

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
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6 Transcript of Proceedings
7 DISCOVERY CONFERENCE
8 January 15, 2014
9 Jefferson City, Missouri
10 Volume VII

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(Start time of conference: 2:00 p.m.)

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION

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6 Transcript of Proceedings

7 DISCOVERY CONFERENCE

8 January 15, 2014

9 Jefferson City, Missouri

10 Volume VII

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13 In The Matter Of Lake Region)
Water And Sewer Company's)
14 Application To Implement A) Case No.
General Rate Increase In) WR-2013-0461
15 Water And Sewer Service)

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18 MICHAEL BUSHMANN, Presiding,
REGULATORY LAW JUDGE.

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1 (Start time of conference: 2:00 p.m.)

2 P R O C E E D I N G S

3 JUDGE BUSHMANN: Let's go on the record.

4 Today's January 15th, 2014, the time is 2:00 p.m.

5 Commission has set this time for a discovery

6 conference in the case captioned as In The Matter

7 Of Lake Region Water and Sewer Company's

8 Application To Implement A General Rate Increase In

9 Water and Sewer Service, File No. WR-2013-0461, et

10 al.

11 My name is Mike Bushmann, the Regulatory Law

12 Judge in this matter. Would said counsel make

13 their entries of appearance.

14 For Lake Region Water and Sewer Company?

15 MR. COMLEY: Appearing for Lake Region Water

16 and Sewer Company, Mark W. Comley, Newman, Comley

17 and Ruth, 601 Monroe Street, Suite 301 Jefferson

18 City, Missouri.

19 JUDGE BUSHMANN: And for Commission Staff?

20 MS. MOORE: Appearing on behalf of the

21 Commission Staff, Amy Moore, Tim Opitz, and Kevin

22 Thompson, P.O. Box 360, Jefferson City, Missouri,

23 65102.

24 JUDGE BUSHMANN: And for Office of Public

25 Counsel?

1 MS. BAKER: Thank you. Christina Baker,
2 P.O. Box 2230, Jefferson City, Missouri, 65102,
3 appearing on behalf of the Office of the Public
4 Counsel and the Ratepayers.

5 JUDGE BUSHMANN: Thank you. Today, we're
6 here to -- at our last regularly scheduled
7 discovery conference -- to take up Office of Public
8 Counsel's motion to compel. As I mentioned in an
9 email yesterday, we are not going to talk about the
10 motion to quash that was filed by RPS Properties
11 because the parties still have until, I think,
12 Friday to make responses to that, and I suspect the
13 Commission will take that up, is my guess.

14 So, we're here today to talk about the
15 motion to compel. And, as memory serves me, at the
16 last discovery conference when we were talking
17 about the same set of data requests, I thought that
18 there was general agreement on some of them. I
19 thought that there were only a handful that was in
20 dispute, but I may be wrong because it seems like
21 now there's more of them that are in dispute. So,
22 the first thing I want to figure out is exactly
23 which data requests are still in dispute and that
24 there are still some disagreement about whether
25 they've been adequately responded to.

1 So, Ms. Baker, I guess since this is your
2 motion to compel, can you kind of let me know which
3 data requests we're talking about?

4 MS. BAKER: I mean, there were several data
5 requests where the answer to the data request was,
6 We do not have this information, or Lake Region
7 does not have this information under its -- its
8 control.

9 JUDGE BUSHMANN: That was after the last
10 discovery conference.

11 MS. BAKER: That was during the objections
12 for the original data requests. Since then --

13 JUDGE BUSHMANN: Okay.

14 MS. BAKER: -- the last discovery
15 conference, there were two more data requests that
16 went out with similar objections, and responses
17 back that, This information is not available, not
18 under the control of Lake Region. And, so, having
19 that answer, at that particular point, we met, we
20 talked about some of them, but in the meantime --
21 and we talked about it during the discovery
22 conference and it was stated to Lake Region that
23 they needed to answer the things that were under
24 their control and the information that's available
25 to them.

1 We leave out of that, then answers come in
2 to a Sunshine Law request that shows that there is
3 information that is under their control, and they
4 are not providing that information.

5 JUDGE BUSHMANN: So, would you say, then,
6 that -- I'm looking here at Appendix A to Lake
7 Region's response to the motion to compel. There
8 are a number of data requests listed, starting with
9 1,000 and going up to 1,017.

10 Are all those the ones that are currently in
11 dispute, would you say?

12 MS. BAKER: I would say, yes, because I
13 don't -- I know longer believe their statement that
14 they don't have this information, that it's not
15 available to them, that it's not under their
16 control.

