

**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
FURTHER SUGGESTIONS IN SUPPORT OF ITS
MOTION IN LIMINE**

**MOTION TO STRIKE PORTIONS OF THE WRITTEN TESTIMONY OF STAFF
WITNESS KIM BOLIN AND
PORTIONS OF THE WRITTEN TESTIMONY OF TED ROBERTSON AND
SECTIONS OF STAFF'S REVENUE REQUIREMENT
AND COST OF SERVICE REPORT**

On December 6, 2013, attorneys for the Commission Staff, and Office of Public Counsel ("OPC") filed objections to Lake Region Water and Sewer Company's ("Lake Region") several and separate motions asking the Commission to strike portions of the prefiled written testimony of identified Staff and OPC witnesses that related to charging or collection of availability fees, the revenue derived therefrom, the amounts thereof or the means of collecting, enforcing or applying the same. Lake Region asked for similar relief by motion to strike portions of the Staff's revenue requirement and cost of service report. Staff filed objections to this motion. Additionally, by motion in limine Lake Region sought an early ruling from the Commission concerning the admissibility of evidence pertaining to availability fees and Staff and OPC have objected to the relief sought in that motion as well.

These suggestions are submitted as a global response to Staff's and OPC's positions on Lake Region's motions to strike and motion in limine. The Commission should grant Lake Region's motions and overrule Staff's and OPC's objections.

I. The Rate Case of 2010 and the Commission's Directive to Formulate a Rule

A. Lake Region's Previous Rate Cases -- SR-2010-0110 and WR-2010-0111

At significant cost and expense to all parties involved, an extensive record concerning the origination, collection, transfer and ownership of availability fees at a real estate development known as Four Seasons Lakesites was created in Lake Region's previous rate case(s) (the "2010 Rate Case"). The findings of fact and conclusions rendered about availability fees written in the *Report and Order, Case Nos. SR-2010-00110 and WR-2010-0111* issued August 18, 2010 (*hereinafter "Lake Region 2010 Report and Order"*) reflect the enormity of the evidentiary base. The Commission devoted over twenty pages of text, which involved over 90 numbered paragraphs of findings, in discussing availability fees, and those pages and paragraphs of the report and order have been attached hereto as **Appendix A** for ease of reference.

The Commission made findings of fact which are salient to these suggestions:

1. The Developer of Four Seasons Lakesites, Inc. installed the water and wastewater connections for each lot in the development.
2. The lots in the development are subject to recorded covenants and restrictions which impose upon owners of undeveloped lots the obligation to pay monthly fees in exchange for the available water and sewer connections ("availability fees").
3. The Developer imposed those fees in the covenants to recover the costs of the water and sewer infrastructure the Developer installed.
4. If lot owners fail to pay the availability fees the obligation becomes a lien on the lot which is enforceable by foreclosure or other remedy allowed by the covenants.
5. The owners of lots in the Four Season Lakesites, Inc. subdivision may vote to end the obligation to pay availability fees

6. By a series of sales, transfers and assignments originating with the Developer the rights to collect the availability fees are now owned in part by owners of the outstanding shares in Lake Region.
7. Ownership of the availability fees was disputed in court proceedings and pursuant to a confidential settlement¹, the Developer has retained the right to receive a portion of the availability fees. The Developer has taken a security interest in the availability fees.²
8. Lake Region's shareholders registered "Lake Utility Availability 1" as a fictitious name to collect the availability fees.
9. Lake Region does not own or control the collection, distribution, enforcement or the termination of the availability fees.
10. Lake Region does not charge availability fees.
11. Lake Region does not collect availability fees.
12. Lake Region's customers do not pay availability fees.
13. Lake Region has reasonably relied on the Commission's past guidance and treatment of availability fees.

The instant case is *de novo*. The parties, including Lake Region, may offer facts and circumstances that update the Commission on Lake Region's revenues, rates and expenses. Although it may be elementary that the Commission, as an administrative agency, is not bound by *stare decisis*, the evidence upon which the Commission made its findings in the *Lake Region 2010 Report and Order* about availability fees, if that evidence were to be re-admitted as evidence in the present matter, would not be significantly different, if different at all. It is

¹ A copy of the settlement agreement was produced in evidence under seal and presumably is accessible to the Commission. *Lake Region 2010 Report and Order* ¶200.

