

**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  
RESPONSE TO ORDER DIRECTING FILING AND SUGGESTIONS OPPOSING  
OFFICE OF PUBLIC COUNSEL'S APPLICATION FOR REHEARING**

On May 28, 2014, Office of Public Counsel (OPC) filed an application for rehearing of matters determined in the Commission's Report and Order issued on April 30, 2014. On the same date as OPC's filing, the Commission entered an order directing Staff and Lake Region Water & Sewer Company (Lake Region) to provide by June 5, 2014 a response to OPC's application for rehearing.

The Commission is authorized to grant an application for rehearing "if in its judgment sufficient reason therefor be made to appear[.]" Section 386.500.1.<sup>1</sup> "Sufficient reason" includes a significant mistake of law or fact by the Commission or a public policy argument not previously considered.<sup>2</sup> OPC has failed to show sufficient reason for the Commission to rehear any matter determined in the Commission's Report and Order and its application for rehearing should be denied.

***A. Availability Fees***

OPC argues the Commission improperly concluded that availability fees collected from

---

<sup>1</sup> Statutory citations herein are to RSMo 2000 or its current supplement unless otherwise indicated.

<sup>2</sup> *Christ et al. v. Southwestern Bell Telephone LP*, Case No. TC-2003-0066, *Order Denying Rehearing*, February 4, 2003, at 4.

owners of undeveloped lots on Shawnee Bend should not be applied against Lake Region's rate base. In support of that argument OPC contends that the Commission wrongly shifted the burden of proof on this issue to OPC and Staff. OPC claims that because Lake Region has the statutory burden to show that its rate increase request is just and reasonable it likewise had the burden to show that its donated plant was not paid for by fees it did not own or control. OPC also contends that it was error for the Commission to believe Lake Region's witness, John R. Summers,<sup>3</sup> and his "far-fetched assertion" that it would take more than 45 years for the developer to recoup its \$5.3 Million investment in the water and sewer systems through collection of the availability fees. OPC argues Mr. Summers' testimony was refuted by other witness testimony sponsored by OPC or Staff. These arguments have no merit.

1. *The Commission lacks jurisdiction over availability fees.*

Throughout this case, Lake Region has argued repeatedly in various motions, post hearing briefs and other post hearing filings that the Commission lacks subject matter jurisdiction over availability fees. Lake Region's position and argument was expressed most recently in Lake Region's *Limited Application for Rehearing* filed on May 29, 2014. Lake Region reasserts its arguments on this subject and incorporates by reference herein, as if they were fully set forth, Lake Region's *Limited Application for Rehearing* and the portions of its Post Hearing and Reply Briefs that are devoted to the Commission's lack of jurisdiction over availability fees. In the event the Commission rehears its determination on this issue and concludes rightly that it lacks jurisdiction over availability fees, OPC's arguments become moot.

2. *Burden of Proof*

As provided in Section 393.150.2:

---

<sup>3</sup> The Commission decreed a change in Mr. Summers' name to "Larry R. Summers" for purposes of the Report and Order. (Page 26, Paragraph 66.) The error was corrected *nunc pro tunc* in the *Notice of Correction* issued on May 5, 2014.

At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

OPC argues that within this statutory burden of proof was an additional burden on Lake Region to prove that the costs of donated plant---on which Lake Region sought no return in the rates it sought to increase---“had not already been recovered through other means, including through availability fees.”<sup>4</sup> OPC cites no statutory or case authority for the proposition and there is none.

At the outset, the Commission should observe that OPC’s argument underscores the irrelevancy and immateriality of such an inquiry. Whether a developer who donated water and sewer system infrastructure to a public utility, which earns **no return** on the asset, is ever paid in full, or at all, for the cost of those improvements, by lot sales or some “other means” is utterly disconnected to determining the fairness or reasonableness of rates the utility seeks to adjust on the basis of increased costs, expenses and a reasonable return on assets in which it has actual investments.

Moreover, OPC is arguing for an improper shift in the burden of proof in these types of proceedings.

When courts discuss the burden of proof, there are two components: the burden of producing (or going forward with) evidence and the burden of persuasion. *See McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.2d 557, 561–63 (1932).<sup>FN6</sup> Cases also refer to a burden of pleading, which in most instances simply is assigned to the party with the burden of proof on an issue. *See, e.g.,* \*54 *Menzenworth v. Metropolitan Life Insurance Co.*, 249 S.W. 113, 115 (Mo.App.1923).

FN6. The common understanding, as set forth in Black's Law Dictionary, is that the burden of persuasion is “a party's duty to convince the fact-finder to view the facts in a way that favors

---

<sup>4</sup> *OPC Application for Rehearing*, at 2.

that party.” BLACK’S LAW DICTIONARY 190 (Seventh ed.1999). The burden of producing evidence is “a party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.” *Id.*

*Kinzenbaw v. Director of Revenue*, 62 S.W.3d 49, 53 -54 (Mo. en banc 2001).

