BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Silverleaf Resorts, Inc. and Algonquin Water Resources of Missouri, LLC for Authority for Silverleaf Resorts, Inc. to Sell Certain Assets to Algonquin Water Resources of Missouri, LLC and, in Connection Therewith, Certain Other Related Transactions.	)))))))	Case No. WO-2005-0206 SO-2005-0207

SUGGESTIONS IN SUPPORT OF
MOTION FOR SUMMARY DETERMINATION

COMES NOW Silverleaf Resorts, Inc. (Silverleaf) and Algonquin Water Resources of Missouri, LLC (Algonquin) (collectively, Applicants), by and through their counsel, and, pursuant to 4 CSR 240-2.117, submits its Suggestions In Support of their Motion for Summary Determination filed simultaneously herewith.

INTRODUCTION

Silverleaf is a "water corporation," "sewer corporation" and a "public utility" as those terms are defined in Section 386.020, RSMo., and is subject to the jurisdiction and supervision of the Commission as provided by law, as it operates small water and sewer systems in the state of Missouri. Silverleaf has agreed to sell to Algonquin certain assets, to include the Missouri water and sewer systems. Summary determination is warranted in this matter because there is no dispute that Algonquin has the necessary experience, general financial health and ability to operate the subject assets.

APPLICATION STANDARD

Section 393.190.1, RSMo provides that a public utility may not sell its "franchise, works or system, necessary or useful in the performance of its duties to the public" without "having first

secured from the commission an order authorizing it so to do." The Missouri Supreme Court has stated that the right to sell property is "incident important to ownership." State ex rel. City of St. Louis v. Public Service Commission, 73 S.W.2d 393, 400 (Mo. banc 1934). Therefore, in the context of public utilities, the Court found that a "property owner should be allowed to sell his property unless it would be detrimental to the public." *Id.*

The Court went on to state that:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefitted,* as a condition to change ownership, but their duty is to see that no such change shall be made as would work to the public *detriment.* 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"

Id. at 400.

It is this standard, essentially a presumption in favor of approval of sales of utility plant, unless the Commission finds that such sale would be detrimental to the public. Benefit to the public is not required.

It was previously stated by the courts and this Commission that the "'obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.' *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently. *See In the Matter of the Joint Application of Missouri*

Gas Energy et al., Case No. GM-94-252 (*Report and Order,* issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220." *In the Matter of the Joint Application of Missouri-American Water Company and United Water Missouri, Inc.*, 9 Mo.P.S.C. 3d 56, 58 (March 16, 2000).

SUMMARY DETERMINATION STANDARD

Commission Rule 4 CSR 240-2.117(E) provides that:

> The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

Similarly, Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure states that summary judgment shall be entered if the motion and response thereto reveal that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Stanley v. City of Independence,* 995 S.W.2d 485, 486 (Mo. banc 1999).

NO DISPUTE AS TO ALGONQUIN QUALIFICATIONS

The facts are undisputed to grant the Applicants' Application as to both the sale of the utility assets and the grant of certificates to Algonquin. As to approval of the sale, the Commission has stated that it considers such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently. *See In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (*Report and Order,* issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

Algonquin has the necessary experience, general financial health and ability to operate the

subject assets. Algonquin's member, Algonquin Water Resources of America (AWRA), currently serves approximately 50,000 water and wastewater connections in southern parts of the United States. Algonquin will have available to it a robust team of utility professionals who would manage and operate the systems. These resources include in-house engineering, development services, accounting, environmental/safety compliance, customer service, and operations work groups. AWRA has $824 million in assets, including $495 million in equity.

The Commission Staff has stated that it has no reason to believe that Algonquin does not have the technical, managerial and financial capabilities necessary to provide the services encompassed by the Joint Application.

ACQUISITION ADJUSTMENT ISSUE IS NOT DETERMINATIVE

The only issues raised by the Staff in its Recommendation are the issues described by the Staff as "Acquisition Premium Issues Identified by the Staff" and "Ratemaking Issue Identified by the Staff." (Staff Recommendation, Official Case File Memorandum, p. 3, 5).

The Staff indicates its belief that these issues are relevant to this application as a result of the Missouri Supreme Court's decision in *State ex rel. Ag Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo.banc 2003). In *Ag Processing*, the Supreme Court found that the Commission's failure to consider the acquiring company's proposed plan to recoup acquisition premium required reversal of the Commission's approval.

A clear distinction between the *Ag Processing* case and the case at hand is that in *Ag Processing*, the acquiring company proposed a regulatory plan as a part of the application that addressed recovery of the acquisition premium associated with the merger. No such proposal has been made in this case (additionally, this is not a merger).

In this case, issues related to acquisition premium may be preserved for a future rate case as they have no import at this point in time. This can be seen by the Staff's responses to Algonquin's data requests:

- **Question** - Would the existence or non-existence of an acquisition premium in this transaction have an impact on whether this transaction is not detrimental to the public interest"? **Staff Response** - "The existence or non-existence of an acquisition premium does not in and or itself have an impact upon the [sic] whether a transaction would be detrimental to the public interest. . . ." (Staff Response to Algonquin DR 1-1);
- **Question** - Would the existence or non-existence of an acquisition premium have any bearing on rates and tariffs charged to a customer or any aspect of service to the customer? **Staff Response** - "The existence or non-existence of an acquisition premium would only have a bearing on the rates charged to the customers of a system if the Commission allowed the Company to include the acquisition premium in the cost of service instead of recording it below the line, which is the historical treatment of this item." (Staff Response to Algonquin DR 1-2).