² *Lake Region 2010 Report and Order* ¶176.

entirely fair and proper to assume that the fundamental facts concerning the origination, collection, transfer and ownership of availability fees in Four Seasons Lakesites have not changed.³ Staff and OPC have so assumed in rendering their arguments and Lake Region shall do the same for purposes of these continuing suggestions.⁴

That the Commission is not bound by *stare decisis* and may therefore ignore conclusions it has made in the 2010 Rate Case means in this matter that whether the Commission has subject matter jurisdiction over availability fees is again an open question. Accordingly, Lake Region has reasserted its objection and argument that the Commission unconditionally lacks jurisdiction over availability fees and therefore any evidence pertaining to the same is irrelevant and inadmissible. If the Commission should now so conclude, as it should, Lake Region's motions to strike and motion in limine should be granted without delay.

B. Commission's Jurisdiction

After examining the definition of "service" set out in Section 386.020(48), at page 101 of the Report and Order in the 2010 Rate Case the Commission wrote:

[w]hile the Commission has not done so in the past, availability fees could be construed to be a "commodity" and thus fall under the definition of a "service" despite its expert Staff's testimony to the contrary.

The Commission did not come to the conclusion that the fees were a "commodity;" however, it toyed with the possibility that they could be construed as such. By classifying the fees as a "commodity," the Commission would stretch the meaning of the word far beyond its plain and ordinary meaning. The fees represent a stream of income, and the assignment of that

³It should be noted that in 2010, RPS Properties LP and Sally Stump were the owners of the outstanding shares of Lake Region. Sally Stump transferred her shares to Vernon Stump since that time and is no longer a shareholder. However, RPS Properties LP and Sally Stump remain the owners of the right to collect the availability fees.

⁴ These facts are assumed by Lake Region and are not stipulated to as evidence in this case. What is past though has become prologue for the parties' arguments on Lake Region's current motions. For these matters to constitute evidence in this record, they must be introduced with proper foundation in accordance with the rules of evidence to the extent those rules have application in the Commission.

income, as is the case involving the fees collected in Four Seasons Lakesites, is the assignment of a contract right -- an intangible item -- unlike wheat, corn, pork or other movable fungibles or personal property in commerce. If there is a statutory “commodity” in this exchange, and Lake Region denies there is, it is the available water and sewer connections, not the fee charged to recover the costs of installing them.

At page 3 of its *Response to [Lake Region’s] Motion to Strike*, Staff argues that in collecting availability fees Lake Utility 1 is engaging in the provision of utility service (utility availability) without Commission certification. Staff further suggests that Lake Utility 1 should be enjoined on that basis. To repeat, Lake Utility 1 is the transferee of the rights to collect availability fees **and Lake Utility 1 is not the only entity collecting availability fees**. The Developer of the Four Seasons Lakesites project is receiving a share of that revenue and under staff’s interpretation of the law **that developer would be subject to regulation by this Commission**, as would any real estate developer who charges owners of undeveloped lots a monthly or other fee, periodic or lump sum, for recoupment of costs for water and sewer connections.

Real estate developers employ many ways to recover the costs of “available” installed utility infrastructure. That cost can be an additive or embedded figure in the lot purchase price. The cost can be recovered by an explicit charge, based for example upon the developer’s cost per lot, paid at closing by the buyer. For Four Seasons Lakesites, the Developer chose a continuing monthly fee for both water and sewer that would end when a lot owner connected or when the other lot owners voted to terminate the charge. Staff’s interpretation of the statutory definition of “service” means all the methods of recouping the cost of utility infrastructure incurred by a developer should be subject to regulation and approval by this Commission. Nothing in the

history and court interpretation of the Public Service Commission Law supports a contention that real estate development and costs recovered by developers are within Commission jurisdiction.

