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 INITIAL BRIEF

INTRODUCTION

On November 2, 2017, almost two years ago, a newly formed subsidiary of Central States Water Resources, Inc., Confluence Rivers Utility Operating Company, Inc. ("CRU"), filed an application with the Missouri Public Service Commission ("Commission") to acquire the assets and certificates of a number of water and sewer entities. That case was WM-2018-0116. The case was ultimately settled pursuant to a Unanimous Stipulation and Agreement, which Stipulation and Agreement was approved by the Commission on February 14, 2019. However, CRU withdrew one of the transactions from its application pursuant to the Stipulation and Agreement, the acquisition of Port Perry Service Company's water and sewer assets. Then, on March 29, 2019, CRU filed an application in this case to acquire the assets of Port Perry Service Company.

LIST OF ISSUES

1. Should the Commission find that Confluence Rivers Utility Operating Company, Inc.'s ("Confluence Rivers") acquisition of the Port Perry Service Company's ("Port Perry") water and wastewater assets and certificates of convenience and necessity is not detrimental to the public interest, and approve the transaction? No.

Legal Standard

In order to receive the Commission's approval of its Application, CRU must do two things in this case. First, it must present to this Commission substantial and competent evidence that its Application is not detrimental to the public interest. Second, in doing so, it must carry its burden of production and burden of persuasion regarding the "necessary and essential issues" that the Application is not detrimental to the public interest. CRU must give the Commission adequate information to do a cost-benefit analysis and conclude that the Application is not detrimental to the public interest.

The Missouri Supreme Court set forth once again the analytic structure for this case in *Ag Processing v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo. 2003):

> 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. [footnote omitted] 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. [footnote omitted] 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.

Thereafter, the Commission itself clarified the implementation of the Court's decision in a subsequent case involving Ameren:

> The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing "not detrimental to the public" standard. In particular, the Court clarified the analytical use of the standard. What is required is a **cost-benefit analysis** in which all of the benefits and detriments in evidence are considered. [emphasis added]

* * * *

> In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.[1]

This case requires the Commission to do a cost-benefit analysis on the impact to the public interest. The cost-benefit analysis must extend to all benefits and detriments implicated in the case. The cost-benefit analysis must also extend even to substantial and competent evidence related to opportunity costs. In a yet more recent case, involving Aquila's application requesting authority to leave Southwest Power Pool and join the Midwest ISO, the Commission observed that when alternatives are presented, such alternatives must be considered.

> 9. When alternatives with economic impacts are presented, an evaluation of the detriments of a particular alternative to the public interest must include consideration of the opportunity cost of not pursuing any available alternatives. There do not appear to be any Missouri state court cases directly announcing this principle, but it is a well-established aspect of Federal administrative law.
>
> 10. Missouri's Western District Court of Appeals has recently held that the Commission is not limited to narrowly considering the possible benefits of a presented alternative when other alternatives are also important. In Environmental Utilities, LLC v. Public Service Commission, the court upheld the Commission's rejection of a proposed sale of a part of the sewer system of a troubled utility, because, while there were benefits to those customers who would be served by the purchaser, the benefits of the sale of the entire system would be greater, and would be lost if the incomplete transaction were allowed to proceed.[2]

Ultimately, the Commission concluded that staying with Southwest Power Pool was the better alternative and denied the application.

> 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

---

[1] *In the Matter of the Application of Union Electric Company, d/b/a 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, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, Report and Order on Rehearing (February 10, 2005), pp. 48, 49.

[2] *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.

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.[3] [emphasis added]

CRU's obligation in this case is to provide the Commission a cost-benefit analysis and persuade the Commission that its Application is not detrimental to the public interest in light of other alternatives.

Discussion

Burden of Production

As a general matter, CRU has failed to carry with its burden of proof. The burden of proof has two parts: the burden of production and the burden of persuasion. *White v. Director of Revenue*, 321 S.W.3d 298, 304 (Mo. banc 2010). The burden of production is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder." BLACK'S LAW DICTIONARY 223 (9th ed. 2009). The burden of persuasion is defined as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." CRU has failed to carry both its burden of production and its burden of persuasion.[4]

CRU failed to carry the burden of production. In this case the burden of production is a cost-benefit analysis or an analysis that takes into consideration all necessary and essential factors showing that the Application is not detrimental to the public interest. CRU's case in chief consists primarily of a discussion of two things, its capabilities and speculation on the need for improvements to the systems based on the described condition of the facilities it seeks to

[3] Id. at 17.

