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 Assets and for a Certificate of Convenience and Necessity	)))))	File No. WA-2019-0299 File No. SA-2019-0300

MOTION TO DISMISS

Comes Now Lake Perry Lot Owners Association ("Lake Perry LOA"), pursuant to Rule 4 CSR 240-2.116(4), and respectfully requests that the Missouri Public Service Commission ("Commission") dismiss the Application filed in these cases on March 29, 2019 by Confluence Rivers Utility Operating Company, Inc. ("Confluence Rivers"). In support of this Motion, Lake Perry LOA states as follows:

1. Lake Perry LOA is a nonprofit mutual benefit corporation organized under the laws of the state of Missouri. Formed in August 2003, the purpose of Lake Perry LOA is to maintain and promote the high stand of quality in appearance, safety, and peaceful enjoyment of the Lake Perry subdivision. The Lake Perry subdivision consists of approximately 600 lots, to which Port Perry Service Company provides water and sewer services.

2. Lake Perry LOA is seeking dismissal of the Application in this case for two reasons. First, Confluence Rivers has failed to provide the Commission and other interested parties with the 60-day advance notice required by Commission rule 4 CSR 240-4.020(2). Second, Confluence Rivers does not have the statutory right or authority to file the Application.

Rule 4 CSR 240-4.020(2)

3. The Commission's rules provide that a regulated entity must file a 60-day notice of any intended contested case application. The rule specifically provides in part as follows:

> Any regulated entity that intends to file a case likely to be a contested case shall file a notice with the secretary of the commission a minimum of sixty (60) days prior to filing such case. Such notice shall detail the type of case and issues likely to be before the commission.

4. In a recent case, this Commission declared that the purpose of the rule is "to promote the public trust in the Commission by regulating communications between the Commission and potential parties to contested cases."[1] In that case, the Commission found that the rule applied even to Grain Belt Express Clean Line, a new applicant seeking regulated status. "Furthermore, waiver of the rule is not appropriate in these circumstances. Grain Belt was evidently well aware of the requirements of the regulation as it filed a 60-day notice in its previous application proceeding, File No. EA-2014-0207, which was a highly contentious case involving many parties regarding a similar request for a certificate of convenience and necessity."[2]

5. Lake Perry LOA is no less in need of the protection against a violation of the public trust in the Commission maintaining the integrity of proper communications in this case. Confluence Rivers is also well aware of the Commission rules, and the prior case involving Port Perry was likewise contentious in the Lake Perry community. The Commission should direct the Secretary to reject the Application as it did in the Grain Belt Express case.

[1] *In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, ORDER DENYING WAIVER AND DIRECTING THE SECRETARY TO REJECT APPLICATION, File No. EA-2016-0358, July 12, 2016, p. 2.
[2] *Id*.

Section 393.190.1 Requires the Owner to File an Application Before the Commission.

6. Section 393.190.1, RSMo provides that no water or sewer corporation, as defined by § 386.020, RSMo, "shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public…without having first secured from the commission an order authorizing it so to do." The statute is simple in its meaning. It contemplates that the *owner/seller* of property seek the Commission's permission and approval to transfer its utility assets.

7. The statute is simple in its meaning. The Western District Court of Appeals observed in 2015 that the seller must be the applicant. In the case of *City of O'Fallon v. Union Elec. Co*., the cities of O'Fallon and Ballwin filed a complaint against Ameren and requested the Commission grant them the option to buy their street lights from Ameren.