The Commission was in error to construe “commodity” as possibly inclusive of availability fees, and in error by concluding it was conditionally vested with jurisdiction.

C. Case Nos. SW-2011-0042 and WW-2011-0043

Case Nos. SW-2011-0042 and WW-2011-0043 were opened by the Commission for a distinctive purpose.

To satisfy the standards of due process and avoid unpredictability with such a significant issue involved with determining a company’s operational revenues, **the Commission will open a workshop docket** to lead to rulemaking. **In the rulemaking proceeding, the Commission will delineate the definitive policy for the prospective treatment of availability fees**, reservation fees, standby fees, connection fees, or any other similar fees, their proper use as mechanisms of capital recovery and their proper ratemaking treatment.⁵

[emphasis added]

Staff may be suggesting, and it is not entirely clear, that *stare decisis* does not bind the Commission to, and the Commission may ignore, this section of the *Lake Region 2010 Report and Order*. The Commission must reject that argument. Staff and the parties that are regulated by the Commission are bound to follow the Commission’s orders and this was no exception. The Commission ordered workshops established by which to promulgate a rule to govern prospective treatment of availability fees and those dockets were created and the workshops convened.

Pursuant to a Commission order consolidating similar investigations, Case Nos. SW-2011-0042 and WW-2011-0043 were folded into an earlier established workshop which was assigned Case No. WW-2009-0386. Proceedings were conducted thereafter under that case

⁵ *Lake Region 2010 Report and Order* at 106.

number. On November 1, 2012, Staff moved to close the workshop. On November 28, 2012, the Commission directed Staff to prepare a report about the workshops including a complete list of all of the identified issues discussed during the workshops. On January 2, 2013, Staff submitted a summary of the workshop experience to the Commission as directed and identified four ultimate issues. At page 3 of its order closing the consolidated workshops,⁶ the Commission acknowledged Staff's list of the issues:

. . . Staff noted that the issues ultimately identified in the workshop and addressed were as follows:

- (1) Surcharges
- (2) PSC Assessment
- (3) Contingency/Emergency Funds
- (4) Rate Cases

Conspicuously absent from Staff's list of identified workshop issues is "availability fees" and a recommended rule to govern prospective treatment of availability fees.

The Commission will search in vain through the reports or submissions filed in Case No. WW-2009-0386 for any meetings convened to discuss availability fees or the promulgation of a definitive rule or any workshop consideration at all of availability fees or the development of party-participant consensus on a proposed rule designed to address availability fees. Unmistakably, the workshop did not ever serve the purposes for which Case Nos. SW-2011-0042 and WW-2011-0043 were created.

The Commission had the authority to reject the Staff's workshop report; deny Staff's motion to close the case and direct further proceedings on the central issue and anticipated rulemaking of Case Nos. SW-2011-0042 and WW-2011-0043. The Commission instead granted the motion to close which leads Lake Region to surmise that the Commission perchance then concluded its general jurisdiction over availability fees was in serious doubt. This case and Lake

⁶ *Order Granting Motion to Close File*, issued January 23, 2013.

Region's pending motions afford the opportunity for the Commission to resolve that doubt in favor of declining jurisdiction over availability fees on the grounds Lake Region has repeatedly asserted.

D. Due Process

The history of the creation, purpose, sale, transfer, collection and distribution of availability fees charged to vacant lot owners in Four Seasons Lakesites has not changed. Staff's arguments and OPC's arguments for imputation of availability fees to Lake Region's revenue requirement have not changed. They are the same as the arguments Staff and OPC raised in the 2010 Rate Case. The reasons why the Commission rejected Staff's and OPC's arguments concerning treatment of availability fees in the 2010 Rate Case have not changed. For the Commission to assert jurisdiction over availability fees in the instant case and apply them as Staff and OPC propose would be, as it was in the 2010 Rate Case, based on an adjudication on specific accrued facts. Therefore, the Commission's lengthy declaration in the 2010 Rate Case that principles of due process would be violated is as compelling today as it was then:

The Commission asserting jurisdiction over revenue derived from availability fees, as now declared in this matter, cannot simply be based on an adjudication on a specific set of accrued facts. What the Commission is announcing today is it is going to prospectively change its statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements before this agency. Agencies cannot engage in this type of rulemaking by an adjudicated order. Pursuing a major change in the Commission's interpretation, implementation and prescription of its definitional statutes and its long-standing policy regarding ratemaking treatment of availability fees, requires compliance with the more stringent and lengthy process of rulemaking as required under section 536.021.