[4] *Request for an Increase in Sewer Operating Revenues of Emerald Pointe Util. Co. v. Office of Pub. Counsel*, **438 S.W.3d 482, 490 (Mo. App., 2014).**

acquire. These limited issues do not amount to a cost-benefit or an appropriate analysis of all necessary and essential issues.

Regarding the public interest, Mr. Cox simply states the following in his direct testimony,

> **Q. HOW DO YOU BELIEVE THE PROPOSED TRANSACTIONS RELATE TO THE PUBLIC INTEREST?**
>
> A. As my testimony explains, the proposed acquisition of the specified assets of Port Perry and the related transactions are not detrimental to the public interest of the State of Missouri. The assets would be acquired by Confluence Rivers and remain subject to the jurisdiction of the Commission. Confluence Rivers is fully qualified, in all respects, to own and operate the systems to be acquired and to otherwise provide safe and adequate service – something that is not present at the current time.[5]

His entire rationale is the qualification of CRU.

Staff echoes CRU's story by reciting the Tartan Factors and observing CRU's capability. Staff's Memorandum recommending approval of the Application based on its assessment of CRU's capabilities but dismisses the crucial public interest determination.

> This case does not contemplate a new CCN, however, Staff asserts that applying the Tartan criteria to the proposed CCN transfers is valid. Staff's conclusion in this matter is that CRU has the requisite TMF capacities to operate the PPSC water and sewer systems, CRU has met the Tartan Energy criteria, and therefore, its proposal to acquire the assets of the PPSC water and sewer systems and associated CCNs is not detrimental to the public interest.[6]

The Tartan Factors, applied to CCN cases, are: 1) Need for Service, 2) Applicant's Qualifications, 3) Applicant's Financial Ability, 4) Economic Feasibility of Proposal, and 5) Promotion of the Public Interest. Regarding the fifth factor, the Staff Report proposes as follows: "positive findings with respect to the other four standards above will in most instances support a finding that an application for a CCN will promote the public interest."[7] In this analysis, the CRU and Staff have misapplied the law and Commission policy and failed to

[5] See Direct Testimony of Josiah Cox, Exhibit No. 1, page 16.
[6] See Direct Testimony of Natelle Dietrich, Exhibit No. 100, Schedule ND-d2, page 5.
[7] Id. at page 6.

provide the Commission the basic information on the cost-benefit analysis and the necessary and essential issues in this case: the public interest. While capability is certainly a consideration, it is not the only consideration. It is certainly not the cost-benefit analysis the courts or this Commission require.

With reference to the need for improvements, CRU's entire case is speculation. CRU presents various "could happens" but no actual facts that indicate a substantive risk of harm to human health or the environment. Indeed, at the evidentiary hearing CRU witness Cox admitted that its decision-making process is iterative.[8] However, CRU's own engineer confirms that the systems are "reasonably maintained."[9] Association witness Chad Sayre is a registered professional engineer and confirms that the systems are reasonably maintained. Mr. Sayre adds more. Mr. Sayre concluded that the systems exceed MDNR requirements.

> But in this system there was no -- nothing that I saw that would have justified any abatement because it's in compliance, so what would we be abating. It has security that more than exceeds DNR requirements. And there hasn't been any samples.
>
> * * * * *
>
> So whenever you say to prevent future MDNR citations, potential fines, and potential stream remediation costs caused by the existing wastewater operation, I totally disagree. I never -- I talked to two individuals on our tour, site tour, that we took, and one worked for the Lake Perry Lot Owners's Association and one worked for the Port Perry Operations Group. I saw no evidence of any leakage or anything that bothered me from a perspective of serious liability or especially about stream remediation cost caused by the existing wastewater facility.[10]

[8] Tr. Vol. II, p. 57.
[9] Exhibit No. 306, p. 4.
[10] Tr. Vol. II, pp. 197, 198.

There is no evidence that contradicts the conclusion that these systems are adequate for the purposes intended. And since the Commission may not base its decision on mere speculation, CRU has not carried its burden of production on the need.[11]

With these being the only two issues CRU has brought forth, they have failed to carry the burden of production. CRU has presented no cost-benefit analysis evaluating all necessary and essential issues of impact on the public. And the evidence they have brought forth on the two issues the address is not persuasive. CRU's evidence on their capabilities is inadequate. And their evidence on the conditions of the systems is speculation. Therefore, the Application should be denied because CRU has failed to carry its burden of production.

