

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

In the Matter of Lake Region Water & Sewer )  
Company's Application to Implement a General ) **File No. WR-2013-0461, et. al**  
Rate Increase in Water and Sewer Service )

## **STAFF'S RESPONSE TO LAKE REGION WATER & SEWER COMPANY'S OBJECTIONS TO HEARING EXHIBITS**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and asks the Commission to overrule Lake Region Water & Sewer Company's (Lake Region) objections to the hearing exhibits as specified in its filing on March 6, 2014, stating:

1. During the hearing on February 18, 2014, Lake Region requested and was granted leave to file its objections to portions of Staff Exhibit 2 (Staff's Accounting Schedules for Horseshoe Bend Sewer, Shawnee Bend Sewer, and Shawnee Bend Water) and Staff Exhibit 4 (Staff's Rate Design Report) as they related to availability fees attributable to Lake Region.

2. On March 6, 2014, Lake Region filed its *Objections to Hearing Exhibits*. The objections are similar to those previously raised by Lake Region regarding availability fees; namely that the fees are not relevant or material in this matter, are outside the jurisdiction of the Commission, and a new rule is necessary before the Commission can consider the issue. Additionally, Lake Region incorporates by reference the arguments filed in its *Motion to Strike Portions of the Written Testimony of Staff Witness Kim Bolin and Sections of Staff's Revenue Requirement and Cost of Service Report*; *Motion to Strike Portions of the Written Testimony of Ted Robertson, Witness for the Office of Public Counsel*; and *Motion in Limine*, and suggestions

supporting those motions. Staff disagrees with each of these contentions and submits its *Response* according to 4 CSR 240-2.080(13), which states that unless the Commission orders otherwise, parties have 10 calendar days to respond to any pleading.

### **Relevance of Availability Fees Information**

3. Staff's testimony related to availability fees is highly relevant to Lake Region's rate case. Lake Region has asked the Commission to grant an increase in rates. When evaluating a general rate case, the Commission must evaluate all relevant factors in setting just and reasonable rates.<sup>1</sup> Here, Lake Region seeks to prevent the Commission from evaluating evidence relating to availability fees, the inclusion or exclusion of which in this case will have a significant impact on the final rate that customers pay. The position that availability fees are irrelevant to this case flies in the face of reason. Lake Region's position that the Commission should not be allowed to consider evidence regarding such a significant factor for setting rates is effectively an attempt to usurp the Commission's authority.

4. Staff has proposed including availability fee revenue in Lake Region's rates as a means of more accurately reflecting the utility's revenue sources and actual cost of service. If the Commission rules that availability fees are properly included in the calculation of rates in this case, Lake Region's owners could choose to redirect the availability fees revenue stream back to Lake Region, as it was in the past.<sup>2</sup> This would bring the Company into alignment with the cost of service on which its rates would be

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<sup>1</sup> *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979).

<sup>2</sup> As has been discussed in this *Response*, in Staff's testimony, and in the Company's *Motion to Strike*, Lake Region and Lake Utility share common ownership/management.

set, rates that fully represent the costs and revenues tied to the services the Company actually provides, and would ensure the funds collected from availability fees are appropriately available to Lake Region for operations and maintenance costs.

5. Separating these funds from the utility would have the effect of unjustly enriching the utility owners at the expense of ratepayers, which is most decidedly relevant to the Commission's duty to set just and reasonable rates. The service the lot owners receive - a guarantee of the availability of an adequately maintained water and sewer service system - is provided at the expense of Lake Region, which maintains the water and sewer infrastructure. Both of these expenses are partially borne by the ratepayers who must fund the Company's maintenance of infrastructure and who are bearing a higher portion of the Company's costs than they would if undeveloped lots had active customers on them. In the Commission's role of balancing the needs of the Company and its ratepayers,<sup>3</sup> it would be unjust and inappropriate to allow the Company owners to separate from the calculation of utility rates any revenue received for a utility service.

### **Commission Jurisdiction Over Availability Fees**

6. The Commission has jurisdiction over the charging, collection and enforcement of availability fees. In general, the Commission has jurisdiction over water and sewer corporations providing service within Missouri pursuant to Section 386.250, RSMo. Specific jurisdiction over availability fees is derived from Section 386.020(48), which defines service as:

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<sup>3</sup> "Ratemaking is a balancing process. Although there are general guidelines and restrictions placed upon a regulatory body's discretion concerning rates, that discretion is very broad within those perimeters." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State of Mo.*, 765 S.W.2d 618, 622 (Mo. Ct. App. 1988).

