

**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)

RESPONSE TO MOTION TO DISMISS

Under authority of, and in accordance with, 4 CSR 240-2.080(13), Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers” or “Company”) files its response to the *Motion to Dismiss* filed April 3, 2019, by the Lake Perry Lot Owners Association (“LOA”).

Pre-Filing Notice

1. Confluence Rivers acknowledges it did not provide at least sixty days’ notice prior to filing its application for authority to acquire the water utility assets of Port Perry Service Company (“Port Perry”), as required by 4 CSR 240-4.017(1). That’s why the Company’s application included a motion asking the Commission for a waiver of its prefiling notice rule. That motion satisfies all requirements of 4 CSR 240-4.017(1)(D), and the Company believes its request for a waiver should be granted. But regardless of how the Commission ultimately rules, while Confluence Rivers’ motion is pending there is no basis for dismissing the application to which the motion relates.

2. With regard to LOA’s motion, Confluence Rivers notes the Commission rule cited as the basis for the motion – 4 CSR 240-4.020(2) – pertains exclusively to ex parte communications and has nothing whatsoever to do with prefiling notice. As indicated in the preceding paragraph, the Commission rule governing such notice is 4 CSR 240-4.017(1).

3. Confluence Rivers further notes the Commission’s decision in File No. EA-2014-0207, *In the Matter of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, which LOA also cites as support of its motion, is inapplicable to the current case for at least two reasons. First, as reflected in the Commission’s July 12, 2016, *Order Denying Waiver and Directing the Secretary to Reject Application*, the “good cause” basis for Grain Belt Express’s waiver request differs materially from the “good cause” on which Confluence Rivers based its motion.¹ Second, the prefiling notice and waiver rules that were the basis for the Commission’s decision in File No. EA-2014-0207 no longer apply. They were superseded by the current rules, which took effect four months after the Commission issued the order LOA cites and relies on for its motion.

4. Under 4 CSR 240-4.017(1), parties intending to initiate a Commission case are, with limited exceptions, required to provide at least sixty-days’ notice prior to a case filing. The notice must detail the type of case to be filed, identify issues likely to be presented for decision, and include a summary of all communications regarding such issues that occurred between the applicant and the Office of the Commission (as defined in 4 CSR 240-4.015(10)) during the ninety-day period preceding the prefiling notice.

5. But subsection (D) of that rule allows a party to seek a waiver of the prefiling notice requirement for good cause, and expressly states “good cause” for a waiver “may include, among other things, a verified declaration from the filing party that it has had no communication with the office of the commission within the prior one hundred fifty (150) days regarding any

¹ In File No. EA-2016-0207, Grain Belt Express based its waiver request on its belief the prefiling notice requirement did not apply to non-utilities or, in the alternative, its contention the requirement should be waived because it believed the rule did not apply. In contrast, Confluence Rivers’ motion relies on “good cause” as expressly identified in 4 CSR 240-4.017(1)(D).

substantive issue likely to be in the case . . .”

6. In its motion for waiver filed in this case, Confluence Rivers stated it had no communication with the Office of the Commission regarding any substantive issue likely to arise in this case within the 150 days prior to the Company’s filing. And Confluence Rivers verified that statement – along with all other statements of fact included in its application – through the affidavit of its President, Josiah Cox, which accompanied the filing.

7. Because its motion for waiver satisfies all requirements of 4 CSR 240-4.017(1)(D), Confluence River’s application should not be dismissed for failure to provide prefiling notice while that motion is pending.

Essential Parties Under § 393.190.1, RSMo

8. LOA’s motion also asserts § 393.190.1 requires the owner of the utility assets at issue in this case – Port Perry – to file the application seeking approval of a sale of those assets to Confluence Rivers. In support of its assertion, LOA cites the decision of the Missouri Court of Appeals – Western District in *City of O’Fallon v. Union Electric Co.*, 462 S.W.3d 438 (2015). But as the following discussion makes clear, the court’s decision in *City of O’Fallon* does not compel the interpretation of the applicable statute that LOA relies on as the basis of its motion.

9. At issue in *City of O’Fallon* was whether the Commission could compel a utility to sell assets – specifically street lights – to a city wanting to purchase those assets. In concluding the Commission had no such authority, the court reviewed the process for approving transfers of utility assets under § 393.190.1. The language LOA quotes in paragraph 7 of its motion was excerpted from the court’s discussion of that process. However, that portion of the court’s opinion is mere dicta and does not constitute precedent supporting LOA’s interpretation of the

relevant statute.

10. As the full opinion makes clear, the question of whether a willing utility seller is an essential party to a transfer application filed under § 393.190.1 was neither presented to, nor decided by, the court in that case. Instead, *City of O'Fallon* simply interprets the statute to prohibit the Commission from compelling a sale of assets under circumstances where the affected utility is not a willing seller.

11. In contrast, the Commission recently addressed the specific question of whether a willing utility seller is an essential party in an asset transfer case filed under § 393.190.1, ironically in a prior Confluence Rivers case. In its *Order Denying Request to Join Parties*, issued April 25, 2018, in File Nos. WM-2018-0116 and SM-2018-0117, the Commission denied the Office of the Public Counsel's ("OPC") motion seeking to suspend further proceedings unless and until the sellers of utility assets at issue in those cases were joined as parties. OPC based its motion on the same interpretation of § 393.190.1 urged in LOA's motion. In denying OPC's motion, the Commission concluded that when the General Assembly included the phrase "[a]ny person seeking any order" (emphasis original) in subsection 1 of the statute, it "contemplated that the seller of public utility assets is not the only party who can request relief." And the Commission's order further found "the relevant Commission rules do not require the assets' sellers to be parties to the case."

12. As evidenced by the written *Agreement for the Sale of Utility System* between Confluence Rivers and Port Perry,² the asset sale transaction under consideration in this case involves both a willing seller and a willing buyer. Therefore, based the Commission's

² The fully-executed sale agreement between Confluence Rivers and Port Perry is attached to the Company's application as **Appendix A**.

interpretation of the plain language of § 393.190.1, Confluence Rivers is entitled, as a matter of law, to file and prosecute its application based solely on its status as the proposed buyer. And Port Perry, as the proposed seller, is not an essential party to the case.

WHEREFORE, for the reasons previously stated, Confluence Rivers requests the Commission issue an order denying LOA's motion to dismiss.

Respectfully submitted,

/s/ L. Russell Mitten
L. Russell Mitten, MBE #27881
Dean L. Cooper, MBE #36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65012
(573) 635-7166 telephone
(573) 636-7431 facsimile
rmitten@brydonlaw.com
dcooper@brydonlaw.com

**ATTORNEYS FOR CONFLUENCE RIVERS
UTILITY OPERATING COMPANY, INC.**

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on April 4, 2019, to the following:

Office of the General Counsel
Governor Office Building
Jefferson City, MO 65101
staffcounsel@psc.mo.gov
karen.bretz@psc.mo.gov

Office of the Public Counsel
Governor Office Building
Jefferson City, MO 65101
opc@ded.mo.gov
marc.poston@ded.mo.gov

David C. Linton
314 Romaine Spring View
Fenton, MO 63026
dlinton@mlklaw.com

/s/ L. Russell Mitten