Specific Cost-Benefit Issues.

It is CRU's burden to provide a cost benefit analysis on the necessary and essential factors. While CRU and Staff have been willing to rely on the Tartan Factors and nothing more, the Association has provided relevant and substantial evidence in the form of a business plan, engineering report, and testimony that give the Commission the necessary and essential information necessary to do a cost-benefit analysis and to find the Application is detrimental to the public interest. In these efforts, the Association has been able to show that CRU is unable to carry its burden of persuasion. The following are the necessary and essential issues.

1. **Customer Preference**. The customers of Port Perry Service Company have expressed their preference that the Application be denied. At a public hearing held by the Commission, testimony was unanimous against the Application and in favor of maintaining the sewer and water operations with Port Perry Service Company. The witnesses at the local public

[11] "The burden to establish these prerequisites for the authority sought by competent and substantial evidence rests firmly upon the applicant. This burden cannot be met by speculation, guesswork, hopes, or aspirations." *State ex rel. Oliver v. Public Service Commission,* 542 S.W.2d 595, 598 (Mo. App., 1976).

hearing filed a number of petitions from residents stating their desire that the Commission deny the Application.

CRU counters that the parties to the transaction should have a constitutional right to have their transaction approved and the Commission should ignore the Association. CRU on this point is simply wrong. Owners of public utility property subject their ownership interest to the Commission pursuant to a regulatory compact.[12] The Commission exists to primarily protect the public, and only secondarily the utility. On the other hand, the customers do not submit themselves to the regulatory compact. Imposing service on the customers against their will without a critical eye on the utility company clearly violates the customers' interests in their property.

Conclusion: The Application is detrimental to the public interest.

2. **Capability**. CRU may be capable, and then again, it may not be. CRU touts its capability. It touts orders of the Commission based on stipulations of facts. It is clear the Missouri Department of Natural Resources and the Commission Staff like CRU,[13] but CRU has yet to produce a cost benefit analysis in this case.

---

[12] "[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." *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).

"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

[13] The Association echoes Commissioner Kenney's concern with the DNR's testimony as an expert on environmental matters at the site without actually having toured the site. Tr. Vol. II, pp. 103-107. Further, the Association is concerned with the Commission Staff's concern with the various engineering

While CRU's business plan is nonexistent—indeed, Mr. Cox would call their business planning "iterative"[14]—the Association's evidence has shown CRU's capability to be questionable at best. Association witness Justis presented his concern that the structure of Central States Water Resources and CRU creates a significant risk of "self-dealing."[15] This potential has certainly been borne out in the testimony.

a. Iterative and Duplicitous Engineering Reports

CRU had a sealed engineering report dated July 11, 2018 for the Port Perry Water System that showed an "Extension Price" for the water system to be $********* (the sealed engineering report had no reference to a "Well 3").[16] An email from Benjamin Kuenzel to Todd Thomas dated June 16, 2018, explained the cost estimate to include a "VFD install at well 2 and reset pole. Other than that, improvements will be focused on well 1."[17] CRU used that same report to obtain the Missouri Department of Natural Resources Approval of Plans for Water System Improvements on August 3, 2018.[18]

---

reports but its apparent unwillingness to do any further inquiry. Surrebuttal Testimony of David C. Roos, Exhibit, 105, p. 2:

[14] See Transcript, Vol. II, p. 57.
[15] Ex. No. 307, Justis Rebuttal, p. 14.
[16] See Exhibit No. 301C, p. 5.
[17] See Exhibit No. 305.
[18] See Exhibit No. 305. For ease of reference, the Approval on Plans for Water System Improvements, dated August 3, 2018, states as follows:

> INTRODUCTION
>
> Detailed plans dated July 5, and an engineering report and specifications dated July 11, 2018, for water system improvements to serve Port Perry Service in Perry County, Missouri were submitted for review and approval by 21 Design Group of Washington, Missouri.
>
> BRIEF DESCRIPTION
>
> In general, these plans and specifications provide for water system improvements to serve Port Perry Service in Perry County, Missouri. The improvements will consist of installation of internal valves and flushing hydrants within the existing distribution system; replacing the meter

However, CRU provided Commission Staff a different unsigned engineering report with an "Extended Price" estimate for the water system of $******** as part of File No. WM-2018-0116. CRU witness Thomas subsequently filed the $******** cost estimate as part of his testimony on November 19, 2018.[19]