* * *

While not every generally applicable statement or announcement of intent by a state agency is a rule, an agency declaration that has the potential, however slight, of impacting the substantive or procedural rights of some member of the public is a rule. "Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract."

Moreover, the Commission has not found an example of when it has ever completely reclassified revenue and imputed that revenue to the company for ratemaking purposes, and to do so now after Lake Region legitimately relied on the Commission's past treatment of this revenue would be the very definition of an arbitrary and capricious ruling. As the Missouri Supreme court has observed:

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." An agency must not act in a totally subjective manner without any guidelines or criteria.⁷

In the interest of observing Lake Region's rights of due process, the Commission opened the workshop dockets to formulate the needed rule.

No matter what the outcome of the workshop dockets, no matter what the role of the parties may have been in the proceeding, the due process considerations that weighed on the Commission's judgment in the *Lake Region 2010 Report and Order* have not changed. If it was a violation of Lake Region's due process rights to impute availability fee revenue to its revenue requirement in 2010, it is still a violation of that constitutional mandate in 2013 since no rule has been promulgated establishing a definitive policy as ordered by the Commission.

Moreover, this Commission regards the rulemaking as indispensable. Lake Region submitted tariffs in compliance with the *Lake Region 2010 Report and Order* on August 23, 2010. On August 25, 2010 the Office of the Public Counsel filed an objection to approving the tariff sheets. In its *Order Approving Tariff Filings In Compliance With Commission Order* the Commission overruled OPC's objection and offered these reasons:

⁷ *Lake Region 2010 Report and Order* at 104-106. Footnotes and citations in this excerpt of the Commission's Report and Order have been omitted.

Public Counsel asserts that because the Commission declared, in its Report and Order, that it has jurisdiction over the availability fees and the revenue derived from the fees, that Lake Region must list the availability charges in its tariff sheets. Public Counsel's objection; however, is based upon a misunderstanding of the Commission's Report and Order. In the Report and Order the Commission stated:

The Commission asserting jurisdiction over revenue derived from availability fees, as now declared in this matter, cannot simply be based on an adjudication on a specific set of accrued facts. What the Commission is announcing today is it is going to prospectively change its statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements before this agency. Agencies cannot engage in this type of rulemaking by an adjudicated order. Pursuing a major change in the Commission's interpretation, implementation and prescription of its definitional statutes and its long-standing policy regarding ratemaking treatment of availability fees, requires compliance with the more stringent and lengthy process of rulemaking as required under section 536.021.

The determination that the Commission made was that it was going to assert jurisdiction over availability fees in future actions after undertaking a formal rulemaking process. The Commission specifically noted that it could not assert jurisdiction based upon the adjudicatory process in this single action. Public Counsel's objection is based upon a misreading of the Commission's order.⁸

That the rulemaking is indispensable for purposes of future cases was re-emphasized by the Commission in its *Order Regarding Motions For Rehearing, Motion For Reconsideration And Request For Clarification*, issued September 1, 2010. Lake Region, Staff and OPC had filed motions for rehearing or reconsideration of the *Lake Region 2010 Report and Order*. For different reasons, Lake Region and OPC questioned the Commission's decision that imputing revenue from availability fees would be unjust and unreasonable. After repeating that portion of the *Lake Region 2010 Report and Order* which announced that a rulemaking was required before

⁸ *Order Approving Tariff Filings In Compliance With Commission Order*, Case Nos. SR-2010-0110 and WR-2010-0111, issued August 25, 2010 at page

the Commission could change course on treatment of availability fees, the Commission further explained:

Indeed, the Commission painstakingly delineated how rulemaking is necessary for redefining service, reclassification of revenue streams and a complete reversal of its statement of general applicability that implements, interprets or prescribes law, policy, procedure and practice after at least 37 years of following one practice, based upon its interpretation and applications of the law. The Commission provided additional clarification regarding the declaration of its intent to address its jurisdiction over availability fees prospectively where found appropriate in the future in its order approving Lake Region's compliance tariffs.

