

**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) File No. WM-2022-0186
Water Company, and in Connection)
Therewith, Certain Other Related)
Transactions.)

RESPONSE TO APPLICATION FOR REHEARING

COME NOW Foxfire Utility Company and Ozarks Clean Water Company (“Foxfire” and “OCWC” respectively, or the “Companies” collectively), by and through the undersigned counsel, and state the following to the Missouri Public Service Commission (“Commission”) as their *Response to Application for Rehearing*.

INTRODUCTION

On December 21, 2022, the Commission issued its *Report and Order* (“*Order*”) in this matter (effective January 4, 2023). Subsequently, on January 3, 2023, the Office of the Public Counsel (“OPC”) filed an *Application for Rehearing* (“*Application*”), alleging that the “Order disregards important evidence and arguments without explaining the commission's basis for dismissing evidence and argument before it” and “misapplies the ‘not detrimental’ standard.” (App., p. 7). The Companies will address these arguments herein.

STANDARD OF REVIEW

A review of the Commission's decision has two steps: first, the Court must determine whether the Commission's order is lawful and, second, whether the order is reasonable. *Office of Pub. Counsel v. Mo.Pub.Serv.Comm'n*, 409 S.W.3d 371, 375 (Mo. banc 2013). An order is lawful if the Commission had the statutory authority to act as it did. *Id.* In determining the

lawfulness of the order, this court exercises unrestricted independent judgment and must correct erroneous interpretations of the law. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n of State of Mo.*, 37 S.W.3d 287, 292 (Mo. App. 2000).

A reasonable order is an order that is not arbitrary or capricious and is not an abuse of the Commission's discretion. *Office of Pub. Counsel*, 409 S.W.3d at 375. A Commission order is reasonable if it is supported by substantial and competent evidence on the whole record. *Id.* “In the context of the Commission's approval of a transfer of regulated utility assets, the Commission's decision will be found to be unreasonable if it “erroneously ignores evidence that may have substantially impacted the weight of the evidence evaluated to approve” the transaction. *See State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. Banc 2011) (internal quotations omitted).” *Osage Util. Operating Co. v. Mo. Pub. Serv. Comm'n*, 637 S.W.3d 78, 93 (Mo. Ct. App. 2021)

INACCURATE STATEMENTS OF BACKGROUND

In its Introduction, OPC makes some inaccurate statements to which the Companies would like to respond.

First, OPC indicates that “acquisition premium is the difference between the real value of a company and the actual price to be paid for it.” (App., p. 1) (emphasis added). Within the context of regulated utilities, acquisition premium is the amount of the purchase price paid which is above the net book value of the properties purchased.¹ “Net book value” is roughly the original cost of plant, minus depreciation and contributions in aid of construction. There is nothing about this accounting that purports to represent “real value,” whatever that may be.

¹ The acquisition premium is the amount of the purchase price paid by UE to APL which is above the net book value of the properties purchased. *In the matter of the joint application of Arkansas Power & Light Company and Union Electric Company*, Cases Nos. EM-91-29 and EM-91-404, 1991 Mo. PSC LEXIS 41, *11, 1 Mo. P.S.C. 3d 96 (September 19, 1991).

Second, OPC alleges that “. . . the Commission has consistently protected the public by ordering public utility systems to be valued at rate base without an acquisition premium.” (App., p. 1) (emphasis added). While the Companies would agree that the Commission has generally utilized the “net book value” of a utility in establishing a public utility’s return for purposes of ratemaking, it has not, and could not, establish a utility’s “value” for purposes of a sale. Public utilities are commonly bought and sold at prices that are above the net book value.

LAWFUL

OPC alleges that the *Order* “misapplies the ‘not detrimental’ standard.” (App., p. 7). In fact, the *Order* properly cites the standard to be applied – “The Commission must authorize the transfer of a regulated utility’s assets unless the transfer is shown to be detrimental to the public.” (*Order*, pp. 12-13). OPC alleges that the “*Order* fails to provide any objective analysis balancing the known detriments of the transfer with the purported benefits.” (App, p. 7). That is because the Commission found no detriments.

That is because OPC argues from a position of speculation, without evidence to support its speculation. For example, while OPC speaks in terms of an “inevitable” rate increase in a short period of time and the purchase price being “without a doubt”, a clear indication rates will be excessive in the near future, the Commission pointed out that “Staff, Foxfire, and OCWC disagree, and presented evidence showing the details of the transaction and the likely impact the transaction will have on the rates for service and quality of service provided.” (*Order*, p. 13).

The Commission made the following findings of fact in this regard:

21. The cash flows from the existing rates will be adequate for OCWC to cover the obligation associated with the purchase price and continue to provide quality service to its customers.
22. In his testimony, Casaletto proposed to use the existing rates for Foxfire customers for at least one year following the acquisition.

23. OCWC's Board of Directors has established a reserve account funded at 75% of its annual operation and maintenance budget.

24. An Email from Casaletto to the OCWC Board of Directors states OCWC can readily meet its financial obligations with a \$25,000 annual surplus reserved for future repairs at the existing rates.

25. OCWC has the technical and financial ability to manage the Foxfire systems.

(Order, pp. 8-9) (Order footnotes omitted).