CRU attempted to explain the discrepancy in a Data Request Response to the Association:

> Response: The engineering reports initially produced as a part of Todd Thomas's Direct Testimony included costs for a third well house for the water system. Additionally, the engineering report for the wastewater system had an error (costs related to the Equipment Installation and Contractor O & P were included twice as a part of the estimate). The engineering reports provided in response to Staff DR 0012 eliminated the third well and corrected for the extra Equipment Installation and Contractor O & P costs.[20]

Mr. Cox attempted to explain further on cross examination:

> Q. Okay.· The total extended price is not the·$******** that you proposed in your original --
>
> A. No. This is our first iteration.· So we did this in -- I believe it would be the early summer of '18. And then we believed, at that point, the engineer came back and said they think permanent disinfection was required so we went to the permanent disinfection solution, which was the third well drilling. And after further review this spring, we went back and decided that a permanent disinfection was not – that errative [sic – iterative] process is very typical of how we do projects.[21]

This explanation is simply not credible. The sealed engineering report existed on July 11, 2018 and was the official report on the site. It existed at the time of the direct testimony filed on

---

> at Well No. 1; and installing a remote monitoring chlorine analyzer. In addition a variable frequency drive will be installed at Well No. 2, which is used as a backup well for the system. The three existing 800 gallon pressure tanks will be removed from service and used as backup when the existing standpipe is off line for maintenance. The necessary valves, and other appurtenances conforming to American Water Works Association standards will be provided as per detailed plans and specifications.[18]

[19] Tr. Vol II, p. 51. See also Exhibit No. 300.
[20] See Exhibit No. 307, Schedule GJ-06.
[21] See Tr., Vol. 2, p. 57.

November 19, 2018 in File No. WM-2018-0116. CRU provided the sealed engineering report to the DNR, but it provided the Commission Staff a different cost estimate. This is a concern for Staff and should be a concern for the Commission.[22] Using one report for one purpose and another unsealed report for another is the height of self-dealing. But what is most concerning is that this iterative process is how CRU typically does projects.[23]

Not only is this conduct the epitome of self-dealing, its bad engineering practice. As Association witness Sayre discussed in his testimony, the engineering professional rules are put in place to prevent such self-dealing. The sealed engineering report is the official report for public purposes. Sealed reports once made are for public use for all purposes.[24] 20 CSR 2030-3.060 Licensee's Seal provides in part as follows:

> (7) Technical submissions shall be signed, sealed, and dated unless clearly designated preliminary or incomplete, not to be used for construction, or is a record drawing of as-built construction information provided by others. If the document is preliminary or incomplete, not to be used for construction, or is a record drawing of as-built construction information provided by others, the phrase, "The information on this document is preliminary or incomplete, not for construction, recording purposes, or implementation" or similar disclaimer and notice to others shall be placed in an obvious location so that it is readily found, easily read, and not obscured by other markings.

---

[22] While the discrepancy is a concern to Staff, Staff is not willing to do or say anything about it. See Surrebuttal Testimony of David C. Roos, Exhibit, 105, p. 2:

> Q. Are you aware of the inconsistencies found in the Confluence Rivers' engineering reports that Mr. Justis summarized on pages 15 through 17 of his rebuttal testimony?
>
> A. Yes. I have reviewed both Mr. Justis' rebuttal testimony on this issue, and the Confluence Rivers' engineering reports as attached as Confidential Schedules GJ-04 through GJ-06 of Mr. Justis' rebuttal testimony. These inconsistencies are a concern; however, it is my understanding that the cost estimates and scopes of work found in Confidential Schedule GJ-05 are the correct cost estimates and scopes of work that Confluence Rivers has provided in this case.

The Commission will have to forgive the Association's misgivings if the Association fails to understand CRU's and Staff's assurances of the protections the ratemaking process provides if the Staff failed to find these discrepancies and even now refuses to take them seriously.

[23] Id.

[24] Tr. Vol. II, pp. 205-207.

To condone the use of information at odds with the sealed report without a sealed revision is to condone bad engineering.