17 JUDGE BUSHMANN: Okay. So, now, how do we
18 know which ones we're talking about? You mentioned
19 the Sunshine response provided by Camden County
20 Public Water System. So, uh, Mr. Comley, can you
21 explain that response for me so that -- because it
22 seems to have created some confusion about who
23 actually has custody and control of that
24 information.

25 MR. COMLEY: Well, Lake Region's position is

1 it does not have custody and control of that
2 information. It continues to -- the argument would
3 be that Lake Region does not have the ownership of
4 those records and it's not at liberty to disclose
5 any records that are stored in a computer they may
6 have, whether those concern District records or
7 shareholder records or other records that people
8 are using that are using that computer for. I
9 don't know the full extent of the use of that
10 computer.

11 Um, my understanding is that Staff has known
12 that records concerning shareholders in the
13 District are stored on Lake Region's computers, and
14 they have known that since the last case. The
15 issue that we're confronting now is, if these
16 parties want to get access to records on Lake
17 Region's computer and that computer is being used
18 by other parties, then those records are protected
19 by Federal Act, and the investigative procedures
20 and the procedures to get disclosure of those
21 records there is going to be complied with, if
22 they're not complied with, and Lake Region
23 compelled to disclose those records can't do it
24 voluntarily. It exposes it to damages, and I'm
25 going to argue for the strictest compliance of that

1 law.

2 JUDGE BUSHMANN: And the law that you're
3 talking about that you say prevents Lake Region
4 from being able to disclose that, is that the one
5 you talked about in your motion --

6 MR. CONLEY: Right. That would be the
7 Electronics Communication Privacy Act of 1986.

8 JUDGE BUSHMANN: I briefly looked at that
9 and I was a little confused as to whether or not
10 that would apply in this situation because the
11 definition of electronic communication mentions
12 that it affects interstate or foreign commerce.

13 MR. CONLEY: Interstate commerce is
14 definitely part of this. You'll recognize RPS
15 Property's a shareholder in this case, and somebody
16 who purportedly has information about availability
17 fees is a Kansas corporation or Kansas limited
18 partnership. Also, it's been -- it's
19 communications being used by means of interstate
20 commerce. Our conclusion would be no, that is a
21 shared remote computer, and as a shared remote
22 computer, it's not any different than a cloud and,
23 as a consequence, the protection of that Act
24 includes Lake Region's computer and the people
25 involved in it.

1 So, notice to those people, all those
2 people, will have to be given in connection if
3 there's any effort to get that information out of
4 the computer, and I think Lake Region will be
5 entitled to costs for removing that information and
6 disclosing it pursuant to the lawful procedures in
7 the procedures in that Act.

8 JUDGE BUSHMANN: And, based on your
9 knowledge of that Act, I think you said in your
10 response -- and maybe here today, also -- that
11 there was a proper procedure for obtaining that
12 information?

13 MR. CONLEY: Yes. I'm sure there is.

14 JUDGE BUSHMANN: Okay.

15 MR. CONLEY: It's in the same Act.

16 JUDGE BUSHMANN: Um, I've been asking some
17 questions of Mr. Comley. Do any other parties want
18 to provide their position? Both parties have had
19 some discussion of the issue of the Sunshine
20 Request response. Any other parties want to weigh
21 in on what you think about that?

22 MS. BAKER: I mean, as far as the Sunshine
23 Law is concerned, these are records that were made
24 by a public entity. They cannot hide that
25 information just by saying that, We're going to put

1 it on the computer and we're going to hide under --
2 neither the fact that -- that it's under the
3 control of someone else even though I'm the same
4 person who answers for both of them.

5 I mean, I would believe that this is a
6 violation of the Sunshine Law, that they would hide
7 this information.

8 JUDGE BUSHMANN: Is it correct, then, that
9 the -- I maybe need to address this to Staff. But
10 is it correct that, when the Public Water District
11 responded, they responded by not only providing
12 this information, this official response, but they
13 also did provide some documents that were related
14 to availability fees?

15 MS. MOORE: They provided documents related
16 to the availability fees is my understanding of the
17 communications that are sent to us. Documents
18 related to the availability fees that the District
19 itself would bill for itself; however, allocations
20 seemed to be that there was nothing included. We
21 can't find nothing included about the availability
22 fees that are billed -- billing services performed
23 by a District employee on behalf of Lake Utility 1.
24 We can't find any records that was provided by that
25 employee's actions, so I would have to say that I

1 would agree with Public Counsel that it seems, at
2 this point, it needs looked into. It seems, at
3 this point, to be a violation of Sunshine Law.
4 That, however, would be a violation that the
5 District is possibly engaged in.