The Commission noted that “[n]one of the evidence presented rebuts OCWC’s claim that it can readily meet its financial obligations at the existing rates or show that OCWC is not capable of managing the additional assets upon completion of the transaction.” (Order, p. 13).

OPC additionally alleges inappropriate application of the standard because of its allegations related to Mr. Helms and Mr. Casaletto. OPC suggests that they have incentive to “over value the system[s]” and are “bad actors.” (App., p. 5, 6).

Similar to the foregoing issue, the Commission made findings of fact as to this allegation:

4. Helms was on the board of OCWC until he resigned in August of 2019.

5. Helms recused himself from OCWC’s July 15, 2019, board meeting in which the acquisition of Foxfire was first discussed, and resigned from OCWC’s board of directors in August of 2019, before the December [9], 2019, vote to purchase Foxfire’s assets.²

26. Compilations of transactions in Missouri and Illinois on a per customer basis by certified appraisers, as per 2021, indicate a range of water and sewer system sale prices of \$649 to \$5,263 per customer, with a Median of \$3,213 per customer and a Mean of \$3,095 per customer.

27. The contract price of \$1,285,000, results in the per customer price of \$2,491 per customer, not including projected growth.

² Findings of Fact 5 and 31 refer to a December 31, 2019 vote. This was an erroneous date from Mr. Helms Direct Testimony. It was corrected by Mr. Helms at hearing to read “December 9, 2019.” (Tr. 24).

28. Under a sales comparison approach, showing market data pertaining to utility systems that included water and sewer, the sale price of \$3,400³ per customer is within the range indicated by the market data.

30. Helms was both the president of Foxfire, and a board member of OCWC during the time the matter of the transaction was introduced to the board at OCWC.

31. Helms recused himself from OCWC's July 15, 2019 board meeting in which the acquisition of Foxfire was first discussed, and resigned from OCWC's board of directors in August of 2019, before the December [9], 2019⁴ vote to purchase Foxfire's assets at the negotiated price in question.

(Order, p. 7, 9, 10) (Order footnotes omitted).

The Commission correctly decided that "there was no evidence that the relationship between Helms and Casaletto renders their negotiated price invalid." (Order, p. 13).

Again, there is no problem with the Commission's application of the applicable standard.

REASONABLE

In terms of reasonableness, OPC alleges that the "Order disregards important evidence and arguments without explaining the commission's basis for dismissing evidence and argument before it" (App., p. 7). The Order does not "disregard important evidence." It carefully considers the evidence that was placed before it. One of the problems with OPC argument is that it did not meet its burden of coming forward with evidence.

The Court of Appeals has previously described the relationship of the burden of proof (or persuasion) and the burden of production:

The burden of proof has two parts: the burden of production and the burden of persuasion. *White v. Director of Revenue*, 321 S.W.3d 298, 304 (Mo. banc 2010). As the *White* court explained:

³ Finding of Fact 28 refers to a "sale price of \$3,400 per customer." The Companies believe that this reference should be to the approximate figure of \$2,400, as reflected in Finding of Fact 27 (\$2,471).

⁴ Findings of Fact 5 and 31 refer to a December 31, 2019 vote. This was an erroneous date from Mr. Helms Direct Testimony. It was corrected by Mr. Helms at hearing to read "December 9, 2019." (Tr. 24).

The burden of production is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder[.]" BLACK'S LAW DICTIONARY 223 (9th ed.2009). The burden of persuasion is defined as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.*

White, 321 S.W.3d at 304-05.

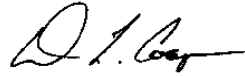
The burden of producing evidence is "simply the burden of making or meeting a prima facie case." *McCloskey v. Koplak*, 46 S.W.2d 557, 563 (Mo. banc 1932). Once a plaintiff has discharged his burden of production, the burden shifts to the other party" to produce, if he desires, competent controverting evidence which, if believed, will offset the plaintiff's prima facie case." *Id.* "If this is done the defendant has met the burden of evidence cast upon him, and made a prima facie defense, whereupon the burden swings back to the plaintiff to bring forward evidence in rebuttal, and so on." *Id.* While the burden of producing evidence may shift from one party to the other and back again, the burden of persuasion does not. *Brinker v. Director of Revenue*, 363 S.W.3d 377, 380 (Mo. App. 2012). The party having the burden of proof carries "the risk of nonpersuasion." *McCloskey*, 46 S.W.2d at 563(citation omitted). Therefore, if the evidence is "equally balanced and the [fact-finder] is left in doubt, the litigant having the burden of proof loses; he must sustain his case by the greater weight of the evidence." *Id.*

PUC v. Office of Pub. Counsel (In re Emerald Pointe Util. Co.), 438 S.W.3d 482, 490-491 (Mo. Ct. App. 2014).

Certainly, Foxfire had the burden of persuasion in this case. It met its burden of production by producing evidence to establish a prima facie case. OPC decided to not produce evidence in response and instead relied on the Commission being left in doubt. The Commission ultimately made findings of fact based on the substantial and competent evidence produced by the Companies and decided that the proposed transaction was not detrimental to the public. The Commission's *Order* is reasonable.

WHEREFORE, Foxfire Utility Company and Ozarks Clean Water Company respectfully request the Commission deny the *Application for Rehearing*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent to all counsel of record by electronic mail this 13th day of January, 2023.