Mr. Sayre has similar misgivings related to the Abatement Order on Consent CRU entered into with the Missouri DNR regarding the Port Perry facilities. Simply put, why would an owner of facilities enter into an AOC when there is nothing to abate? In Mr. Sayre's words, it's an "interesting tactic."[25]

b. Disingenuous Business Negotiations

The testimony shows other evidences of self-dealing. CRU witness Thomas portrayed CRU's thoughts on the PSC process in his emails with the Port Perry sellers. In an email June 13, 2017 to Mr. Yamnitz, Mr. Thomas portrayed CRU's negotiation tactics:

> As you both know, dealing with the PSC is a whole different animal. Most accountants, business people, and bankers don't understand how restrictive, expensive, and onerous the PSC process can be. I'm trying my best to give you the most I can for your system without paying you more than I can recover. Therefore, I'm proposing a change to the agreement (which I will send to you) that puts a floor on how much the purchase price can drop before you are not bound to the agreement. If the PSC comes back with a net book value that is below the minimum, CSWR will have the ability to release you from the agreement or pay the difference and continue with the purchase of the property. An acquisition case and a rate case each costs tens of thousands of dollars. Before I begin spending money, we all need to be comfortable with the agreement. [highlighting provided][26]

There are several aspects of this communication that deserve some critique, but suffice it to note the highlighted statement is not characteristic of a true arm's length negotiation, one that the free market would foster, and one this Commission was created to ensure. The strategy is designed to get the purchase price as high as it can be. If the Commission exists to take the place of competition and foster the efficient expenditure of utility resources for the public benefit, this

[25] Transcript, Vol. II, pp. 197, 198.
[26] Transcript, Vol. II, p. 126. See also Exhibit No. 304C.

approach does not achieve that result. This communication is a necessary and essential issue the Commission must address.

The evidence also presents CRU's self-dealing on the matter of financing, but the Association will deal with that issue separately.

Conclusion: The Application is detrimental to the public interest.

3. **Condition of the Systems**. The entirety of CRU's testimony relating to the condition of the system is speculation, what "could happen." The competent and substantial evidence is that the systems are in compliance with all Missouri Department of Natural Resources requirements and providing good customer services.[27] Even CRU's review of compliance issues conclude that the systems are "reasonably maintained." As for the water system, the 21 Design Group concludes that, "The system appears to be adequate on most parts but will need to have repairs completed on the interior of the well house."[28] As for the wastewater system, the 21 Design Group concludes that, "The wastewater system has a no discharge lagoon system currently in operation."[29] Everything else in the CRU testimony is speculation.

The Preliminary Engineering Report of Association witness Chad Sayre provides a reasonable, prudent approach to making improvements to the two systems:

> **3.0 Proposed System Improvements**
>
> **3.1 Water System**
>
> Following a cursory site review, meetings with Lake Perry HOA, and review of public documents, we don't see any immediate major items that need to be completed for permit compliance. Well #2 needs to be evaluated for rehabilitation, modernization, and improvement options or a new well needs constructed with complete system integration to the elevated storage and Well #1. Both wells as public water supplies need to be able

[27] See Exhibit No. 308, pp. 3, 4.
[28] Exhibit No. 306, p. 4
[29] Id.

to disinfect, and eventually will need pump upgrades, but currently the system is in compliance with regulations and MDNR. Prior to any final change of ownership an MDNR standard comprehensive hydraulic analysis may be helpful to finalize if and what improvements are finally needed, and also may yield data for final improvements recommendation. My report includes several items that may or may not be required and how those potentials would impact water and sewer consumer's rates.

Well #2 may be able to be rehabilitated for less capital, but system waterlines would need to be possibly upsized to allow better pumping hydraulics over time to the existing storage tank, along with a new pump and VFD, SCADA, and system integration. This could also solve future pressure concerns during peak demand flows. Most of these improvements could be managed and/or performed by existing HOA staff and local contractors over time as part of a 5 to 10 year owner supervised plan.

If a new well is drilled, and replaces Well #2, it should be considered to be placed at the existing storage tank site or near it, with system water lines being evaluated by the hydraulic analysis mentioned above.

A complete hydraulic analysis should be completed prior to any work, decisions, or improvements being made. This analysis should be submitted to MDNR in the form of a complete PER to ensure compliance and informed decisions are made. This could save capital investments and increase benefits to cost. The buyer may want to consider this analysis as a contract or agreement contingency following attorney review which will keep rates for water and wastewater consumers at levels in the public interest and at or below reasonable rates for this system.

Enhanced control valves, fencing for security and other minor items can be completed with local staff once the system is acquired to save operations, costs and to allow remote monitoring for the public interest and public health.