6 As to whether or not that information, the
7 billing records, that were produced by the District
8 employee and stored on a computer owned by Lake
9 Region, what that has to do with any dispute we
10 have here, obviously, from our memo, Staff is of
11 the opinion that, if the information is stored on a
12 computer owned by Lake Region, then it is, indeed,
13 in physical actual possession of Lake Region.

14 But, more importantly, concerning Supreme
15 Court decision, it's actually in their control,
16 which the Supreme Court says is addressed that the
17 rule they're relying on for their objection control
18 does not require that party have legal ownership or
19 actual physical possession of the documents at
20 issue, rather documents are considered to be under
21 a party's control and that party has a right,
22 authority, or practical ability to obtain the
23 documents from a nonparty to the action.

24 I can say that documents stored on Lake
25 Region's computer that they own are very

1 practically available to Lake Region to provide.

2 Now, to go to the possible defense that this
3 is somehow information that falls under the
4 Electronic Communication Privacy Act, it's Staff's
5 position that Act does not apply at all.

6 MS. BAKER: And Public Counsel, as well.

7 MS. MOORE: If you read the whole Act, not
8 just the definition, I would say the definition
9 itself shows this information does not apply. But,
10 also --

11 JUDGE BUSHMANN: Why so?

12 MS. MOORE: Sorry?

13 JUDGE BUSHMANN: Why so?

14 MS. MOORE: Electronic communication means a
15 transfer of information. The entire bill is -- the
16 entire Act, including its revision under the
17 Patriot Act, has to do with interception of
18 transmissions. It's not about a discovery dispute
19 about who can provide records that are stored
20 having to do with businesses. This is about the
21 transfer of information and whether or not
22 wiretaps, electronic surveillance, those types of
23 issues are allowable or not. This is not --
24 doesn't apply. So, that's Staff's position about
25 that Act.

1 Um, I also -- I would -- I would want to go
2 to the the overarching theme, also, of all these
3 discovery conferences that we have. It seems, with
4 all of the discovery methods we use, we're either
5 told to ask someone else, someone else has control
6 over it, that the Commission doesn't have
7 jurisdiction. I think we have argued ad nauseum
8 about the relevance of the issue, and it really all
9 keeps coming down to who has possession and control
10 of the information.

11 We've been pointed to different entities.
12 We've asked all the entities. Everybody points to
13 somebody else or says the same argument over and
14 over again. If this Act doesn't apply and if the
15 objection itself doesn't apply, I guess I'm left
16 with the question, Well, then, why don't we have
17 the information by now. What else are we supposed
18 to do?

19 MS. BAKER: Right. This is certainly part
20 of the issue in front of the Commission is to
21 decide if -- if this is going to be a revenue issue
22 or if this is going to be a rate base issue. And
23 both of the arguments hinge on how much money has
24 been collected; and, if we cannot get that
25 information because we're being stymied at every

1 step by multiple entities, even though it's still
2 just the same person, basically, talking, I don't
3 know what else we're supposed to do.

4 JUDGE BUSHMANN: Mr. Comley, I wanted to get
5 your thoughts and your position with what Ms. Moore
6 said about her take on that Electronic Privacy Act;
7 and, also, I wanted to hear what you have to say
8 about this case cited by Staff, Supreme Court case
9 Hancock versus Shook, regarding the definition of
10 what custody means.

11 So, on those two issues, I would like to
12 hear your thoughts.

13 MR. COMLEY: My understanding, most
14 recently, that Google has used the Electronic
15 Communications Privacy Act to stop administrative
16 subpoenas of records kept on its cloud-based
17 systems. And it has done so successfully. This is
18 nothing more than -- well, it would be very much
19 like the Commission storing archive files offsite.
20 And somebody subpoenas the owner of that site for
21 those -- for those records. This is very similar
22 except for dealing with electronic files.

23 I don't know whether Hancock really goes to
24 the point of files that are covered by Electronic
25 Communications Privacy Act. My position would be

1 it probably has not gone that far. I don't know if
2 we have cases in Missouri that talk about custody
3 and control of electronic files that are protected
4 by the Federal law on privacy.

5 Our position is still that we don't have the
6 authority, we don't have the possession or control
7 of those files with which to give them out. Your
8 second question?

9 JUDGE BUSHMANN: That was dealing with
10 Hancock versus Shook --

11 MR. COMLEY: Right.

12 JUDGE BUSHMANN: -- regarding just general
13 discovery requests and the definitions of custody
14 and control that they provide.

15 MR. COMLEY: That, again, I don't think
16 there's a case that involves these federally-
17 protected electronic files. I think that it's
18 quite clear that there's been a transfer of
19 information in writing, these files contain
20 writings, transfer of information has been done
21 electronically, it's been done over a streamed
22 interstate commerce. So, the Act applies. And
23 it's been enforced there.

