

**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,)	Case No. WM-2022-0186
Missouri to Ozarks Clean Water)	
Company, and in Connection)	
Therewith, Certain Other Related)	
Transactions)	

INITIAL POST-HEARING BRIEF of
THE OFFICE OF THE PUBLIC COUNSEL

Respectfully submitted,

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This case asks the Public Service Commission (“Commission”) to determine whether it is detrimental to the public interest to allow the sale of a public utility at a price 13 times above its net book value. If approved, this sale would burden 258 ratepayers with a 20-year, \$1.2 million debt while the Commission removes its own ability to prevent rate impacts.

This case also presents the question of whether it is detrimental to the public’s interest to approve an asset transfer of a public utility where the transfer is neither negotiated by the buyer and seller, nor an arms-length transaction due to the close relationship between parties.

The Office of the Public Counsel (“Public Counsel” or “OPC”), on behalf of the 258 customers of Foxfire Utility Company (“Foxfire”), urges the Commission to deny the request to transfer Foxfire’s water and sewer assets to Ozarks Clean Water Company (“OCWC”), until such time that the Applicants offer a proposal that does not include a harmful \$1.2 million acquisition premium. If the sale is

approved as proposed, each customer would be required to pay monthly approximately \$25.58 for the next 20 years for Mr. Helm's retirement. In return, OCWC would not provide any discernable benefit that would offset the resulting detrimental effect of the sale. That outcome is detrimental to the public interest.

A. Factual Background

a. Foxfire and OCWC Background Facts

In 1995, the Commission granted Foxfire a certificate of convenience and necessity to "construct, install, own, acquire, operate, control, manage, and maintain a water and sewer system for the public" near Table Rock Lake in Stone County, Missouri.¹ The Commission's order granting the certificate "notes that Foxfire seeks to provide water and sewer operations at the Lantern Bay Condominiums... [which] is being developed by one of the stockholders of Foxfire."² At that time, Foxfire's owner/developer anticipated the 50-acre development would contain 534 dwelling units served by Foxfire.³ The Commission authorized a 12.75% return on equity, and a capital structure designed to produce an 11.63% return for Foxfire's owners.⁴

¹ *In the Matter of the Application of Foxfire Utility Company, a Missouri Corporation, for 1) Permission, Approval, & a Certificate of Convenience & Necessity Authorizing it to Construct, Install, Own, Acquire, Operate, Control, Manage, & Maintain a Water & Sewer System for the Public Located in an Unincorporated Area in Stone County, Missouri; 2) Authority to Borrow up to \$400,000 for Purposes of Acquiring, Constructing & Installing Utility Plant and Equipment*, Case No. WA-95-31, Order Granting Certificate of Convenience and Necessity and Approving Financing, March 17, 1995, p. 1.

² *Id.*, p. 3.

³ Transcript ("Tr."), p. 44.

⁴ Case No. WA-95-31, Order Granting Certificate of Convenience and Necessity and Approving Financing, p. 3.

In 2000, Foxfire requested, and received, Commission authority to expand its certificate of convenience and necessity, which allowed it to acquire the Spring Branch water system near Lake of the Ozarks in Benton County, Missouri.⁵

In 2002, Foxfire filed its only request to raise rates, which the Commission approved on December 5, 2002.⁶ At the time, Foxfire had 184 customers in Stone County and 138 customers in Benton County.⁷

In 2004, Mr. Garah Helms, Foxfire's owner, and Mr. David Casaletto created and incorporated OCWC, and were two of the first directors of the OCWC board after its formation as a nonprofit sewer company.⁸

Mr. Helms served as President of OCWC from at least 2005 through 2008, as a board member from 2012 through 2013, and as Secretary from 2014 through 2017.⁹ Mr. Helms continued as a sitting board member of OCWC until he submitted his resignation on August 19, 2019.¹⁰

Mr. Casaletto served as Treasurer of OCWC from at least 2005 through 2008, and then President beginning in 2009 and continuing today.¹¹

⁵ *In the Matter of the Application of Foxfire Utility Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Water System for the Public in an Unincorporated Area of Benton County, Missouri*, Case No WA-2001-53, Order Granting Certificate of Public Convenience and Necessity, April 17, 2001.

⁶ *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. WR-2001-1162, Order Approving Tariffs and Order Approving Agreement, December 5, 2002.

⁷ *Id.*, p. 1; Tr. 45.

⁸ Exhibit ("Ex.") 200, Rebuttal Testimony of Jarrod J. Robertson, Schedule JRR-r2, page 10 of 20.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, see also Ex. 100, Direct Testimony of David Casaletto, p. 1.