On August 19, 2010, the Commission opened the workshops to lead to that rulemaking. And, on August 24, 2010, after issuing formal notice, the Commission **specifically directed its Staff to perform an exhaustive review of all current water and sewer regulations and prepare a comprehensive set of definitions, uniform and in conformity with Section 386.020(48), Cum. Supp. 2009.** As that order pointed out, the Commission has definitions for sewer service in its rules that may not conform with the statutory definition of service and that are inapposite to the arguments made by Public Counsel and Staff in this case that availability fees could constitute a utility "service." Those rules specifically define sewer service as being only the removal and treatment of sewage. **During the workshop/rulemaking process the Commission will examine proposed definitions and finally determine whether availability fees are a commodity or if they fall under one or more of the other categories listed in the statute.**

[emphasis added]

The Commission has announced unequivocally that it will not assert jurisdiction over availability fees in future actions until and unless the formal rule described in its report and order, and subsequent related orders, is promulgated. That rule constitutes a condition precedent to the Commission's assertion of jurisdiction over availability fees. That rule is nonexistent. Lake Region is entitled to rely on the Commission's order(s). In this subsequent case, the Commission, by its own order, must refuse to exercise jurisdiction over availability fees.

Staff and OPC oppose Lake Region’s recent motions with arguments leading the Commission toward unconstitutional conduct and the vacating of seminal orders of the Commission’s own design. Their arguments should be rejected and Lake Region’s several motions should be granted.

II. Staff’s and OPC’s Responses to Lake Region’s Motions to Strike and Motion in Limine

Several of Staff’s and OPC’s arguments should be spotlighted.

A. Staff’s Response to Motion to Strike and Motion in Limine (Staff’s Response)

In paragraph 3 of *Staff’s Response*, Staff claims that Lake Region is essentially supplying a service of guaranteed availability to vacant lot owners. For many years Staff subject matter experts consistently testified that availability fees are not utility services⁹ and that view should prevail. Lake Region supplies water and sewer service¹⁰ to its customers in accordance with its approved tariffs. The Staff has always been aware of the availability fees being charged to the property owners in the Shawnee Bend area¹¹ and has never expected Lake Region to file a tariff concerning the fee.

Also in paragraph 3, Staff claims that “[w]ithout the [water works system and central sewer system], the availability fees would not exist.” As established above, the fees originated with the Developer who had multiple options by which to recover the costs of installing the utility infrastructure including not charging those fees at all. The fees exist because of Developer choice.

⁹ *Lake Region 2010 Report and Order* at ¶208.

¹⁰ As defined in 4 CSR 240-3.300(3), “Sewer service means the removal and treatment of sewage.” That definition is repeated in 4 CSR 240-60.010(3)(M): “Sewer service ---- Removal and treatment of sewage.” Availability is not within either rule’s definition of “service.” This is a longstanding interpretation and meaning of the term.

¹¹ *Lake Region 2010 Report and Order* at ¶210.

In paragraph 4 of *Staff's Response*, Staff suggests that if Lake Region is not providing a service of availability then Lake Utility 1 is fraudulently doing so. Again, as mentioned above, Lake Utility 1 is a collection instrumentality for fees that are shared with the Developer. **The fees were imposed to recover the investment in the water and sewer systems, not to maintain or repair the existing operations.**¹² Lake Utility 1 provides no utility service.

In paragraph 5, Staff states that Lake Region collected this revenue in the past and sold it to another entity to the detriment of ratepayers. First, whether Lake Region ever owned the revenue has never been established and collecting unregulated revenue on behalf of the owner of that revenue does not and has not adversely affected any Lake Region customer. Additionally, the Commission has never included availability fees for ratemaking purposes in any of Lake Region's operating systems. The ratepayers have experienced no detriment.