24 The other thing is Lake Region is going to
25 insist that that Act be complied with. It will not

1 permit discovery of those files through data
2 requests. It will object to a data request on
3 that.

4 Now, the other thing that's come up in Mrs.
5 Baker's discussion, there is only one data request
6 in the group in which Lake Region has said it lacks
7 information to supply the answer, and it's Data
8 Request 1007. And this has been consistent
9 throughout. We have told Public Counsel and told
10 Staff that we don't have information about each and
11 every year, uh, the District has processed the
12 billing and collection duties for how many lots
13 have been billed or the amount of water
14 availability fee billed and collected. Lake Region
15 does not have those documents.

16 Now, we have the argument it may be stored
17 on the computer, but those are not Lake Region's
18 documents. It has no way of identifying them, it
19 has no way of telling anybody how they are prepared
20 or maintained. I guess that raises the other
21 question. Even if Lake Region were to give those
22 records up pursuant to a lawful procedure, it can't
23 identify them. Office of Public Counsel and Staff
24 would have to find a witness qualified to tell them
25 how it's been prepared in order for them to get

1 into evidence. They're hearsay until they're
2 properly given that foundation.

3 And we'd object on grounds of hearsay, and
4 the Commission can't make decisions based on
5 hearsay. That's -- I'm off.

6 MR. THOMPSON: It can if it's unobjected to.

7 MR. COMLEY: Unobjected hearsay evidence
8 could -- We'll object to --

9 JUDGE BUSHMANN: That's admission talk about
10 discovery.

11 MS. BAKER: That brings up the very crux of
12 what's going on here. It is Lake Region's burden
13 to prove that the rate base that they want to put
14 in is correct, that the revenues that they want to
15 put in is correct. If both of those things are
16 affected by availability fees as Public Counsel and
17 Staff contend, it is still Lake Region's burden to
18 prove.

19 MR. COMLEY: I think on the contrary, Judge.
20 We have established by the evidence we've submitted
21 already that we have a case for increased rate.
22 The burden now shifts to Office of Public Counsel.

23 MS. BAKER: No. No, it does not. No, it
24 does not.

25 MR. COMLEY: Please, let me finish. Please

1 let me finish. It is the burden of the Office of
2 Public Counsel and Staff to consider this revenue
3 source outside of Lake Region's rate base, outside
4 of Lake Region's revenue stream is somehow related
5 to this. It's up to them to prove that burden.

6 And, by the way, the Commission has not
7 established at all that it has jurisdiction over
8 this issue, and that's a question I would like to
9 raise with the Commission right now. Has the
10 Commission made a decision -- it's going to decide
11 to impute the revenue? Has it made the decision
12 it's going to go ahead and, perhaps, ignore the
13 ruling it made in its previous order? And that is
14 a rule on this subject is indispensable before it
15 makes any decision how to treat revenue in the
16 census.

17 If it's going to do that, it's committing a
18 due process violation. Or are we going to go ahead
19 and get this information through a very costly
20 process, it's becoming more and more complicated,
21 and just have information for the Commission to
22 review maybe as part of a rulemaking at some point
23 in the future, or just simply to look at?

24 MS. BAKER: I pointed that out in our
25 response. Is this simply an academic exercise?

1 JUDGE BUSHMANN: When Mr. Comley is
2 finished.

3 MR. COMLEY: I'm not finished. I'm not
4 finished.

5 MS. BAKER: Tell me when you're finished so
6 I can talk.

7 MR. COMLEY: I don't have to tell you when I
8 can talk.

9 MS. BAKER: That's the problem, I think.

10 JUDGE BUSHMANN: Let Mr. Comley finish
11 talking.

12 MR. COMLEY: Both parties have made
13 criticisms about Lake Region, but Lake Region is
14 making very valid objections to what is going on
15 here. Those objections are based upon Commission
16 orders, the most recent Commission order, and Lake
17 Region is entitled to make those objections until
18 there is an adequate ruling from the Commission on
19 what it needs -- what needs to be done.

20 We have raised these issues with a
21 condition, we have raised these things with the
22 parties, and we have been consistent throughout
23 this. We have pointed OPC and Staff to the people
24 who actually have possession, custody, and control
25 of these records, and they continue to send data

1 requests to Lake Region.

2 No one has hidden the ball. The ball has
3 been -- we've told them where the ball is. So, I
4 think at some point I would appreciate the
5 Commission giving us direction on how much of this
6 information is really going to be used, and if it's
7 going to be used contrary to what the ruling was in
8 the last case, that means that Lake Region may have
9 other decisions to make.