> In their complaint, the Cities cited Section 393.190, RSMo Cum. Supp. 2013,[1] as authority for the Commission to "approve the transfer of property." Section 393.190.1 concerns the Commission's authority with regard to a utility's sale of its property. Specifically, the statute states that no utility can sell any part of its franchise, works, or system that is necessary or useful in the performance of its duties to the public without first securing an order from the Commission authorizing such a sale. § 393.190.1. Thus, Section 393.190 grants the Commission the statutory authority to approve a sale **only where the seller has agreed to sell its property and sought the Commission's approval**, because it refers to approval after an affirmative, voluntary act by the seller, *i.e.,* the **seller's petitioning and securing** the Commission's order authorizing the sale.
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> Rule 4 CSR 240–3.110, a Commission regulation promulgated pursuant to Section 393.190, confirms that the **applicant seeking authorization for the sale of a utility's property must be the utility itself** and that the sale must be voluntary. Rule 4 CSR 240–3.110 is titled "Filing Requirements for *Electric Utility Applications* for Authority to Sell, Assign, Lease or Transfer Assets." (Emphasis added.) The rule requires the applicant to provide both a copy of the contract or agreement of sale and "verification of proper authority by the person signing the application or a certified copy of resolution of the board of directors of each applicant authorizing the proposed action." 4 CSR 240–

> 3.110(1)(B) and (C). It is axiomatic that, where the utility does not wish to sell its property, it will not file the necessary application, and there will be no contract and no approval or board resolution to attach to the application. Section 393.190 does not give the Commission the authority to order Ameren to sell its street lights to the Cities without its consent. [emphasis added]

462 S.W.3d 438, 443 (Mo. App., 2015).[3] The applicant must be the seller.

8. In addition, section 536.063 RSMo requires that a contested case be filed by the entity required by law to file the case.

> In any contested case:
>
> (1) The contested case shall be commenced by the filing of a writing by which the party or agency instituting the proceeding seeks such **action as by law can be taken by the agency** only after opportunity for hearing, or seeks a hearing for the purpose of obtaining a decision reviewable upon the record of the proceedings and evidence at such hearing, or upon such record and additional evidence, either by a court or by another agency. [emphasis added]

In this case, the applicant is, or at least should be, by statute seeking an action of the Commission authorizing the applicant to "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber" its property, not the authority to buy. In this case, the party seeking the action must be the seller.

9. There are several public policy reasons also why the Commission should follow the statutes plain meaning that the owner/seller must be the applicant. It should go without saying that the Commission's policy is or should be to engender good customer relations between public utilities and their customers. The filing requirements in a case such as this require the public utility to file its agreement with the Commission. The Commission generally calls for local public hearings in a case such as this. Parties in a case such as this are generally expected and encouraged to negotiate amicable settlements. A customer or group of customers

[3] While 4 CSR 240-3.110 has been rescinded, the substance of the requirement is contained in 4 CSR 240-10.105.

should feel free to engage their public utility providers in good faith without fear of threats or reprisals. Interjecting a self-motivated buyer into that mix distorts that relationship. A case in point is the letter the Lake Perry LOA received from the counsel for Confluence Rivers, a copy of which is attached as Exhibit A and made a part hereof for all purposes. Threats and harassment are not becoming conduct to an entity seeking to take the reins of a public utility operation regulated by this Commission. The Application should be dismissed.

10. A second public policy concern arises from the failure to follow the simple reading of the statute. Such a practice creates confusion in the Commission's analysis. In *In the Matter of Aquila, Inc.*, Aquila filed and application to transfer functional control of its transmission system to the Midwest ISO. In its analysis in the *Aquila* case, the Commission observed that in determining what was detrimental to the public interest it must consider all ramifications, including all options, SPP as well as MISO membershp. "Obviously, if Aquila transfers its transmission system to Midwest ISO and joins that RTO, it cannot join Southwest Power Pool's RTO. Foregoing greater financial benefits that could be obtained from joining Southwest Power Pool to instead accept lesser financial benefits from joining Midwest ISO is a potential detriment to the public that the Commission must consider."[4] And thus, both SPP and MISO were options to be considered in the case.

11. This case, like the *Aquila* case, calls on the Commission to determine among the options available to Port Perry. However, in this Application, unlike the *Aquila* case, one of the available options is the applicant. Interjecting one of the possible outcomes in the case as the applicant distorts the process and the analysis. It would indeed be preposterous for SPP to make

[4] *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.*, Report and Order, Case No. EO-2008-0046, October 9, 2008, p.17.

application to take functional control of Ameren Missouri's transmission facilities and MISO to make application to take functional control of KCPL and GMO transmission facilities. These applications are the incumbent utilities' obligations and burden.