The current elevated storage tank is large enough for compliance.

3.2 Wastewater System

The wastewater system reportedly is in compliance with MDNR currently, but a permit evaluation and/or renewal needs to be processed ASAP (see Appendix 7.10 and 7.12). Minor replacements and maintenance items are needed over time as in any operating system. This system is a no discharge system and is in compliance. These include brush clearing, gravel drive access improvements, gates and land application sprinkler head replacements. Additional enhancements to monitor pressure, security, and adding pressure activated valves to allow zone development in the irrigation zones should be planned. Warning signs and potential fencing and some more access restrictions should be considered.

Rather than the "iterative" process CRU proposes, the Association, through Mr. Sayre, proposes that future actions be based on a hydraulic analysis for the water system. Only minor replacements and enhancements are required for the wastewater system.

Conclusion: The Application is detrimental to the public interest.

4. **Customer Service.** CRU has shown no capacity for providing customer service. It has held no meetings with customers. It has directed the seller Port Perry Service Company to refuse to talk to the customers.[30] It has threatened customers of Port Perry Service Company with litigation if they speak to Port Perry Service Company.[31] It has opposed the Association's request for a local public hearing.

The business address for Confluence Rivers is 500 Northwest Plaza Drive, Suite 500, St. Ann, Missouri. The business address for Port Perry Service Company is Perryville, Missouri. The business address for Lake Perry Service Company is 1300 Brenda Avenue, Perryville, Missouri 63775. Clearly, the existing situation and the Lake Perry Service Company proposal maintain local control.

CRU does tout its media savvy. It will have web sites, call centers, Facebook pages, and contract billing agents.[32] But nowhere in the testimony is there any information on prompt customer service.

Mr. DeWilde presents a number of local individuals and entities that have expressed their desire to either continue providing service or are willing to provide service anew to the water and sewer operations if local control is maintained.[33] These are friends and neighbors that have

[30] See Exhibit No. 309, p. 11.
[31] Id.
[32] Direct Testimony of Josiah Cox, Exhibit No. 1, p. 9.
[33] Rebuttal Testimony of Richard DeWilde, Exhibit No. 309, Schedule RD 7.

served in the past and desire to continue to serve wish to engage new local business. The Lake Perry community wants to be served by their friends and neighbors.

Conclusion: The Application is detrimental to the public interest.

5. **Financing**.

CRU witness Cox, describes the financing plans of CRU in his direct testimony:

> Confluence Rivers plans to fund the purchase using equity provided by Confluence Rivers' parent company, CSWR, LLC. Confluence Rivers has not yet determined whether improvements at each system would be funded by equity, debt, or a combination of both. The terms of any debt financing that Confluence Rivers would enter into would be subject to the approval of the Commission.[34]

He elaborates in his surrebuttal testimony:

> Q. DOES CONFLUENCE RIVERS PROJECT THAT ITS NEED FOR DEBT FINANCING WILL BE ANYWHERE NEAR THAT AMOUNT?
>
> A. No. Confluence Rivers plans to acquire the assets using equity. Additionally, Confluence Rivers has committed to move toward a 50-50 mix of equity and debt for its capital structure in future rate cases. Therefore, debt would be needed only to fund some part of the cost of improvements. Thus, Confluence Rivers' need for debt financing will be substantially less than that of the LPSC.[35]

But this is the extent of the evidence on CRU's financing.

In a prior case, the Commission has warned that CRU's evidence on its financial undertakings are not credible. In its *Report and Order* in File No. WR-2017-0259, the Commission found that,

> 7. In the acquisition case, the Commission ordered that the financing allowed in that case be used solely for buying the system and improving plant. But Indian Hills commingled those moneys with other Glarner entities.[36]

In that case, the Commission concluded the following:

> The premise underlying all Indian Hills' arguments about the loan is that it tried to get better financing but none was available. Indian Hills and Staff defy OPC to find a lender

[34] Direct Testimony of Josiah Cox, Exhibit No. 1, p. 10.
[35] Surrebuttal Testimony of Josiah Cox, Exhibit No. 2, p. 10.
[36] Report and Order (February 7, 2018), p. 13.