In rate proceedings the burdens are allocated such that Lake Region bears initially the burden of producing evidence (minimum filing requirements and testimony in support) showing that it is entitled to the rate increase applied for. OPC and Staff in turn are authorized to agree with Lake Region’s proposal or they bear the burden of producing evidence which if true would defeat the utility’s attempt to increase its rates. In this case, OPC was the party advancing the proposition that Lake Region’s plant should not be considered “donated” because of availability fees, and therefore OPC had the burden of proving that proposition.<sup>5</sup> Matters or theories raised by OPC (or Staff) by which to avoid or defeat Lake Region’s rate increase are correctly classified by the Commission as equivalent to affirmative defenses.<sup>6</sup> “‘The party asserting an affirmative defense bears the burden of proof.’ [citation omitted].” *Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 127 (Mo. App. W.D., 2009). OPC’s burden is very heavy given the history of this issue before the Commission.

The record will establish that Lake Region has provided its operating results to the

---

<sup>5</sup> The party asserting the positive of a proposition bears the burden of proving that proposition. *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo.,1994).

<sup>6</sup> An “affirmative defense” is defined as “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s ... claim, even if all the allegations in the complaint are true.” BLACK’S LAW DICTIONARY 482 (9th ed.2009). An affirmative defense seeks to defeat or avoid plaintiff’s cause of action, and alleges that even if plaintiff’s petition is true, plaintiff cannot prevail because there are additional facts and arguments that permit the defendant to avoid legal responsibility. See *Great Rivers Envtl. Law Ctr. v. City of St. Peters*, 290 S.W.3d 732, 735 (Mo.App. 2009).

*Ressler v. Clay County*, 375 S.W.3d 132, 140 -141 (Mo.App. W.D.,2012).

Commission and OPC for over 40 years and the rates applicable to customers on Shawnee Bend, where availability fees are collected from undeveloped lot owners, have been before the Commission on three separate occasions. On each of these occasions availability fees were brought into the mix of issues, addressed and evaluated. Yet, the Commission, when setting Lake Region's rates, refused, and continues to refuse, to consider them for ratemaking purposes.

Based on the cited authorities, Lake Region was not burdened with proving what OPC (or Staff) raised in defense of Lake Region's rate increase request. OPC was allocated that burden and failed in its proof.

### *3. Recouping the Developer's Investment*

On page 3 of its application for rehearing, OPC contends that "Lake Region agreed that the annual availability fees of \$300 for each undeveloped lot was specifically for both water and sewer availability from Lake Region." OPC then cites without paragraph number to *the Joint Stipulation of Undisputed Facts*. Lake Region submits that OPC is not accurately stating what was undisputed by the parties. According to Paragraph 74 of the parties' *Joint Stipulation of Undisputed Facts*: "The annual availability fees for both water and sewer for each entity billed is \$300." Paragraph 42 of the same stipulation recites: "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."

Lake Region can agree that the owner of each undeveloped lot is billed \$300 per year under the covenants and restrictions for availability fees. OPC argues that the calculations made by its witness of billed or collected availability fees was not challenged or refuted by Lake Region. Having the burden of persuasion on this issue OPC was obligated to offer reliable evidence of its proposition. OPC based its calculation upon estimates of availability fees

collected, and because of those estimates the proposal is patently unreasonable. OPC utilized these same estimates in the *2010 Rate Case* and the Commission rejected them. The calculations in its testimony could therefore be rejected on this basis alone. However, and notwithstanding OPC's characterization of the record, Lake Region submitted testimony that directly contradicted OPC's calculations of the years needed for the developer to recoup its investment, as OPC acknowledges beginning on page 2 and through page 3 of its application for rehearing where it gives account to the unobjected to and unimpeached testimony of Mr. Summers.

In his rebuttal testimony,<sup>7</sup> Mr. Summers testified:

**Q. Do you have an estimate of how long it would take the developer and/or his assigns or designees to recoup this investment through the availability revenue stream?**

A. Yes. Using Staff's estimated revenue number of \$342,090 and an interest rate of 6% it would take more than 45 years to recoup the developer's investment of \$5,300,000 per the attached schedule identified as JRS Exhibit 2. In actuality, it would probably take many more years than shown on my schedule as the number of lots drops over time due to homes being constructed or lots being combined as allowed by the restrictive covenants.

It was Mr. Summers' testimony on the subject that prevailed and was accepted by the Commission.

The determination of witness credibility is left to the Commission, " 'which is free to believe none, part, or all of the testimony.' " *Mo. Gas Energy*,

---

<sup>7</sup> Lake Region Exhibit 2, Summers Rebuttal, at 9.

186 S.W.3d at 382 (quoting *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456–57 n. 19 (Mo.App. W.D.2004)).

*State ex rel. Public Counsel v. Missouri Public Service Com'n*, 289 S.W.3d 240, 247 (Mo.App. W.D.,2009); see also, *State ex rel. Praxair, Inc. v. Public Service Com'n of the State of Missouri*, 328 S.W.3d 329, 342 (Mo.App. W.D.,2010). As it is allowed to do by law, the Commission concluded that Mr. Summers' opinions were entitled to greater weight than others and agreed with his analysis. The Commission made no mistake in law or fact.

