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, As consolidated

REPLY TO STAFF RESPONSE TO
MOTION FOR SUMMARY DETERMINATION

COME NOW Silverleaf Resorts, Inc. (Silverleaf) and Algonquin Water Resources of Missouri, LLC (Algonquin) (collectively, Applicants), and, in reply to the Staff of the Missouri Public Service Commission's (Staff) Response to Applicants' Motion for Summary Determination (Response), state the following:

1. On May 25, 2005, the Applicants' filed their Motion for Summary Determination and Suggestions in Support of Motion for Summary Determination. The Motion and Suggestions suggested that this case is appropriate for summary determination in Applicants' favor because there is no dispute that Algonquin has the necessary experience, general financial health and ability to operate the subject assets. The Motion and Suggestions further suggested that because of the specific facts of this case, the issue of acquisition adjustment is not determinative.

2. Staff's Response did not deny any of the facts alleged in the Applicants' Motion. 4 CSR 240-2.117(1)(C). The Staff Response affirmatively stated that Staff does not "dispute that Algonquin has the necessary experience, general financial health and ability to operate the subject [Silverleaf] assets." Stf. Response, p. 2.

3. Staff asserts that Applicants' Motion "fails to meet minimal requirements" because

the Staff "has placed before the Commission the issue of the amount and treatment of an acquisition premium." Stf. Response, p. 4. However, the mere existence of a factual issue is not by itself sufficient to defeat a summary determination motion.

4. Both the court rules governing summary judgment (Mo.R.Civ.P. 74.04) and the Commission Rule governing summary determination (4 CSR 240-2.117) provide that such motions may be granted where there is "no genuine issue as to any material fact." In the context of summary judgment, the courts have stated that a "fact that is of such legal probative force as would control or determine the outcome of the litigation constitutes a material fact." *Karney v. Wohl*, 785 S.W.2d 630, 632 (Mo.App.E.D. 1990), citing *Ware v. St. Louis Car Company*, 384 S.W.2d 287, 290 (Mo.App. 1964). "Only disputes over facts *that might affect the outcome* will properly preclude summary judgment." *Smith v. American Red Cross*, 886 F. Supp. 1494, 1497-1498 (Mo.App.E.D. 1995) (emphasis added). Stated alternatively, "issues of fact must be material to a resolution of the dispute between the parties; where the only disputed issues of fact are immaterial to the resolution of the legal issues, summary judgment is appropriate." *King v. United States*, 914 F. Supp. 335, 338 (W.D.Mo. 1995), quoting *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992).

5. Thus, the question remains for the Commission whether the issue raise by the Staff in this case – "the amount and treatment of an acquisition premium" (Stf. Response, p. 4) – is material to a resolution of the dispute.

6. Applicants continue to believe that this issue is not material within the context of the facts of this case. It has been stated that an owner of utility property "should be allowed to sell his property unless it would be detrimental to the public." *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934). Accordingly, this transaction must be approved

as long as it is not detrimental to the public interest.

7. 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. This is particularly so because no request has been made by the Applicants related to acquisition premium. Moreover, 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." (Motion, App. A (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." (Motion, App. A (Staff Response to Algonquin DR 1-3(a)).

8. Further protection exists for the rate payer because the rates charged for the relevant utility service remain consistent with 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." Therefore, the rates charged must always be those that are deemed by the Commission (and the courts) to be just and reasonable.

9. 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. (Weber Direct). 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. (*Id.*).

10. Because there is no dispute that Algonquin has the necessary experience, general financial health and ability to operate Silverleaf's assets, any further delay has consitutional

implications as Silverleaf's right to sell its property is being needlessly hindered. See *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934) (right to sell property is an "incident important to ownership"). It also prevents Algonquin, a financially healthy, experienced operator of water and sewer systems, from entering into utility business in the State of Missouri. Finally, this delay provides a disservice to Silverleaf's customers as the assets remain in a state of a prolonged state of limbo while this unnecessary issue is pending before the Commission.

CONCLUSION

11. 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 not required in order to approve the proposed transaction. Accordingly, the Commission should issue its order granting summary determination in the Applicants' favor.

WHEREFORE, Algonquin and Silverleaf respectfully request that this Commission enter an Order finding for Applicants, in that there are no genuine issues of material fact and Applicants are entitled to determination as a matter of law, and:

(A) authorizing Silverleaf to sell the assets identified in the Asset Purchase Agreement;

(B) authorizing Silverleaf and Algonquin to perform in accordance with the terms described in the Asset Purchase Agreement, as amended, and to take any and all other actions which may be reasonably necessary and incidental to the performance of the sale; and,

(C) granting Algonquin water and sewer certificates to serve those areas for which Silverleaf currently holds certificates and provides service.

Respectfully submitted,

Dean L. Cooper MBE#36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
(573) 635-7166
(573) 635-3847 facsimile
dcooper@brydonlaw.com

ATTORNEYS FOR SILVERLEAF RESORTS, INC.
AND ALGONQUIN WATER RESOURCES OF
MISSOURI, LLC

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 June 20, 2005, to the following:

Mr. Bob Berlin
Office of the General Counsel
Governor Office Building, 8th Floor
Jefferson City, Mo 65101

Lewis Mills
Office of the Public Counsel
Governor Office Building, 6th Floor
Jefferson City, MO 65101