> at market rates but that argument reverses the burden of proof; OPC has no duty to find Indian Hills a lender. Indian Hills has the burden of proof to show that its rate increase supports just and reasonable rates. The documentation of Indian Hills' search for debt is scant and, in some cases, irrelevant. The Commission finds it unconvincing.[37]

Based on CRU's track record, the Association has, and the Commission should, question CRU's financial plan. CRU's financing plans are an essential and necessary issue. However, rather than justify any financing structure, CRU has taken a step back in this case and not provided any financing evidence at all. CRU prefers to say it will obtain an equity infusion and the Commission should just trust it until the next rate case.

In response to CRU's "trust me" approach, the Association obtained very attractive debt financing terms with its very first attempt. The Association obtained a commitment letter from a bank for financing at a favorable rate.[38] Association witness Justis concludes that the Lake Perry Service Company would have an effective interest rate over its first ten years of operation of approximately 6%.[39] This is more attractive than anything CRU has proposed.

The Commission may not simply "trust" CRU. It must make an analysis of all necessary and essential issues. Financing is a necessary and essential issue. CRU and Staff have not carried their burden of production nor their burden of persuasion.

Conclusion: The Application is detrimental to the public interest.

6. **Rates**.

CRU's rate analysis is similarly evasive as is its financing plan. CRU witness Cox addresses the rate issue in his direct testimony:

> Q. WOULD THOSE RATES EVENTUALLY REQUIRE ADJUSTMENT?
>
> A. Yes. The Commission approved these rates in 2002. The current rates for Port Perry do not reflect the current cost of providing service. Additionally, as indicated above,

[37] Id. at 60.
[38] Rebuttal Testimony of Richard DeWilde, Exhibit No. 309, Schedule 2C.
[39] See Rebuttal Testimony of Glen Justis, Exhibit No. 307, p. 10.

> these systems require investment that would likely result in a rate increase request of some amount after those additions have been completed. However, any such increase would require a separate, future rate case for the purpose of considering such factors.[40]

CRU witness Cox makes a similar proposal on the determination of the net book value. He requests the ability to defer the rate issue until later.

> Staff's statement appears to reserve the right of parties to argue a different rate base value in subsequent proceedings. With Confluence Rivers' disagreement with Staff's determination of the net book value noted, along with the parties' reservation of rights to argue a different rate base value in subsequent proceedings, Staff's Recommendation is acceptable to Confluence Rivers."[41]

However, the Association has done a rate analysis of prior Central States Water Resources companies and has done a risk assessment of CRU's potential rates and LPSC potential rates. Association witness Justis provided his rate analysis as Schedule GJ-07.[42] The following are his findings:

Utility	**Location**	**Original Rate**	**Rate after Acquisition**	**Increase**
- Hillcrest Utility Operating Company (Water)	St. Girardeau County	$3.58	$77.23	2057%
- Hillcrest Utility Operating Company (Sewer)	St. Girardeau County	$14.63	$83.56	471%
- Raccoon Creek (Sewer, Village)	Johnson County	$23.48	$79.74	240%
- Raccoon Creek (Sewer, WPC)	Pettis County	$38.12	$95.76	151%
- Raccoon Creek (Sewer, W 16th)	Pettis County	$26.42	$95.76	262%
- Indian Hills (Water)	Crawford County	$12.70	$108.65	756%

While Staff witness Busch points out a couple of flaws in Mr. Justis' Hillcrest (Water) and Indian Hills (Water) numbers, Mr. Busch does nonetheless recognize that his own adjusted increases of 504% and 603%, respectively, are "rather large."

[40] Direct Testimony of Josiah Cox, Exhibit No. 1, p. 14.
[41] Id, at p. 16.
[42] Exhibit No. 307

By comparison, Mr. Justis' business plan projects an average combined water and wastewater service rate of $64.24 for Lake Perry Service Company, or an 84% increase.[43] Association witness Sayre's engineering report makes similar findings.[44]

The Commission may not accept CRU's trust me request. A realistic assessment of the risk of a rate increase is a necessary and essential issue.[45] Inasmuch as CRU and Staff have failed to provide any substantive evidence on financing or rates, they have failed to carry their burden of production. Further, since they have failed to provide any evidence that is persuasive that CRU can provide a more attractive rate than the legitimate alternative the Association has tendered, CRU has failed to carry its burden of persuasion.

Conclusion: The Application is detrimental to the public interest.

7. **Non-Profit in the Public Interest**.