Staff asserts in paragraph 7 that if the Commission decides to include availability fees in the calculation of Lake Region's rates for service, "Lake Region's owners could choose to redirect the availability fees revenue stream back to Lake Region, as it was in the past." In a footnote to that statement, Staff claims that Lake Region and Lake Utility 1 share common ownership. Staff labors under a misunderstanding. Lake Region owners and the parties making up Lake Utility 1 are different and are not in common. Furthermore, the parties doing business as Lake Utility 1 cannot "choose to redirect the revenue stream" without risk of breaching the confidential settlement agreement forged in the crucible of litigation that controls the ownership and distribution of availability fees. The regulatory power of this Commission should not be exerted in such a way to coerce nonparties into breaking contracts.

At paragraph 8, Staff concludes that the utility owners are unjustly enriched if the availability fee revenue is not included in calculating cost of service. Staff contends that Lake

¹² *Lake Region 2010 Report and Order* at ¶162.

Region offers a service of guaranteed availability at its own cost. Again, “availability” is not a “service” under the statute, and the costs of maintaining Lake Region’s water works and wastewater system have been historically, and continue to be, allocated to the customers actually taking and discharging water into those systems, not the owners of vacant lots who are not customers of Lake Region and drive no demand on maintenance or capacity.

In paragraphs 9 through 14, Staff defends its use of estimates in the availability fee component of its revenue requirement and cost of service report. Staff invites the Commission to ignore the disfavor of those estimates, which the Commission expressed in the *Lake Region 2010 Report and Order*, arguing that the Commission is not bound by its own decisions. Staff claims it uses the “known number” of unimproved lots, the known number of new connections, and the known annual amount charged for availability fees yet the figures Staff purports to know are not disclosed in the reports. Staff lacks any idea of the amount of availability fees actually paid, to whom they were paid and at what cost.¹³ Staff also defends the use of these estimates as the source for the opinions¹⁴ of its experts on the issue and cites Section 490.065 RSMo 2000. The following discussion from *Whitnell v. State*, 129 S.W.3d 409 (Mo.App. E.D., 2004) describes the statute’s allowances to testifying experts:

In recognition of the generally accepted principle that an expert acquires his knowledge and expertise from a number of sources, some of which may include inadmissible hearsay, an expert can rely on hearsay information in forming an opinion. *Dillon*, 103 S.W.3d at 239. **An expert can rely on such information provided that those sources are not offered as independent substantive evidence, but rather serve only as a background for his opinion.** *Id.* (quoting *State ex rel. Mo. Highway & Transportation Comm’n v. Delmar Gardens of Chesterfield, Inc.*, 872 S.W.2d 178, 182 (Mo.App.1994)). Section 490.065.3 permits an expert to consider facts not in evidence in forming an

¹³ The amount of fees charged; the amount of fees collected and from whom vary from year to year. *Lake Region 2010 Report and Order* ¶¶ 180-184.

¹⁴ The Staff Revenue Requirement and Cost of Service Report should itemize “actual” costs and revenues for the Company. The Staff should not be allowed to merely render opinions as to what those costs and revenues are and have the Company sort out the errors as part of its evidentiary burden in rebuttal and at hearing.

opinion or inference, but a two-step approach must be used to determine the admissibility of that expert opinion. *McDonagh*, 123 S.W.3d at 156–57; *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 833 (Mo.App.1996), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). First, **the facts or evidence must be of a type reasonably relied on by experts in the field** in forming opinions or inferences on the subject. *Id.* Second, the **trial court must independently decide if the facts and data relied on by the expert meet a minimum standard of reliability, i.e., are otherwise reasonably reliable.** *Id.* [emphasis added]

Whitnell at 416.