In 2015, Foxfire petitioned the Commission for authority to donate the Spring Branch system to Upper White River Basin Foundation, Inc., a nonprofit associated with OCWC, transferring the system to OCWC.¹² At this time, Foxfire served 244 customers on its system in Stone County, a 60-customer increase since 2002.¹³ Foxfire served 104 customers at its Spring Branch system in Benton County, a decrease of 34 customers since 2002.¹⁴

Along with being President at OCWC, Mr. Casaletto is President of Ozarks Environmental Services (OES), a position for which Mr. Casaletto receives financial compensation.¹⁵ OES is a nonprofit sewer and water maintenance company that operates over 70 water systems and 70 sewer systems.¹⁶ Mr. Helms retired from OES in December 2016.¹⁷ OES employed Mr. Helms and Mr. Casaletto at the same time.¹⁸ Foxfire compensates OES approximately \$60,000, annually, to operate and maintain Foxfire's water and sewer systems.¹⁹ As a paid employee of OES, Mr. Casaletto benefits financially from Foxfire's continued use of OES to operate the Foxfire system.²⁰

¹² *In the Matter of the Application of Foxfire Utility Company for Authority to Transfer Certain Water Assets located in Benton County, Missouri to Upper White River Basin Foundation, Inc. and, in Connection Therewith, Certain Other Related Transactions*, Case No. WM-2016-0094, Order Approving Transfer of Utility Assets, December 16, 2015.

¹³ *Id.*, footnote 2

¹⁴ *Id.*

¹⁵ Tr. 32; see also Ex. 100, Direct Testimony of David Casaletto, Appendix A.

¹⁶ Ex. 100, Direct Testimony of David Casaletto, Appendix A.

¹⁷ Ex. 1, Direct Testimony of Garah Helms, p. 2.

¹⁸ Tr. 32.

¹⁹ Ex. 300, p. 1.

²⁰ *Id.*, Tr. 32.

b. Proposed Transfer of Assets Facts

On or before July 10, 2019, OCWC Director and Secretary, Mr. Helms, and OCWC President, Mr. Casaletto, discussed the terms of the sale of Mr. Helm's Foxfire system to OCWC.²¹ Mr. Casaletto explained, "Rick Helms, called me. Rick indicated that having reached retirement age, he and his wife would like to have the freedom to travel and enjoy retirement and that he was considering selling the Lantern Bay systems."²²

On July 10, 2019, Mr. Casaletto sent an email to the OCWC Board of Directors stating his desire to call a special OCWC board meeting 5 days later to discuss the acquisition of Foxfire.²³ Mr. Casaletto's email to the OCWC board states that "OCWC can raise rates after we acquire the system" and provides the following financial summary of Foxfire:²⁴

\$200,000	Annual Income
(\$80,000)	Principal & Interest (paid annually to Mr. Helms)
(\$60,000)	Operations and Maintenance cost to OES
(\$20,000)	Electricity
<u>(\$15,000)</u>	<u>Administration costs</u>
\$25,000	Annual Surplus/Reserve for Repair

Mr. Casaletto's email further explains that Foxfire is a 255-customer system, and that "the above number reflects today's connections and rates. Both number of connections and rates can go up without affecting costs to any large

²¹ Ex. 300.

²² Ex. 101, Casaletto Surrebuttal Testimony, p. 2. "Lantern Bay" is development Foxfire serves.

²³ Ex. 300.

²⁴ *Id.*, emphasis added.

degree.²⁵ This email also states, “Rick does not have a shortage of buyers [for Foxfire] as there are the large players already wanting to buy Rick’s system, but he is giving OCWC the first shot.”²⁶

On July 15, 2019, the OCWC board of directors held a special meeting to discuss the proposed acquisition of Foxfire.²⁷ The OCWC Board of Directors Meeting Minutes state that President David Casaletto, four additional directors, two employees of OCWC, and an employee of OES were in attendance.²⁸ The minutes reflect that the purpose of the meeting was to discuss the possible sale of the Foxfire water and sewer system, and that “Director Helms chose to excuse himself from this special meeting so there would be no conflict of interest as he is the owner of the Lantern Bay system.”²⁹

The meeting began at 10:00 a.m., with Mr. Casaletto referencing the proposed acquisition, followed by Director Richard Meyerkord inquiring “about raising the current rates to allow for a greater profit margin.”³⁰ The minutes further state, “Director Leach made a motion to purchase the Lantern Bay System for the price and terms previously discussed subject to removal from PSC Oversight. Motion was seconded by Director Meyerkord.”³¹ On August 19,

²⁵ *Id.*, emphasis added. By the time the Applicants filed their application in this case, Foxfire had added three customers for a total of 258 customers.

²⁶ *Id.*

²⁷ Ex. 301.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, emphasis added.

³¹ *Id.*

2019, two months after the OCWC Board of Directors decided to proceed with the purchase, Mr. Helms resigned from the board.³²

Foxfire's response to a Staff data request explained the agreement between Foxfire and OCWC involved no negotiation between the buyer and seller, and there was no purchase price calculation.³³

On December 10, 2019, Mr. Helms (on behalf of Foxfire) and Mr. Casaletto (on behalf of OCWC) signed an asset purchase agreement, whereby Mr. Helms would receive **\$1,285,400** for the Foxfire system.³⁴ The Agreement includes a Promissory Note, whereby Mr. Helms would "lend" OCWC the purchase price; with a 2.5% per annum interest rate and OCWC would pay Mr. Helms **\$6,599.41** monthly from February 10, 2023, to February 20, 2043. The 20-year obligation would be paid through rates and would cost each customer approximately **\$25.58** per month.³⁵

Foxfire's residential water utility customers currently pay a fixed monthly rate of \$20.10, which includes the first 2,000 gallons used, and an additional commodity charge of \$1.36 per each additional 1,000 gallons used.³⁶ Foxfire's residential sewer utility customers currently pay a fixed monthly rate of \$40.22, which includes the first 2,000 gallons, and an additional commodity charge of \$3.21 per each additional 1,000 gallons used.

³² Ex. 200, Direct Testimony of Jarrod Robertson, Schedule JRR-r2, page 10 of 20.

³³ *Id.*, page 11 of 20.

³⁴ Ex. 100, Direct Testimony of David Casaletto, Schedule DC-1, Agreement for Sale and Purchase of Assets, paragraph 2.01.

³⁵ \$6,599.41 per month / 258 customers = \$25.58 per month, per customer.

³⁶ Ex. 200, Rebuttal Testimony of Jarrod Robertson, Schedule JRR-r2, page 9 of 20.

On March 15, 2022, the Applicants jointly filed the Application to transfer Foxfire assets to OCWC that initiated this case, Case No. WM-2022-0186.

c. Staff's Recommendation Facts

On June 28, 2022, the Staff filed its Memorandum and Recommendation.³⁷ The Staff's Memorandum recommends approval of the application, but states, "Absent previous Commission guidance, Staff would **not** recommend approval of this application."³⁸

The Staff's Memorandum identifies two concerns with the proposed transfer of assets. First, "Staff remains concerned about any transactions that include an acquisition premium that could ultimately be borne by ratepayers."³⁹ Second, "Staff is also very concerned that although the seller abstained from voting on the acquisition, he was a member of the board that approved the purchase of his system."⁴⁰

Regarding the acquisition premium, the Staff explains the basis for Staff's concern regarding ratepayer impacts:

Normally, in cases involving a regulated utility's proposed acquisition of another ... utility, Staff would calculate an estimated rate base, which Staff would expect the purchasing utility to use the next time it submitted a rate case to the Commission. In addition, Staff would use this estimated rate base to determine the reasonableness of the transaction and whether or not there was an acquisition premium that should not be included in customer rates.

...

³⁷ *Id.*, Schedule JRR-r2.

³⁸ *Id.*, page 13 of 20.

³⁹ *Id.*

⁴⁰ *Id.*

At a \$1,285,400 purchase price, **OCWC will be paying an acquisition premium of \$1,195,548, more than thirteen (13) times over the estimated rate base.**⁴¹

Regarding the concern about the relationship between the Foxfire owner and the OCWC board of directors at the time of the proposed transfer, the Staff explains:

Staff is concerned that Mr. Helms, as owner of Foxfire, was a sitting board member of OCWC at the time he contacted another board member to make an offer to sell Foxfire to OCWC. In addition, Staff is concerned about the long-term relationship between Mr. Casaletto and Mr. Helms, who were both incorporators and shared several years together on the board of directors of OCWC.

The Staff explains that it would normally recommend the Commission not approve the proposed transfer, but because the Commission granted prior asset transfers despite similar Staff objections, the Staff recommends the Commission approve the transfer.⁴²

B. ARGUMENT: The Evidence Supports a Finding that the Transfer Would Be Detrimental to the Public Interest

a. The Standard for Asset Transfers

The Commission's authority regarding transfers of assets includes the authority to deny such transfers if it would be detrimental to the public interest. §393.190 RSMo; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980).

⁴¹ *Id.*, p. 1, emphasis added.

⁴² *Id.* p. 13 of 20.

In a recent transfer of assets case, the Commission applied a “balancing process” to determine whether the transfer would be detrimental to the public interest. The Court of Appeals explained:

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.⁴³

Accordingly, the Commission’s review in this case necessarily requires careful consideration of the detriments and benefits of a transfer under the Applicants’ proposed terms. In a 2004 Union Electric asset transfer case, the Commission further explained its analysis:

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates....The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.⁴⁴

Following the Commission’s analysis in the Union Electric case, to approve the pending application, it must conclude that Foxfire’s 258 customers are receiving

⁴³ *Osage Util. Operating Co. v. Mo. Pub. Serv. Comm’n*, 637 S.W.3d 78 (Mo. App. W.D. 2021).

⁴⁴ *In the Matter of the Application of Union Electric Company, Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, Report and Order, October 16, 2004, emphasis added.

a benefit that is of equal or greater value than the \$1.2 million acquisition premium.

b. The Acquisition Premium is Detrimental to the Public Interest.

The proposed transfer of assets is a detriment to the public because without the transfer as proposed, the \$1.2 million, 20-year burden, *would not exist*. Since the proposal would obligate OCWC to pay Mr. Helms \$6,600 per month for the next 20 years, approximately \$25.58 of each bill paid by each customer will go towards paying Mr. Helms' retirement.⁴⁵ This obligation would not expire until 2043, and each customer will end up paying Mr. Helms over \$6,000. This result is clearly detrimental to every Foxfire customer.⁴⁶

As customers of a regulated utility, receiving service under the Commission's protection, Foxfire's 258 customers expect the Commission to protect them from such harm. Missouri courts have repeatedly concluded that protecting the public is the Commission's purpose. ("The whole purpose of the [Public Service Commission] act is to protect the public." *State ex rel. St. Louis v. P.S.C.*, 73 S.W.2d 393, 399 (Mo. 1934). "The Commission's principal interest is to serve and protect ratepayers", *State ex rel. Capital City Water Co. v. P.S.C.*, 850 S.W.2d 903, 911 (Mo. app. WD 1993); "In regulatory legislation of public utilities, the dominant thought and purpose of the policy of such legislation is the protection of the public while the protection given the utility is merely incidental." *State ex rel. Crown Coach Co. v. P.S.C.*, 179 S.W.2d 123 (Mo. App. 1944)).

⁴⁵ Ex. 100, Casaletto Direct Testimony, Schedule DC-1, Promissory Note; \$6,599.41 per month / 258 customers = \$25.58 monthly obligation per customer.

⁴⁶ *Id.*

Mr. Casaletto states that OCWC proposes not to raise rates within the first year.⁴⁷ However, even if Mr. Casaletto could hold the OCWC board to this, it would only mean a short delay before a near-inevitable rate increase. The evidence before the Commission supports a high likelihood of a rate increase given that the Board of Directors are already suggesting to raise rates to increase “profit margin”⁴⁸ without corresponding plans to incur any offsetting infrastructure upgrades.⁴⁹

Even without an immediate attempt to raise rates, the \$1.2 million obligation would remain with this system and these ratepayers for 20 years.⁵⁰ The acquisition premium would greatly diminish the ability of current rates to absorb future investments over the next 20 years, as the annual \$80,000 obligation to Mr. Helms would equal a whopping *forty percent* (40%) of the present revenues.⁵¹ Therefore, the obligation would diminish the amounts OCWC puts into reserve for future investments by an equal amount,⁵² which is detrimental to the public interest. The fact that OCWC is a non-profit that supposedly lacks the motivation to seek higher profits is irrelevant since even non-profits have to cover their costs. If this transfer goes through, OCWC’s financial obligation would include the \$1.2 million, 20-year payment to Mr. Helms.

⁴⁷ *Id.*, p. 6.

⁴⁸ Ex. 300.

⁴⁹ Mr. Helms describes the system as being in “very good condition” with “no known need for repairs or immediate investment in the system.” Ex. 1, p. 6.

⁵⁰ Ex. 100, Casaletto Direct Testimony, Schedule DC-1, Promissory Note.

⁵¹ Ex. 300.

⁵² *Id.*, Tr. 38.

This proposal requires a substantial positive benefit to offset this huge burden on customers in order to result in a transfer that is not detrimental to the public interest. The Applicants have provided no such offsetting benefits. At most, the Applicants asserted that Foxfire customers “will receive several conveniences not currently available with Foxfire”.⁵³ The Applicants have not shown that those few billing conveniences are worth the rate increases and long-term debt obligation that will occur if the Commission approves the acquisition premium.

c. Allowing the Sale of a Public Utility Without an Arms-Length Transaction or a Transparent Negotiation is Detrimental to the Public Interest

The second concern raised by the Commission’s Staff is the close affiliation and relationship between Mr. Helms, Mr. Casaletto, and OCWC, and the lack of any tangible negotiation in determining the sale price. The Staff’s Memorandum and Recommendation states, in part:

Staff is concerned that Mr. Helms, as owner of Foxfire, was a sitting board member of OCWC at the time he contacted another board member to make an offer to sell Foxfire to OCWC. In addition, Staff is concerned about the long-term relationship between Mr. Casaletto and Mr. Helms, who were both incorporators and shared several years together on the board of directors of OCWC...

Staff submitted Data Request No. 0015 to Foxfire to understand how the owner-offered sales price was determined. Foxfire’s response

⁵³ Ex. 101. This testimony clearly fails to follow the Commission’s rules for surrebuttal testimony because it does not properly respond to rebuttal testimony. (20 CSR 4240-2.130(7)(D)). Public Counsel chose not to object to this testimony because it shows the Applicant’s best effort at explaining how these 258 customers will benefit from this \$1.2 million burden, and fails to overcome the substantial detriment. It also shows how claims of purported customer benefits were merely an afterthought.

implied there was not any negotiation between the buyer and seller. “There was no ‘calculation’ of a purchase price. The purchase price was an agreed-to price between a buyer and a seller based on their respective knowledge of the market.”⁵⁴

It is a detriment to the public interest to allow the sale of a public utility where the transfer does not involve an arm’s-length agreement. An arm’s-length agreement is not possible in this case due to the close relationship between Mr. Helms and OCWC, and the close relationship between Mr. Helms and the OCWC Board President David Casaletto.⁵⁵

Mr. Helms and Mr. Casaletto have a financial interest in the outcome of this case that further makes their agreement and valuation unreliable. Mr. Helms would benefit from the \$1.2 million paid to him over 20 years, clearly giving him an incentive to place a high value on the system. Moreover, Mr. Casaletto is President of the operating company that would continue getting paid \$60,000 annually to service the Foxfire water system if the Commission approves the transfer of assets.⁵⁶ Therefore, without obstacles to recovering the acquisition premium in rates, neither party has an incentive to negotiate this acquisition at a lower price.⁵⁷

Even if the testimonies of Mr. Helms or Mr. Casaletto were impartial, and even if it *was* in the public interest to burden Foxfire’s customers with an acquisition premium, the history of the Foxfire system does not support the claimed value. Mr. Helms claims the purchase price represents a fair market

⁵⁴ Ex. 200, Schedule JJR-r2, page 11 of 20.

⁵⁵ Ex. 200, Rebuttal Testimony of Jarrod Robertson, Schedule JRR-r2, pp. 10-13.

⁵⁶ Ex. 100, Appendix A; Tr. 32-33.

value for the assets, because “significant growth is likely which will insure to the benefit of OCWC.”⁵⁸ In response, Public Counsel first points out that a benefit to OCWC is not a benefit to Foxfire customers. In addition, the facts simply do not support the assertion that “significant growth is likely.”

When Foxfire first received a CCN in 1995, it anticipated it would serve “534 dwelling units.”⁵⁹ By 2002, Foxfire served 184 customers.⁶⁰ By 2015, Foxfire served 244 customers.⁶¹ Currently, Foxfire serves 258 customers, which is only 48% of the growth Mr. Helms anticipated for his system.⁶² This means Foxfire has connected approximately 3.7 new customers per year over the last 20 years.⁶³ In the last 7 years, this number has dropped to only **two new connections per year**.⁶⁴ Contrary to the assertions of the growth potential that Mr. Helms and Mr. Casaletto claim to justify their valuation, the facts support a finding that growth in the area is slow or stagnate, and Mr. Helms’ assumptions on the growth potential have proven inaccurate from the beginning. The

⁵⁸ *Id.*

⁵⁹ Tr. 44.

⁶⁰ *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. WR-2001-1162, Order Approving Tariffs and Order Approving Agreement, December 5, 2002, p. 1; Tr. 45.

⁶¹ *In the Matter of the Application of Foxfire Utility Company for Authority to Transfer Certain Water Assets located in Benton County, Missouri to Upper White River Basin Foundation, Inc. and, in Connection Therewith, Certain Other Related Transactions*, Case No. WM-2016-0094, Order Approving Transfer of Utility Assets, December 16, 2015, footnote 2.

⁶² Ex. 1, p.3.

⁶³ Tr. 45-46.

⁶⁴ 258 current customers minus 244 customers in 2015, equals 14 new customers over the last 7 years, at a rate of 2 new customers per year.

testimony of Mr. Helms or Mr. Casaletto suggesting the system should be valued above net book value is simply unsupported.

C. ARGUMENT: Past Commission Decisions Do Not Support Approval of the Application

Prior Commission decisions demonstrate a long Commission history of rejecting acquisition premiums for recovery by regulated utilities. The analysis the Commission applies in denying acquisition premiums should be the same for transfers to non-profit companies because the impact on customers will be the same - an obligation for the customers of the system to repay the premium. Keeping the premium out of the sale price is even more concerning in a sale to a non-profit because the transfer removes the Commission's ability to keep the premium out of rates as it would for a regulated utility.

a. Prior Commission Cases Reject Acquisition Premiums

For decades the Commission has recognized that allowing an acquisition premium to be passed on to the public is detrimental for ratepayers receiving service from electric, gas, water, sewer, and telecommunications utility companies. A leading case on acquisition premiums is Case No. EO-2000-292, which provides a thorough Commission analysis of the reasons for not allowing recovery of a premium. The foundation for rejecting acquisition premiums is the “**net original cost rule.**” The Commission explained:

As a general rule, only the original cost of utility plant to the first owner devoting the property to public service, adjusted for depreciation, should be included in the utility's rate base....

The net original cost rule was developed in order to protect ratepayers from having to pay higher rates simply because ownership of utility plant has changed, without any actual change in the usefulness of the plant. If a utility were allowed to revalue its assets each time they changed hands, it could artificially inflate its rate base by selling and repurchasing assets at a higher cost, while recovering those costs from its ratepayers. Thus, ratepayers would be required to pay for the same utility plant over and over again. The sale of assets to artificially inflate rate base was an abuse that was prevalent in the 1920s and 1930s and such abuses could still occur...

An acquisition adjustment can be either positive or negative. In other words, when a utility purchases an asset, it may pay more or less than the net original cost of the asset. When the utility pays more than net original cost, it is said to have paid an acquisition premium. But, in some circumstances, a utility may be able to purchase assets at less than net original cost. In that situation, the utility has a negative acquisition adjustment...

This Commission has consistently applied the net original cost standard when placing a value on assets for purposes of establishing a utility's rates. No party has cited a single instance in which the Commission has allowed a utility to directly recover an acquisition premium through its rates...

For many years, the Commission has used a net original cost standard to place a value on utility plant after a merger. That standard has proven to be fair to utilities as well as to ratepayers. There is no reason to vary from that standard in this case. The Commission concludes that UtiliCorp should not be allowed to recover any of the acquisition premium in its rates.⁶⁵

As the Commission explained above, Missouri has traditionally applied the net original cost standard when considering the ratemaking treatment of acquisition adjustments. The Commission protects ratepayers by prohibiting the

⁶⁵ *In the Matter of the Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Company for Authority to Merge St. Joseph Light & Power Company with and into UtiliCorp*

purchasing utility from recovering an acquisition premium from its ratepayers. It also means that ratepayers do not receive lower rates through a decreased rate base when the utility receives a negative acquisition adjustment. Even if a company acquires an asset at a bargain price, it puts the asset into its rate base at its net original cost.⁶⁶ Similarly, ratepayers do not share in the gains a utility may realize from selling assets at prices above their net original cost. Those gains flow only to the utility's shareholders. The net original cost rule, therefore, operates to protect both ratepayers and company shareholders.

The below quotes are from Commission decisions issued over the last 32 years showing the Commission's long history of issuing orders that protect the public from the harmful impacts of paying for acquisition premiums:

1990: "...the amount of any acquisition premium...paid by UE to APL shall be treated below the line for ratemaking purposes in Missouri and shall not be sought to be recovered by UE in rates in any Missouri proceeding."⁶⁷

1991: "Based upon...the fact that the acquisition premium paid by UE to APL will not be recovered in rates...the Commission determines that the sale proposed in Case No. EM-91-29 should be approved."⁶⁸

1993: "The amount of any acquisition premium...shall be treated below the line for ratemaking purposes in Missouri and neither amortization nor

United Inc., and, in Connection Therewith, Certain Other Related Transactions, Case No. EO-2000-292, Second Report and Order, February 26, 2004.

⁶⁶ See *In the Matter of the Transfer of Assets of Hillcrest Utilities Company from Blomeyer Investments, Inc. to Brandco Investments, LLC*, Case No. WM-2007-0261, Order Approving Proposed Transfer of Water Utility Assets, August 7, 2007.

⁶⁷ *In the Matter of the Investigation of Union Electric's Class Allocation and Rate Design*, Case No. EO-87-175, Report and Order, November 6, 1990.

⁶⁸ *In the matter of the joint application of Arkansas Power & Light Company and Union Electric Company for an order authorizing the sale, transfer and assignment of certain assets, real estate, leased property, easements and contractual agreements and, in connection herewith, certain other related transactions*, Case Nos. EM-91-29, Report and Order, September 19, 1991.

inclusion of the premium in rate base shall be sought to be recovered by Southern Union in rates in any Missouri proceeding.”⁶⁹

1995: “In addition, the Commission finds that the stipulation provides protection to the ratepayers by prohibiting BPS from recovering its acquisition premium through rates.”⁷⁰

1995: “Staff witness Boltz... testified that the recovery of positive acquisition adjustments in rates would not provide sufficient incentive for the purchaser to negotiate the best possible price owing to the assumption that the acquisition premium could be passed on to the ratepayers... The Commission finds the testimony of Boltz to be competent and substantial for the showing that instead of the savings alleged by the Company, the reverse is true.”⁷¹

1997: “The Commission finds that MGE's acquisition savings adjustment should be rejected in total because adoption of this adjustment would be contrary to the provision of natural gas service based on the costs of providing such service”⁷²

2001: “That UtiliCorp United Inc., treat any acquisition premium below-the-line for ratemaking purposes and that it shall not seek recovery of any

⁶⁹ *In the Matter of the Joint Application of Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, a Kansas Corporation, and Southern Union Company, d/b/a Missouri Gas Energy, a Delaware corporation, for an order authorizing the sale, transfer and assignment of certain assets relating to the provision of gas service in Missouri from Western Resources, Inc. to Southern Union Company, and in connection therewith, certain other related transactions, Case No. GM-94-40, Report and Order, December 29, 1993.*

⁷⁰ *In the Matter of the Joint Application of GTE Midwest Incorporated and BPS Telephone Company for Authority to Transfer and Acquire Part of GTE Midwest Incorporated's Missouri Franchise, Facilities or System Located in the State of Missouri, Case No. TM-95-135, Order Approving Sale and Order Granting Certificate, July 11, 1995. The Commission made identical findings in TM-95-163 (Cass County Telephone Co.), TM-95-142 (Modern Telephone Co.), and TM-95-134 (Ozark Telephone Co.)*

⁷¹ *In the matter of Missouri-American Water Company's tariff revisions designed to increase rates for water service provided to customers in the Missouri service area of the company, Case No. SR-95-206, Report and Order, November 21, 1995.*

⁷² *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Service Area, Case No. GR-96-285, Report and Order, January 22, 1997.*

acquisition premium resulting from the transaction in any future Missouri rate case.”⁷³

2007: “The Commission finds that \$ 2.4 million of the \$ 3.8 million purchase price for Silverleaf’s Missouri jurisdictional assets is an acquisition premium, and therefore unrecoverable from Missouri jurisdictional ratepayers.”⁷⁴

2011: “The Commission orders no recovery of acquisition adjustment or acquisition premium in this case, or any future rate cases.”⁷⁵

2012: “VWU shall not recover any acquisition adjustment or acquisition premium in relation to this action.”⁷⁶

2013: “Missouri-American Water Company shall not seek recovery of an acquisition premium as a result of the transaction in any future proceeding before the Commission.”⁷⁷

2013: “The Commission Orders no recovery of the identified acquisition premium in this or any future rate case.”⁷⁸

⁷³ *In the Matter of the Application of UtiliCorp United Inc., for Authority to Acquire the Shares of Avon Energy Partners Holdings and to Take All Other Actions Reasonably Necessary to Effectuate Said Transaction*, Case No. EO-2002-215, December 18, 2001.

⁷⁴ *In the Matter of the Tariff Filing of Algonquin Water Resources of Missouri, LLC, to Implement A General Rate Increase for Water and Sewer Service Customers in its Missouri Service Areas*, Case No. WR-2006-0425, Report and Order, March 13, 2007.

⁷⁵ *In the Matter of the Joint Application of Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water for Authority for Liberty Water to Acquire Certain Assets of Noel Water Co., Inc. and, in Connection Therewith, Certain Other Related Transactions*, Case No. WO-2011-0328, Order Approving Joint Application, August 10, 2011.

⁷⁶ *In the Matter of the Joint Application of Valley Woods Water Company, Inc. and Valley Woods Utility, LLC for Authority of Valley Woods Water Company, Inc. to Sell Certain Assets to Valley Woods Utility, LLC*, Case No. WM-2012-0288, Order Approving Transfer of Assets and Granting Certificate of Convenience and Necessity, May 9, 2012.

⁷⁷ *In the Matter of the Joint Application of Missouri-American Water Company and Meramec Sewer Co. for Authority for Missouri-American Water Company to Acquire Certain Assets of Meramec Sewer Co. and, in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2013-0260, Order Approving Application and Order Granting Motion for Expedited Treatment, February 20, 2013.

⁷⁸ *In the Matter of the Joint Application of Bilyeu Water Co, LLC and Bilyeu Ridge Water Company, LLC for Authority to Sell Assets to Bilyeu Ridge Water Company, LLC*, Case No. WM-2013-0329, Order Approving Application, February 27, 2013.

2013: “There will be no recovery of the acquisition premium.”⁷⁹

2013: “Missouri-American Water Company shall not recover any acquisition adjustment or acquisition premium in relation to this action or any future rate case.”⁸⁰

2014: “MAWC shall not seek recovery of any acquisition premium, related to this transaction, through rates.”⁸¹

2015: “MAWC shall not recognize for accounting purposes any "acquisition adjustment" or "acquisition premium" associated with the transfer.”⁸²

2017: “Thus, the Commission will authorize the transfer of assets and grant MAWC the certificate of convenience and necessity to provide water and sewer service within the proposed service area, subject to the conditions described by Staff above and MAWC's statement that it will not seek to recover an acquisition premium if one exists.”⁸³

⁷⁹ *In the Matter of the Joint Application of Moore Bend Water Company, Inc. and Moore Bend Water Utility, LLC for Authority of Moore Bend Water Company, Inc. to Sell Certain Assets to Moore Bend Water Utility, LLC*, Case No. WM-2012-0335, Order Authorizing Transfer of Assets, April 24, 2013.

⁸⁰ *In the Matter of the Joint Application of Missouri-American Water Company and Tri States Utility, Inc. for Authority for Missouri-American Water Company to Acquire Certain Assets of Tri States Utility, Inc. and in Connection Therewith, Certain Other Related Transactions*, Case No. WO-2013-0517, Order Approving Transfer of Assets Granting Certificate of Convenience and Necessity, and Granting Waiver, August 21, 2013.

⁸¹ *In the Matter of the Joint Application of Missouri-American Water Company and Emerald Pointe Utility Company for Missouri-American Water Company to Acquire Certain Water and Sewer Assets of the Emerald Pointe Utility Company in Connection Therewith, Certain Other Related Transactions*, Case No. WO-2014-0113, Order Approving Transfer of Assets and Certificate of Convenience and Necessity and Granting Waiver, March 12, 2014.

⁸² *In the Matter of the Joint Application of Hickory Hills Water & Sewer Co., Inc. and Missouri-American Water Company, for MAWC to Acquire Certain Water and Sewer Assets of Hickory Hills and, in Connection Therewith, Issue Indebtedness and Encumber Assets*, Case No. WA-2016-0019, Order Denying Request for Local Public Hearings and Granting Applications with Conditions, November 4, 2015.

⁸³ *In the Matter of Missouri-American Water Company for Certificates of Convenience and Necessity Authorizing It to Install, Own, Acquire, Construct, Operate, Control, Manage and Maintain Water and Sewer Systems in and Around the Village of Wardsville, Missouri*, Case No. WA-2017-0181, Order Granting Certificate of Convenience and Necessity, April 13, 2017.

Courts have found that the Commission "is not bound by *stare decisis*," meaning the Commission's prior administrative decisions are not binding on the Commission in later cases, so long as its current decision is not otherwise unreasonable or unlawful. *State ex rel. Praxair, Inc. v. PSC*, 328 S.W.3d 329, 340 (Mo. App. W.D. 2010) (quoting *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003)). However, the Commission has consistently concluded, year after year, that the net original cost rule should protect ratepayers from harmful acquisition premiums that provide no offsetting benefits. A departure from these principles should only occur if the Commission has a factual basis for determining that allowing this detriment is somehow in the public interest. Such factual basis does not exist in this case. Moreover, an analysis of the cases cited by the Staff where the Commission previously allowed an acquisition premium show the facts and are significantly different from the facts and argument in the present case.

b. Prior Commission Cases Cited by Staff

Two past Commission cases provide the *only* reason the Commission's Staff of experts did not recommend the Commission deny the transfer. As explained below, those prior cases should not form the basis for a similar outcome in the present case.

1. Case No. WM-2017-0186

The first case the Commission's Staff pointed to in support of this transfer of assets was WM-2017-0186. This case involved a transfer of assets from Lake

Region Water & Sewer Co. to Camden County Public Water Supply District. The Staff recommended the Commission deny the asset transfer as follows:

Staff contends that under the terms of the Purchase Agreement, the District is paying an acquisition premium of approximately \$3.7 million. According to Staff, were the purchaser of Lake Region's assets a Commission-regulated entity, they would not be allowed to recover the acquisition premium cost in a customer rate increase. However, since the Commission does not regulate the District, Staff fears that the District may choose to recover the acquisition premium costs through a customer rate increase.⁸⁴

The Commission, however, departed from its long-held net original cost rule because in WM-2017-0186 the Commission did not regulate the acquiring utility. The Commission stated:

[T]he Commission does not share Staff's concern. The Commission does not regulate the District, nor does it have jurisdiction over the District's board of directors or the future rates set by that board. Nevertheless, Staff's concerns about the future rates for the District's customers may be allayed since the District is a political subdivision that has no motive for seeking profits. The District is answerable to voters, and is obligated by statute to set reasonable rates.⁸⁵

The Commission's findings above should not be persuasive in the present case. Here, the \$1.2 million acquisition premium causes the detrimental impact and would happen regardless of any profit motivations. Currently, there is no \$1.2

⁸⁴ *In the Matter of the Application of Lake Region Water & Sewer Co. and Camden County Public Water Supply District # 4 for an Order Authorizing the Sale, Transfer, and Assignment of Water and Sewer Assets to Camden County Public Water Supply District # 4 and in Connection Therewith Certain Other Related Transactions; In the Matter of the Application of Lake Region Water & Sewer Co. and Camden County Public Water Supply District # 4 for an Order Authorizing the Sale, Transfer, and Assignment of Water and Sewer Assets to Camden County Public Water Supply District # 4 and in Connection Therewith Certain Other Related Transactions*, Case No. WM-2017-0186, Order Authorizing Sale, Transfer, and Assignment of Water and Sewer Assets, April 13, 2017.

⁸⁵ *Id.*

million obligation limiting the utility's future ability to pay for needed plant investments – but approving this application will create a 20-year burden on the utility. Moreover, the OCWC Board of Directors have also signaled their intent to raise rates in order to “increase profit margin,”⁸⁶ despite there being no plan to make any plant investments.⁸⁷ This is particularly troubling because current rates easily cover all plant depreciation and expenses, creating an annual surplus that clearly indicates a rate increase is not necessary.⁸⁸

In addition, having directors that are “answerable to its members” could result in the replacement of directors, but it would not result in the replacement of the obligation to repay the \$1.2 million premium over the next 20 years. It is also not likely that the small number of Foxfire customers, representing only 9.7% of the total OCWC membership,⁸⁹ could cause a change in the Board of Directors, especially directors that created OCWC.

In the Lake Region case, the Commission also distinguished its approval of the transfer from its longstanding practice of not allowing acquisition premiums because the applicants in that case used an independent consultant to value the system. However, whether the owners or independent consultants do the valuation in no way alters the fact that there would be an enormous acquisition premium obligation placed on ratepayers that would otherwise not occur were the

⁸⁶ Ex. 301.

⁸⁷ Ex. 1, p. 6.

⁸⁸ Ex. 300.

⁸⁹ OCWC provides service to 2,380 locations (Ex. 100, p.3), and if Foxfire's 258 customers are added to this total, Foxfire customers would constitute 9.7% of the total 2,638 members (2,638 / 258 = 9.7%).

system to remain regulated and under the Commission's protection. Additionally, in the present case, individuals with a financial interest in the outcome of the case provided the only valuation, and their valuations come with an obvious conflict of interests as explained above.

2. Case No. WM-2015-0231

In the Staff's stated reason in the current case for not recommending the Commission deny the requested transfer of assets, it also cites to Case No. WM-2015-0231, where Ozark Shores Water Company sought to transfer assets to Camden Water District.⁹⁰ The Staff recommended rejection due to its concerns over impacts of an acquisition premium and self-dealing among leadership of the applicants. The Commission relied on the fact that it does not have jurisdiction over the Water District to approve the application. This analysis, however, does not recognize that the inability to protect ratepayers in the future creates the need to provide those protections when the regulated utility attempts to remove a system and its ratepayers from the Commission's jurisdiction and protection. The Commission's inability to protect ratepayers in the future if it approves the Application does not negate its obligation to protect these customers today.

The Commission did not consider the Public Counsel's points in the present case in either WM-2017-0186 or WM-2015-0231. Reaching a different result is fully justified by these additional arguments and the factual differences in

⁹⁰ *In the Matter of the Application of Ozark Shores Water Company, North Suburban Public Utility Company and Camden County PWSD #4 for an Order Authorizing the Sale, Transfer and Assignment of Water Assets to Camden County Public Water Supply District Number Four and in Connection Therewith Certain other Related Transactions*, Case No. WM-2015-0231, Order Granting Application, June 24, 2015.

these cases. Those differences primarily being the enormous 13-time rate base price, the stated intent to raise rates, and the clear conflict of interests between Mr. Helms and Mr. Casaletto, the two individuals that created the plan to sell the system without negotiation. The conceived plan would provide a 20-year retirement fund for Mr. Helms, and retain Mr. Casaletto's employer as the company paid to operate the Foxfire system. This plan's implementation would be a win-win for the planners, but would cause the public to lose.

D. Conclusion

Generally, Public Counsel respects the rights of small water and sewer owners to sell their systems, and rarely opposes such asset transfers. In this case, however, the detriment to the public is obvious, and only the Commission can prevent that harm. For all the reasons explained above, Public Counsel urges the Commission to deny this transfer of assets under the terms proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 16th day of November 2022.

/s/ Marc Poston
