

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of Confluence        )  
Rivers Utility Operating Company, Inc., for        )  
Authority to Acquire Certain Water and Sewer        )        File No. WA-2019-0299  
Assets and for a Certificate of Convenience        )  
and Necessity    )

**LAKE PERRY LOT OWNERS ASSOCIATION RESPONSE TO MOTION TO STRIKE  
AND/OR TO LIMIT SCOPE OF THE PROCEEDING**

COMES NOW Lake Perry Lot Owners Association (“Association”), and for its response to Confluence Rivers Utility Operating Company, Inc.’s (“Confluence Rivers”) Motion to Strike and/or to Limit Scope of the Proceeding (“Motion to Strike”), states as follows to the Missouri Public Service Commission (“Commission”):

**BACKGROUND**

1. On March 29, 2019, Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers”) filed its *Application and Request for Waiver* (“Application”), requesting the Commission approve the sale of the water and sewer utility assets of Port Perry Service Company to Confluence Rivers.
2. On April 3, 2019 and April 15, 2019, respectively, the Association requested and was granted the right to intervene in this case.
3. On July 25, 2019, Confluence Rivers and Staff filed the Direct Testimony of Todd Thomas and Josiah Cox and Natelle Dietrich. On August 23, 2019, the Association filed the Rebuttal Testimony of Richard DeWilde, Glen Justis, Chad Sayre and Hon. Rick Francis.
4. On September 6, 2019, Confluence Rivers filed its Motion to Strike.

## STANDARD

5. This case arises from Section 393.190.1, RSMo., which reads in part as follows:

No . . . water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of . . . its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

6. The fundamental underlying principle behind section 393.190.1 is the regulatory compact, which requires the Commission's approval of this Application as not being detrimental to the public interest. The regulatory compact requires this Commission to place some discipline on utility transactions.

[The regulatory compact] arises out of a "bargain" struck between the utilities and the state. As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer.<sup>1</sup>

"The Commission's primary function is the regulation of public utilities, and the Commission identifies its principal purpose as serving and protecting ratepayers." *State ex rel. Capital City Water Co. v. Mo. Pub. Serv. Comm'n.*, 850 S.W.2d 903, 911 (Mo. App. W.D.1993).

7. Under this standard, the Commission has an obligation to review the transaction in detail and satisfy itself that the transaction is "not detrimental to the public interest." And it must consider all essential concerns. In *Ag Processing v. Public Service Com'n.*, 120 S.W.3d 732

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<sup>1</sup> *United States Gypsum, Inc. v. Indiana Gas Co. Inc.*, 735 N.E.2d 790, 797 (Ind. 2000), citing *Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor ("Indiana Gas I")*, 575 N.E.2d 1044, 1046 (Ind.Ct.App.1991).

(Mo., 2003), the Missouri Supreme Court determined that the Commission failed to fulfill its principal purpose when it failed to evaluate a merger premium in a merger case.

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. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. 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.

8. In reliance on the *Ag Processing* decision, the Commission has concluded that it must consider all possible alternatives. In the *Matter of the Application of Aquila*, Aquila had a binding contract with the Midwest ISO (“MISO”) to turn the functional control of its transmission system over to MISO. It had no contract with the Southwest Power Pool (“SPP”). In its *Report and Order* rejecting Aquila’s request to join the Midwest ISO, the Commission concluded that joining SPP would be a better option for Aquila.

Aquila’s proposal to transfer operational control of its transmission assets to Midwest ISO would cause a detriment to the public interest and on that basis, Aquila’s application will be denied.

The detriment to the public interest occurs, in part, because Aquila’s plan to join Midwest ISO would **preclude** it from joining Southwest Power Pool. As established by the independent and credible cost benefit analysis performed by CRA International, the net benefit to Aquila of joining Midwest ISO would be approximately \$65 million less over ten years than the net benefit it **could** obtain by joining Southwest Power Pool. [emphasis added]

*In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc.*, Case No. EO-2008-0046 (2008), p. 17.

9. Confluence Rivers misconstrues the *UtiliCorp United* case it cites in paragraph 7 of its *Motion to Strike*. In that case, the offers were entirely speculative. The Commission highlights that observation in its *Report and Order* in the quote provided by Confluence Rivers.

The record is clear that these proposals had been **withdrawn** by the time the Williams' proposal was accepted. Simply because **there may have been proposals** more favorable to ratepayers at **some point** does not have much bearing on whether or not the current proposal is detrimental. [emphasis added]

The *UtiliCorp United* case is not on point. In that case, the so-called proposals were entirely speculative. In this case, the Association has provided a detailed business plan and a binding offer. The *UtiliCorp United* case does not support Confluence Rivers' *Motion to Strike*.