"Service" includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons;

7. In the case of availability fees, the service provided by Lake Region is a guarantee of the availability of an adequately maintained water and sewer service system to lot owners in Lake Region's certificated service territory. Lake Region owns the water works system and central sewer system that make it possible for customers to connect and receive water and sewer utility service in the future. Without these systems, the availability fees would not exist. Lake Region is the entity providing the guarantee of water and sewer service availability and incurring the associated costs of maintaining the water and sewer systems while the lots remain undeveloped. The only service provided by Lake Utility is the collection of the fees for RPS Properties and Sally Stump.<sup>4</sup> Because it is Lake Region, a regulated utility, that is providing the service for which fees are collected, the funds derived from these fees should be included in Lake Region revenue.<sup>5</sup>

8. Further, in Lake Region's previous rate case, the Commission reasoned that it should have jurisdiction over availability fees and like charges, stating:

Because the utility had, at different intervals, direct use of or access to this revenue stream, and because the fees can be defined as a commodity falling under the definition of utility service, **the Commission concludes**

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<sup>4</sup> RPS Properties is also an owner of Lake Region, and Sally Stump was also an owner of Lake Region until December 31, 2012. Now, Vernon Stump, Sally Stump's husband, and RPS Properties are the owners of Lake Region.

<sup>5</sup> From 1974 to 1998, the availability fees were collected by Lake Region. *In the Matter of Lake Region Water & Sewer Co.*, Case No. WR-2010-0111 (*Report & Order*, iss'd Aug. 18, 2010) p. 102 ("2010 Report & Order").

**that it should assert jurisdiction over availability fees.** And when the prior owners eliminated Lake Region's access to these fees, these acts had the potential to become a detriment to the ratepayers; albeit, these actions were done with Public Service Commission acquiescence or approval in many cases over many years.<sup>6</sup> (emphasis added)

Staff recognizes that the Commission is not bound by its previous decisions,<sup>7</sup> however, Staff believes the Commission's analysis on this point is reasonable. As the Commission pointed out, a commodity is something that is useful or serviceable, particularly articles of merchandise movable in trade such as goods or wares, or something that is bought and sold.<sup>8</sup> Lake Region has shown that availability fees revenues are something that can be bought and sold as it sold these revenues to a related party in 1998.<sup>9</sup> It is exactly this aspect of the commodity at issue that presents one of the best arguments for including availability fees revenue in the calculation of rates: Lake Region collected this revenue in the past and sold it another entity, to the detriment of ratepayers.<sup>10</sup>

### **Absence of Rulemaking**

9. Lake Region has contended that a rule promulgated or adopted on the treatment of availability fees is a prerequisite to Commission consideration of the issue. Staff disagrees with this contention. While Lake Region is technically correct in its assertion that the Commission ordered a workshop docket for the purpose of

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<sup>6</sup> *Id.*, at p. 103.

<sup>7</sup> "...the PSC is not bound by *stare decisis* based on prior administrative decisions, so long as its current decision is not otherwise unreasonable or unlawful." *See, e.g., State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003) ("an administrative agency is not bound by *stare decisis*"); *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 390 (Mo. App. W.D. 2005). *State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n of State*, 326 S.W.3d 20, 32 (Mo. Ct. App. 2010).

<sup>8</sup> 2010 Report & Order, p. 100; see also *Black's Law Dictionary* (6th) West Publishing Company, 1990, p. 274.

<sup>9</sup> 2010 Report & Order, at p. 55, para. 165-168.

<sup>10</sup> *Id.* at pp. 55-56, 102-103.

developing a rulemaking to address availability fees and that the workshop docket closed without producing a rule, the details Lake Region leaves out are vital to understanding why Staff and the Company find themselves addressing the availability fees issue in a rate case once again. These details are also the very reason the Commission should reject any argument that the absence of an applicable rule is a valid reason to bypass the Commission's authority to hear and determine the question of availability fees treatment. As was decided in Lake Region's last rate case, the Commission opened Case Nos. SW-2011-0042 and WW-2011-0043 in order to determine how to treat revenue derived through the use of availability fees.<sup>11</sup> In response to Staff's *Request for Extension of Time*<sup>12</sup> on December 22, 2010, the Commission issued an *Order Granting Extension of Time*, which directed Staff to file a proposed schedule for workshops by July 11, 2011.<sup>13</sup> On June 16, 2011, the Commission initiated the consolidation of these dockets into an existing docket, WW-2009-0386,<sup>14</sup> which had been opened for the purpose of investigating solutions to problems facing Missouri's small water and sewer public utilities.