### ***B. Return on Equity***

The Commission determined that a fair and reasonable return on equity for Lake Region is 11.93%, the Staff's recommended figure given the Commission's decision on capital structure. On this determination OPC also argues that Lake Region failed in its statutory burden of proof. OPC proposed that Lake Region's return on equity remain at 8.50% as approved in the *2010 Rate Case*. The Commission ruled that OPC did not provide sufficient financial analysis to demonstrate that its recommended return was consistent with current market costs or would support Lake Region's financial integrity and access to capital markets. OPC contends that it was not required to admit such proof as part of its burden. Rather, it was Lake Region's burden; and because Lake Region provided no such proof, the Commission's order is unlawful, unjust and unreasonable, according to OPC.

What was written above about the allocation of the evidentiary burdens is appropriate in this section of Lake Region's opposing suggestions as well. Irrespective of its protests to the contrary, OPC is burdened with the obligation to prove its propositions or theories that are designed to defeat the extent of Lake Region's request to increase rates. OPC's return on equity recommendation was lower than Lake Region's proposal and clearly is a proposition designed to defeat the full extent of the rate increase applied for. Furthermore, substantial evidence was

submitted by Lake Region, corroborated in part by the Staff, which justified the Commission to determine an even higher return on equity.<sup>8</sup>

Mr. John Summers and Mr. Michael Gorman, the latter a frequent and well-qualified expert witness before the Commission on capital structure and rates of return, offered testimony in support of a 13.89% return on equity. Staff conditionally agreed if the Commission adopted Staff's capital structure recommendation. If the Commission did not accept Staff's capital structure recommendation, Staff recommended 11.93% as a return on equity. The evidentiary support in the record for the competing recommendations and alternatives is legion.

Again, the Commission is given the power to evaluate the credibility of witnesses and it may believe none, part, or all of the testimony. As it has the authority to do, the Commission, unfortunately to Lake Region's detriment, gave greater weight to the opinions and conclusions of its own Staff on the issue of return on equity than it did to other testifying experts. It engaged in nothing unlawful in the process.

### ***C. Legal Fees***

OPC last contends that the Commission's Report and Order is unlawful, unjust and unreasonable because it allows Lake Region to include in rates the legal fees it incurred in defending a breach of contract case and defending the appeal of the circuit court's favorable judgment in that matter. OPC argues on page 9 of its application for rehearing that:

[d]espite the loss of the case and a court determination that Lake Region unreasonably and unlawfully breached its contract,<sup>9</sup> the Commission concluded that the legal fees incurred by Lake Region in defending the circuit court breach of contract case and participating in the appeal were reasonable and should be

---

<sup>8</sup> Mr. Michael Gorman's recommended return on equity of 13.89% for Lake Region is well supported in the evidence and the Commission is justified in adopting it; however, Lake Region has elected not to apply for rehearing of the Commission's determination of a lower return on equity.

<sup>9</sup> OPC described the circuit court's determination the same way in its post hearing briefs. There is no evidence however that the circuit court made a finding or determination that Lake Region's delay in paying the amounts in dispute under the contract was either unreasonable or unlawful. Furthermore, a "reasonable" or "lawful" breach is still a "breach" of contract.

included in the calculation of rates for Lake Region.

In support of its position, OPC seems to question the standard the Commission may have applied to determine whether the legal fees were recoverable in rates. It is true that the Commission briefly discussed the presumption of prudence on page 51 of the Report and Order. The brevity of that discussion does not diminish the Commission's definitive findings and conclusions on the same page that Lake Region's decision to participate in the appeal was not imprudent and that:

Lake Region pursued a reasonable course of action by participating in the appeal of this case in an attempt to avoid increased costs. The Commission concludes that the legal fees incurred by Lake Region in defending the circuit court case and participating in the appeal, including the \$520.10 incurred during the true-up period, were reasonable and should be included in the calculation of rates for Lake Region.

The Commission found that the legal fees were just, necessary and reasonable and should be included in the rates. Competent evidence appears from the record to substantiate that finding. The matter does not warrant rehearing by the Commission.

On the basis of the above and foregoing, the Commission should deny OPC's Application for Rehearing.

Respectfully submitted,

**/s/ Mark W. Comley**

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

Attorneys for Lake Region Water & Sewer Co.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via email, on this 5<sup>th</sup> day of June, 2014, to Kevin Thompson at [kevin.thompson@psc.mo.gov](mailto:kevin.thompson@psc.mo.gov); Tim Opitz at [timothy.opitz@psc.mo.gov](mailto:timothy.opitz@psc.mo.gov); General Counsel's Office at [staffcounsel@psc.mo.gov](mailto:staffcounsel@psc.mo.gov); Christina Baker at [christina.baker@ded.mo.gov](mailto:christina.baker@ded.mo.gov); and Office of Public Counsel at [opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov).

**/s/ Mark W. Comley**