While the Association's proposal for a Lake Perry Service Company is not the focus of this proceeding, it is a necessary and essential issue the Commission has indicated it must consider. Section 393.900 provides that certain nonprofit, membership corporations may be organized only for the purpose of supplying water for distribution, for wholesale, and for treatment services within the State of Missouri. Similarly, Section 393.825.1 provides that certain

---

[43] Rebuttal Testimony of Glen Justis, Exhibit No. 307, p. 18.
[44] Rebuttal Testimony of Chad Sayre, Schedule CWS2, Section 5.0.
[45] The Commission made the following determination in the AmerenCIPS case:

> The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. Approval should be based upon a finding of no net detriment. Likewise, contrary to UE's position, **the *AG Processing* decision does not allow the Commission to defer issues with ratemaking impact to the next rate case**. Such issues are not irrelevant or moot because UE is under a temporary rate freeze; the effects of the transfer will still exist when the rate freeze ends. [emphasis added]

See *In the Matter of the Application of Union Electric Company, Report and Order*, Case No. EO-2004-0108 (October 6, 2004).

nonprofit, membership corporations may be organized only for the purpose of supplying wastewater disposal and treatment services within the State of Missouri. The Commission has interpreted these statutory rights to promote the public interest. In File No. WO-2007-0410, the Commission found that the transfer of assets from Swiss Villa Utilities, Inc. to the Black Oak Mountain Water Company and the Black Oak Mountain Sewer Company to be in the public interest. "In fact, the Commission determines that having a stable and concerned nonprofit corporation controlled by the homeowners association is in the public interest. The transfers are approved."[46]

The Association has undertaken great effort at significant expense to follow that statutory process. The Association's proposal is a stable and concerned nonprofit corporation controlled by the homeowners' association and in the public interest. Foreclosing that option before the proposed non-profit service company has had an opportunity to sit at the bargaining table is detrimental to the public interest.

Conclusion: The Application is detrimental to the public interest.

8. **Conclusion**.

What are the Commission's options in this case? To grant or deny the Application. In prior cases, the Commission has made it clear that it is willing to deny an application even for troubled water and sewer systems if the applicant cannot satisfy the applicants burden of proof and remedy all of the irregularities in the application. See *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W.3d 258 (Mo. App. 2007). In that case, the Court affirmed the Commission's decision that maintained the troubled systems in the hands of the seller until a better arrangement could be made. Port Perry Service Company is NOT a troubled system. And

[46] See ORDER APPROVING TRANSFER OF ASSETS AND CANCELING CERTIFICATES AND TARIFFS, File No. WO-2007-0410, February 3, 2010, p. 8.

the Association has shown itself a capable advisor in this case. If the Commission denies this application, the system will not become troubled simply due to delay, especially so in light of the experience the Association has acquired through its own advisors Mr. Justis and Mr. Sayre. Approving this Application with the evident uncertainties in this case when the present situation is stable and in the hands of the good Association advisors would be detrimental to the public interest.

Conclusion: The Application is detrimental to the public interest.

2. If so, should the Commission condition its approval of Confluence Rivers' acquisition of Port Perry and, if so, what should such conditions be?

If the Commission determines to approve the CRU acquisition of Port Perry, the Commission should impose the following conditions on CRU, as proposed by Association witness Justis, at pages 21 and 22 of his Rebuttal Testimony:

a. Limit CRU's starting rate base to Staff's recommended net book value.
b. Require Confluence Rivers to develop a clear capital investment plan for Lake Perry that is endorsed by both LPLOA and the Office of Public Council (OPC).
c. Require Confluence Rivers to establish a customer advisory board and associated governance processes, satisfactory to both LPLOA and OPC, that allows meaningful customer input into future capital investments before they are incurred.
d. Require Confluence Rivers to undergo a biannual independent audit, using an auditor and audit plan acceptable to both LPLOA and OPC, to review the reasonableness of operating costs and to confirm that all goods and services are being procured appropriately.

The Commission has already determined that CRU's financing and business plan are relevant, necessary and essential issues in a case such as this. It is also apparent that CRU has been hostile to good customer relations with the current customers of Lake Perry. Each of the above conditions is designed to establish some discipline on CRU in its development of a business plan and financing and return some respect to the customers in Lake Perry.

WHEREFORE, the Association respectfully requests the Commission deny the Application.

Respectfully submitted,

By: 

David C. Linton, #32198
314 Romaine Spring View
Fenton, MO 63026
Telephone: 314-341-5769
Email: jdlinton@reagan.com

Attorney for Lake Perry Lot Owners Association

Filed: October 31, 2019

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 31st day of October 2019.