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<sup>11</sup> "During the recent ratemaking proceeding for Lake Region Water and Sewer Company, the Commission announced its intention to change, on a prospective basis, its practices and policies with how it treats revenue derived through the use of availability fees and other similar fees for capital recovery of infrastructure investment in sewer and water companies." *In the Matter of a Working Docket to Investigate Appropriate Methods for Ratemaking Treatment of Fees or Other Mechanisms used for Capital Recovery of Sewer and Water Infrastructure Investment*, Case Nos. SW-2011-0042 and WW-2011-0043 (*Order Directing Notice of Working Case and Directing Filing*, iss'd Aug. 23, 2010) ("Availability Fees Working Dockets")

<sup>12</sup> Staff requested one previous extension on September 23, 2010.

<sup>13</sup> "The January 7, 2011, deadline for the Staff of the Missouri Public Service Commission to file a proposed schedule for workshops, along with any other proposals it has regarding the procedure to follow in these workshop dockets, is extended until July 11, 2011." *Availability Fees Working Dockets, Order Granting Extension of Time*, iss'd Dec. 29, 2010).

<sup>14</sup> *Availability Fees Working Dockets, Order Consolidating Investigations*, iss'd June 16, 2011. Case No. WW-2009-0386 was styled *In the Matter of a Working Case to Investigate Solutions to Problems Facing Small Water and Sewer Public Utilities*. That case was closed on January 23, 2013.

10. More than a year later, on November 1, 2012, Staff filed a *Motion to Close Case* in WW-2009-0386, to which none of the docket participants objected.<sup>15</sup> In that *Motion* and in its subsequent *Summary of Working Docket in Support of Case Closure*, Staff explained that, while meetings conducted over the course of that docket resulted in identification of several problem areas and several proposed solutions, the participants<sup>16</sup> in this docket were unable to reach a consensus on the majority of the issues identified.<sup>17</sup> Because of this and because the docket had become inactive, Staff requested that the docket be closed, saying:

While many . . . problems are common within the industry, each individual water and sewer company presents its own unique situation and solutions are easier to reach by focusing on the individual company. Therefore, Staff states that, at this time, those problems are better addressed in the context of a company's rate case or other company-specific filing with the Commission, as opposed to maintaining an open workshop that is not active or productive to address those problems.<sup>18</sup>

11. On January 23, 2013, the Commission issued an *Order Granting Motion to Close File*, citing Staff's explanation of the working docket activities and Staff's assertion that the unresolved issues in the docket were better addressed in the context of a company's rate case or other company-specific filing.<sup>19</sup> The Commission granted Staff's

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<sup>15</sup> Lake Region participated in the working docket. *In the Matter of a Working Case to Investigate Solutions to Problems Facing Small Water and Sewer Public Utilities*, Case No. WW-2009-0386 (Staff *Summary of Working Docket in Support of Case Closure*, filed Jan. 2, 2013) ("*Solutions to Problems Docket*").

<sup>16</sup> Participants included the Missouri Department of Natural Resources, the Missouri Attorney General's Office, the Office of the Public Counsel, Staff, and various representatives of Missouri water and sewer utilities. *Id.*

<sup>17</sup> *Id.*, p. 2, para. 5.

<sup>18</sup> *Solutions to Problems Docket, Staff's Motion to Close Case*, filed No. 1, 2012, para. 8.

<sup>19</sup> *Solutions to Problems Docket, Order Granting Motion to Close File*, iss'd Jan. 23, 2013, at pp. 1-2.

request to close the docket, saying, “Having reviewed Staff’s verified report, the Commission finds Staff’s request to close this file reasonable and will grant it.”<sup>20</sup>

12. As is evident from reviewing the entirety of this record, the closure of the working docket was not actually a failure to produce a necessary rule but rather a determination that, based on the inability of parties with competing interests to reach a consensus, a rulemaking was not the most effective avenue for addressing the issues raised in the docket. This is an appropriate result of a reasonable effort to address complicated problems. It is perfectly appropriate to begin a workshop with the intent of reaching consensus on a rule, only to find that consensus cannot be reached, which naturally leads back to the need for a contested case, as we have here. The effort to establish a rule clearly shows us that this rate case is exactly the appropriate forum for the Commission to answer the question of availability fees treatment in rates.

13. Additionally, Staff asserts and incorporates by reference the assertions made in its *Response to Motion to Strike*, filed on December 6th, 2013.

**WHEREFORE**, Staff submits this *Response to Lake Region Water & Sewer Company’s Objections to Hearing Exhibits*, asking that the Commission overrule Lake Region’s *Objections to Hearing Exhibits*, and allow those Exhibits to be taken into evidence.

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<sup>20</sup> *Id.*, at p. 5.

**/s/ Tim Opitz**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 12<sup>th</sup> day of March, 2014.

**/s/ Tim Opitz**