10 JUDGE BUSHMANN: Okay.

11 MS. BAKER: May I speak?

12 JUDGE BUSHMANN: Please, go ahead.

13 MS. BAKER: The ruling in the previous case
14 may have been about imputing the revenue, but there
15 was also a ruling in the case that it does affect
16 rate base. That is part of Public Counsel's
17 position in this case. And the Commission did make
18 a finding that the availability fees affect rate
19 base. That's our position. We want to know how
20 much the availability fees are and how much it has
21 affected rate base. That's what we're trying to
22 find out.

23 Mr. Comley is forgetting to mention that
24 particular point of this, that it's not just an
25 imputing revenue issue. It is a rate base issue.

1 And, so, we are trying to find this out. How do we
2 find this out?

3 JUDGE BUSHMANN: Ms. Moore, anything you
4 want to add?

5 MS. MOORE: Just a couple things.

6 JUDGE BUSHMANN: Go ahead.

7 MS. MOORE: First, I think you might have
8 spoken a month ago something that I'm also hearing.
9 This is a discovery dispute. We're not here to
10 decide whether or not evidence will eventually be
11 admissible or relevant. That's for the Judge to
12 decide at the hearing.

13 I think the basic argument is Staff's not
14 attempting to get into the eventual decision of
15 whether or not evidence as collected is admissible
16 or relevant, just that it seems we have made it
17 clear, especially based on the Missouri Supreme
18 Court rule, that the information -- some
19 information we're seeking about availability fees
20 is in the control of Lake Region. We'd like to
21 have access of that information.

22 If now -- and I would note that this is the
23 first time we heard of this and Lake Region's
24 response to motion to compel, if now a defense, is
25 this Electronic Communication Privacy Act, one, if

1 that's something that you would like to hear more
2 about, I would ask for opportunity to brief that
3 since we just heard about this yesterday for the
4 first time as a defense.

5 However, in the time that I had this
6 morning, I did find several cases that seem to go
7 to the idea that -- I did not read the Google case
8 -- but I did find cases that were mentioning that
9 this Act applies to information that is kept on
10 information providers or kept by information
11 providers, perhaps, that's what the application is,
12 but the basic application of the law should be read
13 as involving the transmission of information.

14 I have a case here, Brown v. Waddell, W-a-d-d-e-l-
15 l. It says the principal purpose of the
16 Electronics Communications Privacy Act amendments
17 to the Federal Wiretap Law was to extend to
18 electronic communications the same protection
19 against unauthorized interceptions of wiretap law
20 that have been provided for wire communications due
21 to -- that was in '95.

22 We now have the Patriot Act. I think we are
23 all familiar with what the position of that is.
24 Staff's position is it does not apply.

25 JUDGE BUSHMANN: Okay. Any other parties

1 want to weigh in?

2 MR. COMLEY: I have a few things to respond
3 to Staff's response. I didn't have a chance to put
4 anything in writing.

5 On page -- it's on page 3, and it's an
6 unlabeled page, but the Staff contended that Lake
7 Region has the practical ability of objecting --
8 theoretically has a legal ownership of it, and I
9 think we've covered that. I want to add, too, I
10 think, everybody's known that Mr. Summers has had
11 to wear a variety of hats, and the consolidation of
12 his duties has been to the benefit of the
13 ratepayers for Lake Region. It serves Lake Region
14 from hiring someone independent and separate, but
15 it places Mr. Summers also in the position of
16 having differing duties to each of his employers.

17 And I'm hoping that I made that clear in the
18 motion. We don't want Mr. Summers to be in a
19 position of sneaking records away from somebody
20 else. We have a duty to comply with valid process.
21 If valid process is not being issued, then Lake
22 Region has the objection, and that objection should
23 be heard and it's not. It's not an effort to be --
24 to be an obstructionist. It is simply a valid
25 objection, and those valid objections were made in

1 the last rate case, and the Commission considered
2 them valid objections.

3 Um, talked about hiding the ball, which is
4 also an expression used on that page. That is a
5 particular blister for me. We are not hiding the
6 ball. We have told the parties exactly where this
7 information can be found. Staff has filed -- has
8 submitted a subpoena to RPS Properties, LP. RPS,
9 LP, is a shareholder. That shareholder has control
10 over those records. It may have separate
11 objections to the production of those records, and
12 it is making those separate objections. The fact
13 that this issue is there and has all these thorns
14 on it is not Lake Region's fault.

15 As far as the District's concerned, I cannot
16 speak for the District. The District will have to
17 speak for itself. But, again, that's another party
18 that's going to be complicating this whole matter.

19 Um, there's also a reference, I think it's
20 on page 5, where Staff says that RPS and its
21 various entities are extremely reluctant to provide
22 the Commission with information about availability
23 fees. I think the proper statement would be RPS is
24 not affiliated with Lake Region. RPS may have
25 legitimate objections to producing the information,

1 and those objections need to be heard and
2 discerned. Uh, and RPS and Lake Region are
3 prepared to employ the appropriate methods to
4 object to those requests, and that's what's going
5 on here.