Thus, even for the Staff, the focus is not on any immediate detriment that may result from the existence of an acquisition premium, but rather it is a question of what the Commission may do in a future rate case that the Staff deems to be important. For additional reasons, the possibility that acquisition premium may be addressed in a future case, should be a non-issue for the Staff and, more importantly, this Commission.

The Staff indicates, and the Applicants agree, that there are no "facts or situations that

would require the Commission to grant a utility the recovery of an acquisition premium." (Staff Response to Algonquin DR 1-3(b)). Thus, the "existence" of an acquisition premium does not equal "recovery" of such premium. In fact, the Staff indicates that to its knowledge, "this Commission has never allowed recovery on an acquisition premium." (Staff Response to Algonquin DR 1-3(a)).

Further, if any recovery was ultimately authorized the resulting rates would still be subject to the statutory limits on the Commission's ability to set rates. Section 393.130, RSMo requires that the rates to be charged by a public utility "be just and reasonable." Thus, the recovery of an acquisition premium could only be ultimately allowed, if the rates were deemed by the Commission (and the courts) to be just and reasonable.

The Commission should follow the template it used in *In the Matter of the Joint Application of Missouri-American Water Company and United Water Missouri, Inc.*, Report and Order, Case No. WM-2000-222, 2000 Mo. PSC LEXIS 304, 9 Mo. P.S.C. 3d 56 (March 16, 2000). In that case, the Staff sought to deny recovery of acquisition premium at the time of acquisition, in spite of the fact that the acquiring company had not asked the Commission to address recovery. The Commission found as follows:

> The matter of the acquisition adjustment is also not properly before the Commission in this case. That is a matter for a rate case, as the Applicants point out. This is not a rate case. Therefore, the Commission will not address the matter of the acquisition premium in this case. *See In the Matter of the Application of Missouri-American Water Company for Approval of its Acquisition of the Common Stock of Missouri Cities Water Company*, Case No. WM- 93- 255 (*Report and Order*, issued July 30, 1993) at 8 and 10.
>
> The only purported public detriment that any party has identified is the possibility of a future attempt to recover the acquisition premium from ratepayers. The Commission reads *State ex rel. City of St. Louis v. Public Service Commission,*

supra, 335 Mo. at 459, 73 S.W.2d at 400, to require a direct and present public detriment. The acquisition premium, which MAWC may seek to recover from ratepayers in a rate case yet to be filed, is not a present detriment. "The Commission is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur." *In the Matter of the Joint Application of Missouri Gas Company et al.*, Case No. GM-94-252, *supra, 3 Mo. P.S.C. 3rd at 221.* There is no such compelling evidence in this record.

AG PROCESSING CAN BE ADDRESS BASED UPON UNDISPUTED FACTS

Even if the Commission believes that *Ag Processing* cannot be distinguished and that acquisition premium must be addressed in some fashion in this case, *Ag Processing* does not require the Commission to rule as to "recovery" of acquisition premium. The Missouri Supreme Court stated that "[w]hile [the Commission] may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public." *Ag Processing* at p. 736.

Again, it must be remembered that the *Ag Processing* case was created in the context of a utility request that the Commission rule on a plan/process for the ultimate recovery of acquisition premium - something that is not present here. As to the reasonableness of the acquisition premium, the Supreme Court defined this "cost analysis" by citing in a footnote *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 S.W.2d 388, 399 (Mo. banc 1976), which was said to state "that, for ratemaking purposes, recovery of the cost of an asset acquired from another utility depends on the reasonableness of the acquisition, considering the factors of whether the transaction was at arm's length, if it resulted in operating efficiencies, and if it made possible a desirable integration of facilities."

Using this standard, any acquisition premium present in this transaction is reasonable. The transaction between Algonquin and Silverleaf is at "arm's length." The companies are not affiliates and the transaction was negotiated by independent company representatives and attorneys. Responsibility will no longer belong to Silverleaf, a company that is primarily in the business of timeshare vacation sales, marketing and development. (Conner Direct).

Lastly, Algonquin understands that if an acquisition premium is ultimately determined to exist that it is a possibility that Algonquin will not recover any of the premium in rates. If the Commission finds an acquisition premium to exist and Algonquin does not recover any of the premium, Algonquin has the financial resources to allow it to continue to operate the Missouri assets and provide safe and adequate service. (Weber Direct).

Thus, the public interest is ultimately protected whatever the rate case treatment may be. On one side, if recovery is not granted, Algonquin will still be in a position to provide safe and adequate service. On the other side, any rates ultimately approved by the Commission must, by statute, be just and reasonable.

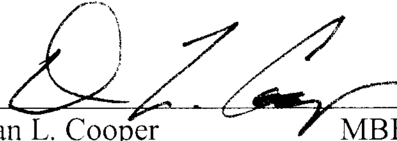
CONCLUSION

There is no legal or practical reason requiring the Commission to address the acquisition premium issues raised by the Staff in this case. The issues raised by the Staff are irrelevant. Accordingly, the Commission should issue its order granting summary determination in the Applicants' favor.

WHEREFORE, Algonquin and Silverleaf, for all of the reasons set forth above and in its Motion for Summary Determination filed concurrently herewith, respectfully requests that this Commission enter an Order finding for Applicants on all remaining issues, in that there are no

genuine issues of material fact and Applicants are entitled to determination as a matter of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by U.S. Mail, postage prepaid, or electronic mail, on May 25th, 2005, to the following:

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