12. A third public policy concern is that the buyer's applicant status places the it and its attorney in an untenable direct conflict of interest. Supreme Court Rule 4-1.7 prohibits a lawyer from representing a client if the representation of one client will be directly adverse to another client. In a litigated process such as this, there are inherent conflict between buyer and seller. Permitting the buyer to represent both itself and its seller places Confluence Rivers' interest in a position that has and will interject a conflict with Port Perry's interest.

13. Fourth, allowing the buyer to serve as the applicant violates the very statute the Commission is required to enforce. As previously cited, the Commission has recognized that section 393.190, RSMo requires a regulated utility to obtain permission from the Commission before transferring control of any part of its system. And yet, in the typical process of a contested case, parties negotiate and offer compromises in an effort to pursue their interests in a case. Such proposals and compromises oftentimes include agreement to certain operational constraints and entail compromises to the property. Where the buyer is the applicant, the buyer is taking a direct hand in the commitments to the operation and control of the property prior to the Commission's approval, all in violation of the statute and Commission holdings.

14. The Commission should enforce the statute as written. "No . . . water corporation or sewer corporation shall hereafter **sell, assign, lease, transfer, mortgage or otherwise dispose** of or encumber the whole or any part 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." [emphasis added]

Wherefore, for the foregoing reasons, Lake Perry LOA respectfully asks the Commission to direct the Secretary to reject the Application filed in this case by Confluence Rivers on March 29.

Respectfully submitted,

By: 

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Attorney for Lake Perry Lot Owners Association

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application to Intervene was sent to all parties of record in File No. WM-2019-0299 and SM-2019-0300 via electronic transmission this 3rdth day of April, 2019.

Exhibit A

THE BECKEMEIER LAW FIRM, LC

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March 19, 2019

Richard T. Dewilde
908 Sunset Dr.
Perryville, MO 63775

Re: Demand to Cease and Desist From Interfering With Central States Water Resources, Inc.'s Contract With Port Perry Service Company

Dear Mr. Dewilde:

We represent Central States Water Resources, Inc. ("CSWR"). As you know, CSWR has entered into a binding purchase agreement to acquire substantially all of the rights and assets owned by Port Perry Service Company ("Port Perry") in and to the waste water and water utility systems located in Perry County, Missouri. Despite having clear knowledge of a binding contract between CSWR and Port Perry and the business expectancy related to the same, you have made numerous attempts to undermine and interfere with CSWR's contractual rights with Port Perry by wrongfully using information that you received under a non-disclosure agreement in a malicious and improper manner.

On August 24, 2018, you executed a Certificate acknowledging and agreeing to be bound by Missouri Public Service Commission Rule 4 CSR 240-2.135 (the "Confidentiality Rule"), which sets forth that any information that was designated within the Public Service Commission case proceeding as "confidential" is protected information that is not to be disclosed to any third parties. Subsequent to agreeing to be bound by the Confidentiality Rule, you received access to certain information that contained a confidentiality designation, and in an attempt to interfere with CSWR's contract with Port Perry, we have reason to believe you have disclosed certain confidential information to third parties in violation of the Confidentiality Rule.

Therefore, at this time, CSWR hereby demands that you immediately cease and desist from taking any further actions to undermine and/or interfere with CSWR's contractual rights with Port Perry. Such actions would include, but are not limited to, making false or misleading statements to any party regarding CSWR, disclosing any confidential information that you received from the PSC case file that has been provided by CSWR, making any false claims that CSWR is unable to perform under its contract with Port Perry, etc. If you choose to violate this demand to cease and desist from interfering with CSWR's contract with Port Perry, CSWR will pursue legal action against you and any other parties who

have aided and assisted you, and will seek the full recovery of any damages caused to CSWR by your and/or your co-conspirators' actions. This letter will be the last notice you receive related to this demand.

Sincerely,

James A. Beckemeier
For the Beckemeier Law Firm, LC

JAB:ps
cc: Central States Water Resources, Inc.