6 I think the last page, people -- wherever,
7 clause -- Staff notes that it says that this group
8 of affiliated entities, and I think it is referring
9 to Lake Region's and others, I think, and I want to
10 point out Lake Region is not affiliated with RPS,
11 LP. Lake Region is not affiliated with Sally
12 Stump. Lake Region is an independent company. The
13 separateness of all those people have not been --
14 in any way been questioned. They are considered
15 separate in the law, and they should be considered
16 separate here. But they continue to resist
17 providing the Commission with any details about the
18 availability fees they collect.

19 We continue to -- those entities,
20 apparently, are continuing to object to that, and
21 there's valid objections to it. It's not
22 unilateral valid resistance. Staff is now
23 considering moving the Commission to extend the
24 discovery period and postpone the hearing dates in
25 this rate case. Lake Region will oppose that.

1 The first time that Staff ever tried to get
2 any -- any discovery about availability fees was
3 after its direct case was filed in this matter.
4 After its direct case was filed in this matter.
5 Office of Public Counsel's first time for discovery
6 on this issue was eight days before its testimony
7 was given. It wasn't during that period of time
8 when we filed the case and when they were expected
9 to file theirs.

10 Also -- and I point out this -- there were
11 three years since the last case for the Staff and
12 Office of Public Counsel to join and come up with a
13 recommended rule that Lake Region and anybody else
14 that's charging availability fees could join in,
15 review, and maybe accept. So, I'd say Staff and
16 OPC have had three years, plus the time before
17 their testimony was due, to engage in discovery on
18 this issue, and they failed to do it. So, there is
19 no justification for delaying any of this case.
20 The discovery period or anything. I think that's
21 all I have.

22 JUDGE BUSHMANN: Ms. Moore, any rebuttal to
23 that?

24 MS. MOORE: I think you probably understand
25 Staff's reply is already just, like, to remind the

1 Judge as to affiliates. I don't think Staff has
2 ever agreed with the Company that an affiliate is
3 not the appropriate term to apply to the Company
4 and the other entities that its shareholders are
5 involved in. It's a technical point for us. I
6 think it applies as a general business term.
7 Everybody understands what it means. It's useful.

8 As for hiding the ball, as Mr. Comley points
9 out, we did attempt to request the information from
10 the entities that we were directed to as the
11 entities that had control of that information. It
12 was only when those entities seemed to indicate
13 that Lake Region actually does have control that we
14 have now joined in OPC's request that they produce
15 those and they be compelled to produce those
16 documents. If hiding the ball is not an
17 appropriate term, I think it's descriptive of the
18 situation.

19 Uh, as for delaying the hearing, um, I would
20 say, just like any parties, Public Counsel or the
21 parties have taken steps needed to present
22 themselves. One thing happens to the next thing.
23 It just happens this is the way this case plays
24 out. If we need a little extra time in order to
25 decide an issue that has been open, hanging around

1 for several years, then we'd request to not take
2 more than a month extra if that's what it is in
3 order to get this resolved further. That's all.
4 Thank you.

5 MR. COMLEY: Your Honor, I'm sorry. I don't
6 mean to prolong this too much, but I would like to
7 return to OPC's data requests in Lake Region's
8 responses. I'm unclear on what we have not
9 answered properly.

10 MS. BAKER: Data Request 1018, Please
11 provide reconciliation, total availability fees
12 billed utilizing Lake Region's regulated billing
13 processes and monthly service bills. Also, show
14 associated amounts collected from lot owners
15 showing water and sewer jurisdiction by year for
16 each and every year --

17 JUDGE BUSHMANN: Okay. I don't think you
18 need to read it. Why don't you just give the
19 numbers.

20 MS. BAKER: 1018 and 1019 are the last ones
21 that we're specifically asking for, for
22 reconciliation of the total availability fees and
23 the answers to those. Certainly, to 1018, what
24 this information seeks or this request seeks is
25 information within the possession, control, and

1 knowledge of nonparties to this matter.

2 That -- that is --

3 JUDGE BUSHMANN: You're saying 1,000 through
4 1,019?

5 MS. BAKER: Well, 1008, 1009 are certainly
6 the newest ones where the answer was --

7 JUDGE BUSHMANN: You said the other previous
8 to that were also --

9 MS. BAKER: And the ones before that were
10 business based on, Please provide a reconciliation
11 of -- let's see -- okay. 1008 -- and then trying
12 to find within that how many lots were part of the
13 availability fees being -- being billed, provide a
14 reconciliation, 1008, of the availability fees
15 collected.

