRWS. A
22 copy of a document that pertains to this assignment is included herein as Attachment 1. I
23 believe the current owners created a fictitious name registration known as Lake Utility

Surrebuttal Testimony of
James A. Merciel, Jr.

1 Availability 1, which fictitious name registration was discussed in my rebuttal testimony,
2 and exists apparently for the purpose of intentionally separating the availability fees
3 revenue. To put these separate entities in perspective, I have included, as Attachment I, a
4 historical timeline of LRWS and some related activities.

5 Q. Do you agree with Mr. Summers' position that the Commission has no
6 jurisdiction whatsoever with regard to availability fees or availability charges?

7 A. No. I believe that the availability fees involve the utility, and in turn
8 involve the Commission. This is based on factors outlined in the above testimony as well
9 as in my rebuttal testimony. I also believe that separation of availability fees revenue
10 from utility revenue is not in accordance with what is represented by the restrictive
11 covenants.

12 Q. Does this conclude your surrebuttal testimony?

13 A. Yes.