If Staff’s analysis of availability fees is an “opinion,” it is inadmissible. Staff must show that the “expert” rendering the opinion relies on: 1) sales of lots in subdivisions; 2) amounts set as fees and charges in real property covenants and restrictions; 3) settlement agreements in litigation; 4) affidavits of subdivision developers; and 5) findings of fact (which may be stale after three years) in a Commission Report and Order which Staff claims may be disregarded by the entity that rendered it, and Staff must show that those facts are “of a type reasonably relied on by experts in the field.” Staff will fail in making that showing. Additionally, as a second step, the Staff must show that the facts and data its expert relies on are reasonably reliable. The Commission has previously ruled that the same estimates are unreliable. Finally, the support for Staff’s calculation of availability fees is in truth being offered as substantive evidence of facts on which to base the Commission’s decision. Those facts cannot be hidden behind an expert’s opinion but must be independently verified in accord with evidentiary rules.

In paragraphs 15 through 19 of its *Response to Motion to Strike*, Staff attempts to explain why the rule ordered by the Commission in the *Lake Region 2010 Report and Order* was not promulgated. Staff writes in paragraph 19:

As is evident from reviewing the entirety of [the record in Case No. WW-2009-0386], 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.

The content of the record in Case No. WW-2009-0386 was discussed *infra*. Staff's synopsis of the record in that workshop is highly inexact. As shown by the various submissions and filings, availability fees was not selected as an issue for that docket, and most importantly, **no rule concerning availability fees was identified as an issue in that docket.** In the workshop there was no effort commenced to create an "availability fee" rule and hence there was no movement toward consensus on the form or content of such a rule.

Over three years ago, the Commission publicly announced that without the rule on availability fees it would violate Lake Region's constitutional right to due process by imputing availability fee revenue to the Company's cost of service and it would not assert jurisdiction over availability fees until such a rule was in force. The Commission created a docket within which such a rule could be formulated. The Commission's order has not been withdrawn. Without the rule it ordered, the Commission would commit the same constitutional violation today.

B. OPC's Objection and Response to Lake Region's Motion to Strike and Motion in Limine (OPC's Response)

In paragraphs 11 through 18 of *OPC's Response*, the office cites its statutory authority to engage in independent investigations of regulated utilities. OPC has not engaged in any investigation of Lake Region under those sections for purposes of Mr. Robertson's testimony. OPC served data requests eight days prior to the testimony due date, to which Lake Region has filed objections, approximately four days before Mr. Robertson's testimony was due to be filed.

Lake Region contends that the Commission's rules concerning discovery by data requests apply rather than OPC's statutory authority to independently seek information from public utilities.

At paragraph 17 of *OPC's Response*, OPC claims that "[t]his is not the first time Lake Region has shown reticence to discuss the issue of availability fees and their affect on the rates to be paid by its customers" and "in its previous rate cases, Lake Region was so obstructive to any attempts to gain information regarding availability fees." Lake Region assumes that OPC is referring to the multiple objections Lake Region asserted to the data requests served by Staff and OPC regarding availability fees in the 2010 Rate Case. As it did then, OPC finds fault with Lake Region for asserting valid objections to overreaching data requests and other discovery devices. The record in the 2010 Rate Case refutes OPC. As the Commission observed:

Additionally, Lake Region was justified in raising its jurisdictional challenges and it could have conceivably constituted legal malpractice for Lake Region's attorney to overlook the jurisdictional arguments as they pertain to availability fees. Public Counsel offers no evidence to support a determination that Lake Region engaged in any frivolous or unnecessary legal practice with prosecuting its case that would support a disallowance. **The objections Lake Region made with regard to data requests concerning availability fees were never over-ruled, and there were no motions filed by any party seeking to compel answers to the data requests where Lake Region lodged an objection.** There simply is no evidence in the record to suggest that Lake Region's rate case expenses were imprudently incurred that would support any disallowance of rate case expenses.¹⁵ [emphasis added]

In paragraph 21, OPC ends with a finding of fact in the *Lake Region 2010 Report and Order*:

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

¹⁵ *Lake Region 2010 Report and Order* at pages 117-118.