16 I mean, through all of these, the objections
17 that were given was, The information is not under
18 their -- their control. And, so, that puts a
19 different light on some of the answers that were
20 given.

21 MR. COMLEY: I'm looking at Request No. 7.
22 We mentioned that the information is not within
23 Lake Region's control. 1008, although it may not
24 be in the response, it's like another response
25 we've made that Lake Region creates none of these

1 reconciliations and it does not have the
2 availability to create them. It's not things on
3 our books. Discovery rules do not require us to
4 create a document that doesn't exist. So, that
5 would be our response to that. We have met the
6 substance of that request.

7 009 that you mentioned, Is it the Company's
8 belief that utility plant and services utilizes the
9 necessary provision services it provides the
10 ratepayers. The response is yes, and that has been
11 given. It meets the substance of the request.

12 Um, on a total number of lots, again, uh, we
13 have given information about who is billed by Lake
14 Region, and they may be on lots that used to be
15 subject to availability fees, but Lake Region does
16 not have records that it can go through and
17 identify the number of lots developed by Four
18 Seasons Lake Sites.

19 MS. BAKER: I think what we all know is what
20 I'm looking for is basically in that 1008, Please
21 provide a reconciliation of the total availability
22 fees, and that's what we want. How much -- how
23 much of the reconcil -- or how much of the
24 availability fees have been billed, how much has
25 been collected. That's -- that's what we're

1 looking for. Go through all of these piece by
2 piece by piece by piece trying to find a way into
3 this maze of information that's being withheld from
4 us.

5 JUDGE BUSHMANN: So, do you have any final
6 comments you wanted to make, since this is your
7 motion?

8 MS. BAKER: I mean, my motion is the fact
9 that there is an answer on the table that says,
10 from the Public Water Supply District, that
11 information is available but it's not on a computer
12 that we own, it's on a Lake Region computer, and
13 we'd really love to give it to you but it's on the
14 Lake Region computer. Kind of goes against Lake
15 Region saying we don't have any control over that
16 information, we don't have that information
17 available.

18 MR. COMLEY: Again, the District's response
19 was only for its records, not other records.

20 JUDGE BUSHMANN: Okay.

21 MR. COMLEY: One final thought, Judge
22 Bushman.

23 JUDGE BUSHMANN: All right.

24 MR. COMLEY: Mrs. Baker has talked about
25 what the relationship fees have with rate base. I

1 hope everybody remembers that all of the plant
2 that's being used by Lake Region that was covered
3 by the availability fees was donated. It does not
4 make a return on any donated plant, and I think
5 that's confirmed in Staff's testimony in this case.

6 MS. BAKER: That is not our testimony. Our
7 testimony is that there is -- there is an ongoing
8 plant, there is a necessity for those who are
9 waiting to attach, that they attach to a state-of-
10 the-art system, they continue to pay -- it's not
11 just the contributed plant. They continue to pay
12 ever year for availability to an upgraded plant.
13 And, so, it's our position that the rate base is
14 still affected because these -- these customers are
15 waiting.

16 JUDGE BUSHMANN: That's an issue for the
17 hearing.

18 MS. BAKER: That's right.

19 JUDGE BUSHMANN: So, we can deal with that
20 then.

21 Any counsel have anything further they want
22 to add?

23 MS. MOORE: No. Thank you.

24 JUDGE BUSHMANN: Okay. Well, first, an
25 observation. Some of these data requests ask for

1 reconciliation, and Lake Region says that no such
2 document exists. And I would agree that, if a
3 document is nonexistent, Lake Region does not have
4 the obligation to create a document to respond to a
5 data request. So, that's an observation.

6 Now as to what to do with this motion to
7 compel. What I would like to do, I was -- I
8 thought that the case cite by Staff, the Hancock
9 versus Shook case, was interesting, uh, especially
10 the definition of control. So, there's a couple of
11 things I would like to have the parties do, and
12 that is -- you may want to write this down.

13 The motion to compel requests that Lake
14 Region produce the documents it has requested from
15 its data requests no later than Friday, which is
16 January 17th. So -- and this is where I'm getting
17 into making orders. I would order that Lake Region
18 disclose to OPC no later than Friday, January 17th,
19 any information that's responsive to the data
20 requests that are in dispute, that are in its
21 possession, custody, or control as those terms are
22 defined by the Missouri Supreme Court in the
23 Hancock versus Shook case which was cited by Staff.

24 In looking at some of the cases in that --
25 that were cited by the Supreme Court from other

1 jurisdictions, one of the definitions of practical
2 ability to obtain the documents means the ability
3 to obtain it upon demand, which I think is a -- is
4 a good definition.

5 So, if Lake Region decides that those
6 documents are not in its possession, custody, and
7 control, then by that deadline of Friday, January
8 17th, I would like Lake Region to file in the case
9 an affidavit detailing precisely what attempts Lake
10 Region made to obtain those documents, when it made
11 them, and to whom its demands were addressed.

12 At that point, the other parties will have
13 information, perhaps, that they did not have now.
14 I don't know about that, about possession or
15 custody and control of those documents. So, that's
16 one thing, and that's kind of on Lake Region at
17 this point to respond to those data requests, to
18 the extent that it can be legally as defined by the
19 Supreme Court.

20 Now, the other thing that I would like,
21 because there's been issues, legal issues, raised
22 about the Federal law and how this might affect
23 allegedly a transfer of documents, I'm going to
24 give the parties another shot at the apple. I want
25 to reopen discovery for one week beginning today.

1 Parties can issue discovery of any kind, including
2 subpoenas for depositions, whatever the parties
3 think are appropriate, or if there are other things
4 maybe the Electronic Privacy Act requires, you can
5 investigate that. You have one week to do so. So,
6 you have until through January 22nd to issue your
7 discovery, if you think that that's necessary, for
8 you to obtain information that you require to
9 present your case. I don't think that will unduly
10 burden anybody. You have until the end of the
11 month to file your surrebuttal.

12 As far as moving the hearing, I'm not in
13 favor of doing that. I'm giving some additional
14 time now for discovery and, hopefully, that will
15 resolve it. Uh, also, the last time we were
16 together, we talked about a joint stipulation of
17 facts. I understand this may have been pushed to
18 the side; is that correct, or how close are we on
19 having on the availability fees the stipulation to
20 clear away some of the historical information for
21 purposes of the record?

22 MS. BAKER: I have reviewed one, I've sent
23 it back to the Company, I think the last that I saw
24 was the Company had not worked on their internal
25 reviews of it. I haven't really seen anything

1 after the internal review.

2 MR. COMLEY: I sent one back last week to
3 both of you.

4 MS. BAKER: But it said that you still
5 hadn't completed the internal review.

6 MR. COMLEY: Right. We may have -- still
7 have some things to do, but it's in your hands what
8 we've done so far.

9 JUDGE BUSHMANN: So, there has been some
10 progress?

11 MR. COMLEY: Right. Perhaps we have been
12 delayed in preparation for this hearing towards
13 getting closer to an agreement, but I can look
14 again, but I'm hoping you still have something to
15 look at to see if the changes we've made so far are
16 okay, and --

17 MS. BAKER: When will you finish your
18 internal review?

19 MR. COMLEY: I think we have already. It's
20 just I haven't been able to get back to you. As I
21 recall, the revisions are very minor. So, what you
22 have as to substance is probably the bulk of our
23 suggestions.

24 JUDGE BUSHMANN: I'd like the parties to
25 keep moving forward on that. I know you have until

1 the 4th to make your final joint stipulation. My
2 hope was that we could get the availability fees
3 stipulation done before surrebuttal to try and cut
4 down on costs to the parties in having to prepare
5 that testimony. Then you could use the February
6 4th to maybe narrow the issues further on other
7 issues in the case. That would be my hope.

8 So, I appreciate it if you can continue to
9 move forward on that. And I don't think I have
10 anything further. Anybody have any questions about
11 what I just said?

12 Mr. COMLEY: Will you be putting that in
13 writing for us?

14 JUDGE BUSHMANN: I'd be happy to issue a
15 notice --

16 MR. COMLEY: A notice?

17 JUDGE BUSHMANN: -- saying what I just said
18 --

19 MR. COMLEY: That will be helpful.

20 JUDGE BUSHMANN: -- and file it with the
21 case. That way somebody would have it.

22 Anything further.

23 (No response.)

24 JUDGE BUSHMANN: In that case, we're off the
25 record. Thank you.

1 (Whereupon, the record ended at 2:42 p.m.)

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1 C E R T I F I C A T E

2 STATE OF MISSOURI)

) ss.

3 COUNTY OF COLE)

4 I, Pamela S. Gentry, Certified Court

5 Reporter with the firm of Midwest Litigation

6 Services, do hereby certify that I was personally

7 present at the proceedings had in the above-

8 entitled cause at the time and place set forth in

9 the caption sheet thereof; that I then and there

10 took down in Stenotype the proceedings had; and

11 that the foregoing is a full, true and correct

12 transcript of such Stenotype notes so made at such

13 time and place.

14 Given at my office in the City of

15 Jefferson, County of Cole, State of Missouri.

16

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18

19

20 Pamela S. Gentry, CCR #426

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