#### ARGUMENT

10. The Association's Rebuttal Testimony fulfills two vital and critical purposes in this case. First, it provides the Commission with an assessment of alternatives, a task the court requires this Commission to undertake, as discussed above. If, as the Commission found in the *Aquila* case, the Application would foreclose a legitimate option that is more beneficial to the public than the Application, the Commission must consider that option. The Association's Rebuttal Testimony does indeed identify a more beneficial option to the public. To strike the Association's Rebuttal Testimony because it presented evidence of options would turn the law on its head.

11. Second, the Association's Rebuttal Testimony provides a stark comparison to the business plan of Confluence Rivers, all of which shows the failure of Confluence Rivers to make its case that the Application is not detrimental to the public interest. The Association's Rebuttal Testimony provides a realistic business plan and shows the weaknesses in the Confluence Rivers' case in chief. The determination on whether this Application is detrimental to the public

interest requires judgement, and judgement requires perspective. The Association testimony, all the Association testimony, provides the Commission perspective. The development of the Association's business plan gave the Association experts the perspective to make a judgement on Confluence Rivers' case and to find the Application lacking and detrimental to the public interest. A few examples should suffice on how the Association's Rebuttal Testimony sheds light on the weaknesses of the Confluence Rivers case.

- a. As Office of Public Counsel pointed out in File No. WM-2018-0116, Confluence Rivers has in the past failed to provide competent competitive financing terms.

In prior cases the Commission has instructed the Applicant that the financing terms approved in prior affiliate cases, such as Hillcrest, Elm Hills, and Raccoon Creek, were not to become a business model and competitive financing terms had to be sought in future cases. The applicant has failed to provide any such attestation or evidence indicating such an effort was made.

*Public Counsel's Response to Staff's Recommendation and Motion for Hearing*, filed March 15, 2018, p. 7. Confluence Rivers has likewise failed to provide evidence of competitive financing terms in this case. However, the Association has done so in its proposal. Competitive financing terms are available. This is true based on the Rebuttal Testimonies of both Richard DeWilde and Glen Justis. The Association's business plan shows the Commission that the Application, which is without competitive financing terms, is detrimental to the public interest.

- b. The Association's Rebuttal Testimony (Justis and Sayre) provides credible rate making evidence. Confluence River's Direct Testimony provides none. Inasmuch as the Association's Rebuttal Testimony provides evidence on ratemaking, this is evidence the Commission must consider pursuant to the *Ag Processing* case in deciding whether the Application is detrimental to the public interest.

- c. The Rebuttal Testimony of Chad Sayre provides an expert engineering report on the water and sewer systems. This evidence is certainly relevant in that it is more reliable than the multiple conflicting reports of Confluence Rivers (see Rebuttal Testimonies of Glen Justis and Chad Sayre) and gives the Commission more evidence that the Application is detrimental to the public interest.
- d. The Rebuttal Testimony of Richard DeWilde provides competent evidence from an expert in utility services, business finance, and management of subdivision services. His testimony describes how local control of the water and sewer systems can and will benefit the community, i.e. be in the public interest.
- e. The Rebuttal Testimony of Rick Francis is the testimony of an elected official of the citizens of Perry County advising the Commission on the balance of public interests within the community of Lake Perry.

12. The Association's Rebuttal Testimony is a unified whole describing how the Association developed its assessment of the Confluence Rivers' Application and is not susceptible to division as Confluence Rivers claims.

13. Once again, as it has done in the past, Confluence Rivers is attempting to stifle the availability of information coming to the Commission. From its threatening letter to Richard DeWilde to its opposition to the local public hearing, Confluence Rivers has consistently taken positions attempt to thwart the Commission's access to relevant information. The credible evidence provided in an actual business plan in contrast to Confluence Rivers' lack of a business plan is useful in helping the Commission make its determination and should be accepted into the record.

14. The function of this Commission is to guard against self-serving transactions that will injure the public as dictated by the regulatory compact. The Association's Rebuttal Testimony portrays a transaction that sets in high relief the terms or lack thereof in the Application that will be detrimental to the public interest. The Commission cannot summarily reject relevant evidence of legitimate options the seller of the water and sewer systems should consider as a subject of the regulatory compact.

**WHEREFORE**, Lake Perry Lot Owners Association respectfully requests the Commission deny Confluence Rivers Utility Operating Company, Inc.'s Motion to Strike.

Respectfully submitted,



By: \_\_\_\_\_

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all parties of record in File No. WA-2019-0299 via electronic transmission this 12th day of September 2019.

  
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