

**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**

STAFF RESPONSE TO APPLICANTS' MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its response to the motion for summary disposition that was filed by Silverleaf Resorts, Inc. and Algonquin Water Resources of Missouri, LLC (collectively referred to as "Applicants", or individually as "Silverleaf" or "Algonquin"), respectfully states:

1. On May 25, 2005, the Applicants filed their Motion For Summary Determination (Motion) and Suggestions In Support Of Motion For Summary Determination in this case. Because the Staff and Applicants had begun the process of settlement negotiations, the Staff filed its Motion For Extension Of Time To File Response To Motion For Summary Determination asking that the Commission grant Staff an extension of time to file its response along with its Rebuttal Testimony that is due on June 10th in accordance with the Commission approved procedural schedule.

2. First, in response to the 2nd paragraph in Applicants' Motion, the Staff agrees with the statement that "...there is no dispute that Algonquin has the necessary experience, general financial health and ability to operate the subject [Silverleaf] assets".

3. Staff's concern in this transaction is the issue of a large acquisition premium, the recovery of which in some future case, if not addressed by the Commission now, would make the approval of this transaction detrimental to the public interest. (Applicants' Motion, para.'s 11 and 12). Algonquin has not committed to forego the recovery of a Commission determined acquisition premium. (Applicants' Motion).

ISSUE OF ACQUISITION PREMIUM

4. On March 28, 2005, the Staff filed its Staff Recommendation with attached Memorandum identifying to the Commission an acquisition premium of nearly \$2,345,600 on the Missouri allocated portion of \$3,800,000 of the total purchase being paid by Algonquin for Silverleaf utility properties in three states. This large acquisition premium is nearly 62% of the total Missouri asset purchase price. The Staff asserts that its identification of such a large acquisition premium relative to asset purchase price creates an issue that is properly set before the Commission according to the Missouri Supreme Court's decision in *State ex rel. Ag Processing Inc. v. Public Service Commission of the State of Missouri*, 120 S.W.3d 732, 736 (Mo.banc 2003) (hereafter referred to as *Ag Processing*).

5. Applicants argue that this case is factually distinguishable from the Supreme Court's holding in *Ag Processing*¹ that the Commission's failure to consider the acquiring company's proposed plan to recoup an acquisition premium required reversal of the Commission's approval. Applicants cite two principal distinctions. First, Algonquin, the acquiring company, has not proposed a regulatory plan as a part of its application that addresses

recovery of the acquisition premium associated with this transaction. In *Ag Processing*, the acquiring company proposed such a plan for Commission consideration. Second, *Ag Processing* was a merger, not an acquisition. (Applicants' Suggestions in Support, p. 4). Applicants' alternatively argue that even if the Commission cannot distinguish *Ag Processing* from this case, *Ag Processing* does not require the Commission to rule on recovery of acquisition premium at this time, but to consider whether the premium is reasonable. Certainly a \$2,345,000 acquisition premium that is 62% of the acquisition price creates an issue of reasonableness.

6. While Staff has no dispute with the factual distinctions made by Applicants regarding this case and *Ag Processing*, Staff disagrees with Applicants' conclusion that *Ag Processing* is inapplicable here. Staff finds *no* language in the *Ag Processing* holding that limits the raising of issues in an asset purchase or merger case to only the acquiring or merging parties, nor does it find any language that would limit that holding to merger cases and not asset transfer cases. The Staff, in its March 28, 2005 Memorandum, and in its Rebuttal Testimony that is being filed contemporaneously with this response, raises for Commission consideration the issue of the acquisition premium to be paid by Algonquin and its possible recovery from ratepayers.

7. The sheer magnitude of this premium – an amount just over \$2.3 million or 62% of the total asset purchase price – lays a heavy burden on the ratepayer should its recovery be authorized in a future case. The *Ag Processing* holding requires that the Commission consider this issue because Staff has identified it as an issue that bears directly on the approval standard of this transaction² and has placed it before the Commission for its decision.

¹ *Ag Processing* at 736.

² “The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp’s being allowed to recoup the acquisition premium.” *Ag Processing* at 736.

8. The Staff asserts that Applicants' Motion fails to meet the minimal requirements of 4 CSR 240-2.117 and should be rejected by the Commission. Under 4 CSR 240-2.117 (E), the Commission may grant a Motion For Summary Determination only:

“...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.”

Because Staff has placed before the Commission the issue of the amount and treatment of an acquisition premium in both its March 25th Memorandum and its Rebuttal Testimony filed today pursuant to a Commission approved procedural schedule, this issue remains in dispute.

9. Moreover, the Staff and Applicants are continuing the process of settlement negotiations.

WHEREFORE, because the Staff has identified and placed before the Commission the disputed issue of acquisition premium and because this issue presents a live controversy to be dealt with by the parties in accordance with the Commission approved procedural schedule, the Staff recommends that the Commission issue an order rejecting Applicants' Motion For Summary Determination.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 10th day of June 2005.

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