BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Foxfire Utility Company for Authority to Transfer Certain Water and Sewer Assets Located in Stone County, Missouri to Ozarks Clean Water Company, and in Connection Therewith, Certain Other Related Transactions	)))))))	Case No. WM-2022-0186

APPLICATION FOR REHEARING

COMES NOW the Missouri Office of the Public Counsel ("Public Counsel") and respectfully requests rehearing[1] of the Public Service Commission's December 21, 2022 Report and Order ("Order"); and states as follows:

Introduction

Public Counsel's position in this case asked the Commission to protect the customers of Foxfire Utility Company ("Foxfire") by finding the proposed transfer to Ozarks Clean Water Company ("OCWC") would be detrimental due to the large *acquisition premium*. An acquisition premium is the difference between the real value of a company and the actual price paid to acquire it.[2] For decades, the Commission has consistently protected the public by ordering public utility systems to be valued at rate base without an acquisition premium.[3]

[1] § 386.500 RSMo

[2]. The Order finds, "The "acquisition premium" is $1,195,548, which is the amount the purchase price exceeds the rate base." (Order, p.8).

[3] *See* OPC Initial Brief, pp. 20-23.

The Order in this case, however, does not offer any explanation for failing to apply those same regulatory protections to the Foxfire transfer. Rather, the Order chose to focus on the fact that the acquiring company is unregulated. The regulatory status of the acquiring company does not negate the vast detriment this transaction places on Missouri citizens under the Commission's care. Without this uncharacteristically expensive transaction, Foxfire's customer base would not be forced to take on such a large financial burden.

The Order treats the Foxfire customers as if they are already customers of an unregulated entity, and negates the Commission's duty to provide similar protections to Foxfire's customers. This is an abdication of the Commission's duty to protect the public, and supports a rehearing to address these matters.[4]

A. Rehearing the Order's finding that "*None of the evidence presented explains why the estimated rate base is relevant or appropriate for use in determining the proposed price of a transaction in the sale of utility assets to a private entity outside of the Commission's jurisdiction*."

This finding overlooks the evidence and argument that explained why the rate base is relevant and appropriate to determining whether the proposed transfer would be detrimental to the public. That evidence showed:

- The sale of Foxfire to OCWC at the proposed price would create a 1.2 million acquisition premium;
- The acquisition premium would obligate Foxfire's customers to pay Mr. Helms $1.2 million over a 20-year period;

[4] "When section 393.190.1 addresses limitations on the sale, it places those limitations on the selling utility corporation. This is to be expected as the selling utility is the party operating the assets in service of the public and is subject to the control of the Commission." *Osage Util. Operating Co. v. Mo. Pub. Serv. Comm'n*, 637 S.W.3d 78, 89 (Mo. App. W.D. 2021).

- The Commission consistently rejects recovery of acquisition premiums;
- Without the sale of the system to OCWC, Foxfire's customers would not be obligated to pay Mr. Helms $1.2 million;
- $80,000 of annual revenue recovery that would otherwise go into a reserve account, would instead go to Mr. Helms;
- By reducing the reserve account by $80,000 annually, this amount will not be available to offset future plant investments;
- By not having the $80,000 annual revenue placed into the reserve account, future rates would need to be increased sooner than if the $80,000 went into the reserve account;
- Absent an offsetting benefit to the customer, a rate increase is detrimental to customers.
- Despite having no plans to invest in new plant, OCWC Board Directors have stated a desire to raise rates;

The Order overlooks the evidence and argument demonstrating the relevance of rate base, and fails to explain how a $1.2 million debt burden that would otherwise not exist is not detrimental. It is unquestionable that indebting the Foxfire system imposes a financial detriment to those obligated to pay that debt. The only benefit that Foxfire customers would gain is the ability to pay for utilities online, which does not offset the inordinate debt. Further, this debt benefits Mr. Helms alone, to the detriment of every single Foxfire customer.

Taking these customers away from the Commission's jurisdiction and protection is itself a relevant fact to assessing the detriment of this transfer. Certain OCWC Board Directors clearly expressed a desire to raise rates without any corresponding investment – a rate increase potential that would not be possible absent the transfer to OCWC. A greater potential of a rate increase with no corresponding investment or other offsetting benefits is a detriment to the

public. OCWC has expressed that they would wait to raise rates. However, that commitment has been limited to as little as one year. Board members have already spoken about the possibility of raising rates. Therefore, the Commission's decision granting this transfer will lead Foxfire's captive customers to an inevitable rate increase in a short period of time.

B. Rehearing the Order's finding that "*Without a clear indication that OCWC's rates will be excessive…the Commission cannot find that the proposed transaction is detrimental to the public*."