This is certainly true today. Contrast the alternative, however. In the 2010 Rate Case, Staff was ordered to provide the Commission with an exhibit illustrating the effects of adding back the contributed plant to rate base and including the availability fee revenue. The result shown in the exhibit was increased rates.¹⁶

At paragraph 22, OPC writes, “it is just and reasonable that the Commission ensure that customers receive all the benefit they are due from paying the availability fees.” As the Commission found in the *Lake Region 2010 Report and Order* Lake Region’s customers are already benefitted in the way the availability fees are now accounted for. Additionally, **Lake Region’s customers do not pay availability fees.**

At paragraph 27, OPC contends “[i]t makes no difference if availability fees are now paid to the current shareholders of Lake Region or some other affiliate entity rather than to Lake Region.” Lake Region has no affiliates. RPS Properties LP and Vernon Stump are Lake Region’s shareholders and they are not affiliates of the Company. RPS Properties LP, Sally Stump and the Developer are the owners of the availability fees generated in Four Seasons Lakesites and they are unaffiliated with Lake Region.

In paragraph 28, OPC suggests that if Lake Region will not provide documentation about the amount of contributed plant that is associated with availability fees, the Commission should consider all of Lake Region’s plant for both its Horseshoe Bend and Shawnee Bend operations contributed plant associated with availability fees. Again, OPC asks the Commission to penalize or sanction Lake Region for asserting its right to object to invalid data requests and raising defenses to Staff’s and OPC’s positions. There is no support for such a sanction. Additionally,

¹⁶ The witnesses for OPC and Staff in this matter are proposing to include the availability fees as company revenue while continuing to treat the plant as contributed. By giving the customer the benefit of contributed plant as well as the availability fees created by the developer, which were created to recoup the cost of that plant, the Commission treats the plant as if it were *donated twice to the Company* which in turn reduces the Company’s rates for service unreasonably in that the Company is denied a reasonable return upon investment.

the Commission should remember that **owners of vacant lots on Horseshoe Bend and all of Shawnee Bend outside the Porto Cima area are not charged availability fees.**

In paragraph 35 of *OPC's Response*, OPC suggests that the Staff's Revenue Requirement and Cost of Service Report utilize estimates because "no information has been forthcoming from Lake Region despite numerous attempts by both parties in both this case and the previous rate cases." If OPC means that Staff and OPC have made "numerous attempts to discover the information," OPC is incorrect. Staff made no inquiries of Lake Region in the present case by data request or otherwise regarding availability fees. As mentioned previously, OPC served data requests on the issue only eight days prior to testimony being due, to which Lake Region has asserted timely objections, four days before its testimony was due. In paragraph 36, OPC goes on to accuse Lake Region of impeding "the collection of data regarding availability fees" and then complaining "that Staff's calculations are only estimates." To repeat, Staff made no inquiries of Lake Region in the present case by data request or otherwise regarding availability fees. Lake Region is blameless with respect to Staff's use of estimates in its reports.

In paragraph 37, OPC contends that Lake Region is "self serving in trying to hide information regarding availability fees from Staff, Public Counsel and the Commission." There is no evidence that Lake Region is concealing any information about availability fees in this case or has concealed information of that nature in previous cases. What it knows has been disclosed in previous cases, along with the knowledge of other parties with direct knowledge about the availability fees charged in Four Seasons Lakesites. Staff has not submitted any data requests to Lake Region in this case about availability fees. OPC also discusses a risk that Lake Region's rate base may be lowered because of the amount paid in

availability feeds in Shawnee Bend. There is no risk. The plant is classified as contributed plant on the Company's books and records. The Commission has already lowered that rate base.

III. Conclusion

On the basis of the above and foregoing, Lake Region respectfully requests the Commission to enter the order and other relief set forth in:

- a) *Lake Region Water & Sewer Company's 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;*
- b) *Lake Region Water & Sewer Company's Motion To Strike Portions Of The Written Testimony Of Ted Robertson, Witness For The Office Of Public Counsel; and*
- c) *Lake Region Water And Sewer Company's Motion In Limine*
- d) Together with such other relief the Commission deems just and reasonable under the circumstances.

Respectfully submitted,

/s/ Mark W. Comley

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 15th day of December, 2013, to General Counsel's Office at staffcounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley