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

LAKE PERRY LOT OWNERS ASSCIATION'S REPLY BRIEF

I. Introduction

Confluence Rivers Utility Operating Company, Inc. ("CRU") and the Missouri Public Service Commission Staff ("Staff") have once more confirmed in their initial briefs that CRU has failed to carry its burden of proof in this case. CRU must prove that this Application is not detrimental to the public interest. While it is CRU's burden of proof to show through a cost-benefit analysis taking into consideration all necessary and essential issues that its Application is not detrimental to the public interest, Staff and CRU have, contrary to law, set forth a truncated, easy to achieve standard ("Tartan Factors") and attempted to persuade the Commission that it should rubber stamp the Application. Staff and CRU would have this Commission believe that all it need do is determine that CRU is capable of serving in accordance with the Tartan Factors and eschew any consideration of the actual impact on the public. The Lake Perry Lot Owners Association has presented a cost-benefit analysis of a better utility operation at Port Perry on every point and shown CRU's case to be wanting in every respect.

II. System Condition

Prior to providing its legal argument in response to Staff's and CRU's initial briefs, the Association would like to provide some discussion regarding the condition of the systems and the urgency of this transaction. The evidence has shown CRU's Application to be false in its

description of the condition of the systems. Paragraph 10 of the Application describes what CRU wanted the Commission to believe the was the condition of the systems.

> Port Perry's water system currently is out of compliance for basic drinking water security, physical separation of chlorine disinfection systems, monitoring of residual chlorine, emergency redundant chlorine pumps, and corresponding operational management. Bringing that system into compliance would require a new chlorination system, including redundancy and testing equipment, and new fencing. In addition, the well house at Well No. 1 is in poor condition and must be repaired. The secondary backup wells also require repairs, including setting a new utility pole and installing a variable frequency drive to eliminate the "water hammer" that occurs at well start-up.[1]

Staff has rightly observed that, "The systems are not troubled, but they require maintenance and repairs to ensure good operation and preserve their normal lives."[2] In other words, the systems need normal maintenance.

CRU attempts in its initial brief to itemize those items of ordinary maintenance which they believe remain.[3] However, on most of these items, CRU's evidence is confused and conflicting.

A. Water System

As an initial matter the Minimum Design Standards for Missouri Community Water Systems CRU cites in its initial brief is a design standard. The design guides apply only to new community public water systems and are not inspection standards.[4] Therefore, the Port Perry water system does not need to meet the Missouri Design Standards as argued in CRU's initial brief. The Association will respond to each item additionally in the order presented by CRU.

- Lack of basic security for drinking water infrastructure. CRU cites Minimum Design Standard 2.5.a.5 for the proposition that security is an issue of concern. However,

[1] See CRU's Application, ¶10.
[2] Staff's Initial Post Hearing Brief, p. 1.
[3] Confluence Rivers' Initial Brief, pp. 10-14.
[4] Minimum Design Standards for Missouri Community Water Systems, Exhibit No. 302, p. vi.

contrary to CRU's contention, fencing is only an option for security. Association witness Sayre observed that fencing is not the only way to provide security to the water system. Lake Perry has security far in excess of the fencing indicated by CRU. The Port Perry system far exceeds the security requirements of DNR.[5]

- Need for physical separation of chlorine disinfection systems from other infrastructure. CRU cites Minimum Design Standard 5.1.1.a.1 for the proposition that chlorination must be located in a separate room. However, CRU witness Cox contradicts this conclusion in his surrebuttal testimony, stating that, "After additional review of the situation it was determined that even although Port Perry's drinking water system at well one is currently being disinfected, there is no MDNR mandated drinking water disinfection for this community."[6] CRU once again contradicts its own claim.
- Need for redundant chlorine pumps and ability to monitor residual chlorine levels in drinking water provided to customers for consumption. Minimum Design Standard 5.1.1.a.1. CRU witness Cox contradicts this concern as well in the very same statement cited above. "After additional review of the situation it was determined that even although Port Perry's drinking water system at well one is currently being disinfected, there is no MDNR mandated drinking water disinfection for this community."[7]
- Need for an operational backup well. Minimum Design Standard 3.2.1.2.b. Once again, CRU's testimony is inconsistent and confused. CRU has two engineering reports it has used to justify both options, a signed sealed engineering report provided to the DNR and a later unsigned unsealed engineering report it used in the prior case, File No. 2018-

[5] Transcript, Vol. II, p. 196.
[6] Surrebuttal Testimony of Josiah Cox, Exhibit No. 2, p. 12.
[7] Surrebuttal Testimony of Josiah Cox, Exhibit No. 2, p. 12.

0116.[8] The Association has proposed to address this issue in response to a hydrology analysis.

B. Wastewater System

- There was a lack of basic maintenance on the berms of the wastewater storage lagoon cells.
- The land application system was not applying the wastewater to the appropriate area.
- The wastewater system also lacks discharge recording and physical protection of the system.

Association witness Sayre testified at hearing that the berms were well maintained. "I saw no visible signs of leakage from any of the berms. We got a really nice tour. It was well-mowed, well-maintained. I believe somebody was mowing it the day I was there even in the fall. I was there last fall. I actually met with the Confluence team briefly either before or after our tour." CRU's own engineer, Benjamin Kuenzel, PE confirmed that opinion in a November 8, 2017 letter, concluding the wastewater system have been reasonably maintained.[9]

CRU's testimony in this case regarding the condition of the systems has been all over the map. From using an unsigned, unsealed engineering report when a signed, sealed engineering report already existed, to admitting that their planning process for projects is an iterative process, to contradicting themselves in testimony, their evidence is confusing at best and disingenuous at worst. The evidence is clear, as the Staff has observed, that the systems are not troubled but require some maintenance. The public deserves a reliable, consistent plan, as the Association has provided, and not the variable, speculative planning of CRU.

[8] Exhibit No. 301, Transcript Vol. II, p. 57, Rebuttal Testimony of Glen Justis, Exhibit No. 307, pp. 16, 17.
[9] Exhibit No. 306, p. 4.

III. Legal Standard

Without rearguing its recitation of the legal standard set forth in its Initial Brief, the Association reminds the Commission the Applicant must carry its burden of proof that the Application is "not detrimental to the public interest." §393.190.1 RSMo. As part of that showing it must produce evidence and persuade the Commission that the transaction is not detrimental to the public interest in a balancing of all necessary and essential issues. *Ag Processing v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo. 2003). Among the necessary and essential issues CRU must present and the Commission must consider are the following:

- The risk of rate increases.[10]
- Any merger premium.[11]
- Customer preference.[12]
- Viable alternatives.[13]

IV. Discussion

Staff and CRU have once again confirmed in their initial briefs that CRU has failed to carry its burden of proof to show that the Application is "not detrimental to the public interest." Rather than present a cost-benefit analysis to this Commission on the impact to the public, CRU's and Staff's briefs primarily discuss the qualifications of CRU in the form of the

[10] *In the Matter of the Application of Union Electric Company, Report and Order*, Case No. EO-2004-0108 (October 6, 2004).
[11] *Ag Processing v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo. 2003).
[12] *State ex rel. Kan. City Power & Light Co. v. Pub. Serv. Com.*, 76 S.W.2d 343, 354 (Mo. 1934).
[13] *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 (October 9, 2008), pp. 16, 17.

Technical, Managerial, and Financial Capacity and the Tartan Factors. Both CRU's and Staff's briefs present narratives from state agencies and self-serving statements that CRU is highly qualified. However, Staff explicitly states in its Initial Brief that it did not examine the prudency of CRU's planned improvements.[14] It could not examine the plan because there is no plan. Both CRU and Staff argue that the Commission may abdicate its responsibility to assess the risk of rate increases and other detriments to the public interest for an assurance that rates will be addressed later in a rate case. Rather than present evidence on the necessary and essential issues, CRU and Staff prefer to stand by their truncated Tartan factor analysis. This is not the legal standard and is inadequate. Instead, Staff and CRU spend time criticizing the Association's business plan and engineering report.[15]

A. Staff's Arguments

Staff first critiques the Association's plan by boot strapping DNR's concerns into this case. The DNR testimony of CRU witness Savage-Clarke stated that "Waters of the state are a shared resource and system owners must be good neighbors to others who use the water of the state."[16] Based on that testimony Staff oddly infers "irresponsible ownership" on behalf of either the existing service company or the Association. First, it must be observed that the Association has shown significant sophistication in this matter. It has every interest to maintain the water quality in its community and its efforts have shown it. If the status quo remains, there will be no "irresponsible ownership." There is no evidence that either the existing owners or the

[14] Staff's Initial Post Hearing Brief, p. 2. It is interesting that most of the Staff's discussion on public interest is a critique of the Association's proposal. See Staff's Initial Post Hearing Brief, pp. 14-17.
[15] The Association's business plan is clearly better because CRU has no business plan. And the Association's engineering report is clearly better because CRU's engineering planning process is iterative at best.
[16] Staff's Initial Post Hearing Brief, p 15.

Association through the service company they have created would be irresponsible. Remember, the condition of the system is compliant. Second, the responsibility of enforcing clean water regulations is that of DNR. This Commission's responsibility is to protect the economic interest of the customers.

Staff's second objection is that, "there is not a ready purchaser of the systems standing behind Confluence."[17] This is not true. The Association has extended an offer to Port Perry Service Company and that offer still stands. If Port Perry Service Company is motivated to sell its system, the Association's offer is still open.[18] If not, the Association questions CRU's claims that Port Perry Service Company desires to get out of the business. Either way, the Association is prepared to provide advice or run the facilities.

Third, Staff calls the Association's objection to CRU's ownership based on its concern over rate increases "incredulous." It is Staff's argument that is incredulous. Staff claims the Association's argument is misleading "because most of the listed systems [in Mr. Justis' comparison] were troubled when Confluence purchased them. Since the Port Perry systems are not troubled, they will not require the same magnitude of improvements."[19] Quite frankly, Staff is confirming the Association's fear. Staff knows as well as the Commission that the Commission often combines rate territories in rate cases. If the Commission incorporates Lake Perry in the next rate case as CRU and Staff request, the Association is justified in its fears, in that its rates will be utilized to subsidize the other systems. The only way the Association can insure against such subsidies is to obtain the Commission's denial of the Application.

[17] Id.
[18] Rebuttal Testimony of Richard DeWilde, Exhibit No. 309, pp. 10, 11, Schedule RD-8.
[19] Id. at 16.

Further, Staff argues that it is incredulous that the Association would immediately raise rates 84%. Again, it is Staff's observation that is incredulous. The Association realizes that there will have to be a rate increase. The Association is simply being prudent. Even CRU's brief observes that maintenance delayed risks greater costs in the long run.[20] CRU rate increases have been on the order of (at a minimum) 150 to 240%.[21] In addition, CRU also observes that Commission regulation is expensive.[22] The Association would immediately raise rates by 84% if it can avoid rate increases of twice that amount from CRU and avoid the expensive regulatory costs it will incur in the next rate case.

Staff furthers its incredulous argument by claiming the Association has no plan for handling customer service and does not have funds in place. This is simply not true. The testimony of Richard DeWilde provides the commitments of individuals and firms that will provide customer service and the commitments of individuals prepared to provide financing.[23] This is more than CRU has done.

Fourth, and related to the third criticism above, Staff states that the Association argues that CRU is "goldplating" the systems. Staff goes on to observe that, "This is a curious position because the Association's proposed improvements are over two times more expensive than Confluence's."[24] Once again, it is Staff's position that is curious and a little disingenuous. Staff mischaracterizes the Association observation on "goldplating." The Association, through Mr.

[20] Confluence Rivers' Initial Brief, p. 19.
[21] Rebuttal Testimony of Glen Justis, Exhibit No. 307, Schedule GJ-7.
[22] Transcript, Vol. II, p. 126.
[23] Rebuttal Testimony of Richard DeWilde, Exhibit No. 309, pp. 7, 9.
[24] Staff's Initial Post Hearing Brief, p. 17.

Justis, has observed that the corporate structure of Central States Water Resources engenders an incentive for self-dealing, which includes goldplating.[25]

However, the evidence adduced in this case reveals actual self-dealing. CRU has used two different engineering reports on the systems. In Case No. WM-2018-0116, CRU provided an unsigned, unsealed engineering report to Staff for its cost justification of its proposed improvements even though a signed, sealed engineering report already existed and had been provided to DNR. The cost estimates in the unsigned, unsealed engineering reports, dated October 15, 2018, given to Staff and used in Case No. WM-2018-0116, presented the cost of improvements to be ******, while the prior signed, sealed engineering reports, presented to the DNR, dated June 21 and July 11, 2018, presented the cost of improvements to be *******.[26] CRU actually admits that this type of "iteration" is their typical manner of doing projects.[27] It is interesting to note that CRU came forward to Staff with the prior, lower cost estimate after CRU filed its second Application for Port Perry Service Company, after the Association had published its engineering report.

The Association's business plan presents the cost of improvements to be $670,000, which is significantly higher than one of CRU's estimates but significantly less than CRU's other estimate. The Association estimate has not changed. It is a conservative estimate based on a specific plan. Based on a future hydraulic evaluation, the cost could come down.[28] And still the rate increase would only be 84% compared to the minimum 150 to 240% typical rate increase for other CSWR customers.

[25] Rebuttal Testimony of Glen Justis, Exhibit No. 307, p. 13.
[26] Rebuttal Testimony of Glen Justis, Exhibit No. 307, pp. 16, 17. Exhibit No. 301; Exhibit No. 305 (letter from DNR dated August 3, 2018).
[27] Transcript, Vol. II, p. 57.
[28] Transcript, Vol. II, p. 211.

One must ask, which is the more reliable estimate, the one definitive estimate against a party's interest or the one that is subject to iterations that vary. In this case, the Association hired an independent engineer that gave an independent judgement. That judgement provides a specific unchanged process and estimate. CRU has provided multiple iterations for the Commission to consider. While not investigating CRU's prudency,[29] Staff prefers CRU's plan and prefers to ridicule the Association's independent engineer's report. That is a curious conclusion. The clear preference should be the Association's definitive plan.

Staff has a double standard. CRU has provided no evidence on commitments or contracts for customer service or financing. It has not provided a business plan. Its engineering planning is iterative and uncertain. The Association has provided a better plan in every respect. If the Association's plan is inadequate, so is CRU's plan. And in this, CRU bears the burden of proof.

B. CRU's Arguments

CRU argues a "contingent offer" is not relevant and not appropriate for the Commission's consideration.[30] CRU's argument is clearly against the law. The Commission must consider alternatives.[31] In this case, it is even more imperative that the Commission consider the Association's offer. This case has been structured by the Applicant to shut down communication on the transaction. The Application was filed by the buyer. The buyer has directed the sellers not to speak to its customers. The buyer has threatened the customers in their

[29] Staff has also expressed concern with CRU's estimates but has refused to respond to those concerns. See Surrebuttal Testimony of David C. Roos, Exhibit No. 105, p. 2.
[30] Confluence Rivers' Initial Brief, p. 26.
[31] *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 (October 9, 2008), pp. 16, 17.

efforts to communicate with the sellers. The buyer has attempted to provide the absolute minimum amount of information necessary in this case, while providing self-serving statements on its capabilities. It has obfuscated on matters of finance, rates, and proposed improvements.

This Commission must act as a surrogate for competition.[32] And if this Commission must act as a surrogate for competition, the Commission must open transactions such as this to the light of day. Competition requires transparency. CRU has not been transparent in this proceeding. OPC has aptly observed in its Initial Brief, "If the Commission fails to do this – if the Commission accepts Staff's position that other potential buyers need not be considered so long as the first buyer "through the door" is able to legally scare the sellers into not accepting or even discussing any other offer – then the Commission will be establishing a precedent that has the strong potential to render it blind, deaf, and dumb to important facts in future cases."[33]

CRU also claims the most glaring deficiency in the Association's plan is the inability to obtain stable financing.[34] In this argument, CRU has confused itself. CRU forgets that it is the Applicant in this case. It has the burden to show its stable financing on this critical issue. The evidence in the record is that CRU has difficulty in obtaining stable financing. In testimony filed in File No. WM-2018-0116, CRU witness Cox described being rejected for financing by 18 banks.[35] The Commission itself has expressed concerns with CSWR's financing.[36] CRU has provided no evidence in this case on a stable financing plan and has provided no evidence to refute Mr. Cox's discussion of his inability to obtain stable financing. The only response is that

[32] Alfred E. Kahn, The Economics of Regulation: Principles and Institutions vol. 1 pgs. 2 – 3 (1970).
[33] Initial Brief of the Missouri Office of Public Counsel, p. 13.
[34] Id.
[35] Exhibit No. 300, p. 25.
[36] File No. WR-2017-0259, Report and Order (February 7, 2018), p. 60.

it will be handled in the next rate case. On the other hand, the Association has shown the capability to obtain stable financing. The Association was able to obtain commitments for financing from a list of individuals and one bank after its first try.[37] If the Association's plan fails to provide stable financing, the same conclusion applies to the CRU evidence.

V. Conclusion

CRU has failed to carry its burden of proof in this case to show that the Application is not detrimental to the public interest. It has relied on its connections at DNR and Staff, who agree with CRU that CRU is capable. But it has not put on any case beyond that effort. The Association has done what CRU failed to do, put together a business plan based on a definitive engineering report. The Association put together an effective business plan despite the threats and opposition of CRU and with no support from the Staff. The Association's business plan shows the failures in CRU's case. While CRU and Staff may attempt to critique the Association's business plan, their efforts simply reveal the dearth of information in CRU's own plan. The irony is that the level of effort put forth on the Association business plan should have been put forth on the CRU plan, but there is no plan.

Respectfully submitted,

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[37] See Rebuttal Testimony of Richard DeWilde, Exhibit No. 309, pp. 6, 7.

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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 7th day of November 2019.