Here the Commission defines its "not detrimental to the public interest" standard as requiring "a clear indication that OCWC's rates will be excessive." This new standard unjustly and unreasonably narrows what constitutes a "detriment." The Commission cites to no authority that "detriment" must equate to a clear showing rates will be excessive. By the Commission's own findings and conclusions made over the last several decades, the Commission has repeatedly deemed that passing along acquisition premiums to customers is detrimental without any finding that rates will be excessive.[5] Even if "clear evidence of excessive rates" is the appropriate standard, increasing the customer's obligation to Mr. Helms by thirteen times their present obligation is without a doubt, a clear indication rates will be excessive in the near future.

The Commission is limiting its own authority to consider more broadly the impact that a debt burden has upon a customer base. The Order does not analyze the impact of the excessive 20-year debt obligation on future plant investments. The Order does not discuss the Board of Directors' clear intent to

[5] *See* Public Counsel's Initial Brief, pp. 20-23.

raise rates for increased “profits”. At no point does the Order mention the Commission’s own Staff clearly stating the logic guiding their recommendation was merely the Commission’s past decisions that they disagreed with. The Order, with a one-paragraph analysis that does not acknowledge, address, or explain their guidance on any of these vital issues, fails to protect the Missouri public.

The Commission’s Order seeks to establish a standard for opposing asset sale prices that is impossible to meet, requiring an admission by the acquiring company that it intends to implement an *excessive* rate increase. An intent to raise rates is not enough itself, so long as there is a short delay in the enactment of the increase. The Order is a message to all other small water and sewer system owners advising them to sell their systems to unregulated utilities and avoid protections against inflated valuations and acquisition premiums.

C. Rehearing the Order’s finding that “*there was no evidence that the relationship between Helms and Casaletto renders their negotiated price invalid*”

The Commission’s Staff raised concerns with the close personal relationship between Mr. Helms and Mr. Casaletto and the lack of an independent evaluation of the system. Public Counsel repeated those concerns, and demonstrated with evidence the financial incentive both Mr. Helms and Mr. Casaletto have to overvalue the system. Public Counsel also repeated the additional fact raised by the Staff that all other OCWC acquisitions were for

nominal amounts. These concerns mostly address the reasonableness of relying upon a system price that provides a partial valuation.[6]

The Order addressed these serious concerns with a single sentence that states, "*there was no evidence that the relationship between Helms and Casaletto renders their negotiated price invalid*." The requirement for glaring proof of impropriety to reject an unduly large transfer between close associates is not only incorrect, but harmful. Bad actors will not need to avoid any roadblocks to take advantage of their Missouri customers, because the Commission has politely moved those obstructions for them.

Conclusion

In *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. 2003), the Missouri Supreme Court addressed the Commission's duty in asset transfer applications and stated:

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC 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.

Similar to *AG Processing*, this Order seeks to relieve the Commission of its duty to address the acquisition premium issue in deciding whether the sale price is

[6] Missouri policy favors impartial and independent valuations of small water and sewer systems. *See* § 393.320.3 RSMo.

detrimental to the public. The Order provides no reason why this same system valuation issue is neither relevant nor integral to the proposed transfer of assets.

In addition, the Order fails to provide any objective analysis balancing the known detriments of the transfer with any purported benefits. The Commission did not even acknowledge the myriad of relevant and serious concerns noted by their own Staff, much less balance those concerns with possible benefits. In *Osage Util. Operating Co. v. Mo. Pub. Serv. Comm'n*, 637 S.W.3d 78, 93 (Mo. App. W.D. 2021), the Missouri Court of Appeals stated:

> In this matter, the Commission indicated that determining whether a sale is detrimental to the public interest "is a balancing process," which requires the Commission to perform "a cost benefit analysis in which all of the benefits and detriments in evidence are considered." Although no exhaustive list has been announced of the considerations that may influence whether a sale is detrimental to the public, Missouri courts have held that the Commission is to consider all relevant factors in issuing its decisions and orders.

Public Counsel requests rehearing because the Order is unjust, unreasonable, arbitrary, capricious, constitutes an abuse of discretion, fails to consider all relevant factors, and is not based on sufficient findings of facts and conclusions of law. The Order disregards important evidence and arguments without explaining the Commission's basis for dismissing evidence and argument before it. In addition, the Order misapplies the "not detrimental" standard. §393.190 RSMo; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980).

Respectfully submitted,

/s/ Marc Poston
Marc Poston (Mo Bar #45722)
Missouri Office of Public Counsel
P. O. Box 2230
Jefferson City MO 65102
(573) 751-5318
(573) 751-5562 FAX
marc.poston@opc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 3rd day of January 2023.

/s/ Marc Poston