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

RENEWED RESPONSE TO MOTION TO DISMISS

COMES NOW Confluence Rivers Utility Operating Company, Inc. ("Confluence Rivers" or "Company"), and, for its *Renewed Response to Motion to Dismiss,* states as follows to the Missouri Public Service Commission ("Commission"):

1. On April 3, 2019, by the Lake Perry Lot Owners Association ("LOA") filed a *Motion to Dismiss* in this matter. On April 4, 2019, Confluence Rivers filed its *Response to Motion to Dismiss*.

2. The Staff of the Commission filed its recommendation on May 31, 2019. LOA filed a *Response to Staff Recommendation, Request for Hearing and Renewal of Its Motion to Dismiss* on June 4, 2019. Among other things, LOA stated that it "renews its motion to dismiss." Additionally, the Office of Public Counsel (OPC) filed a *Response to Staff Recommendation* on June 10, 2019. In its request for relief, OPC requested in part, that the Commission join Port Perry Service Company as a party. For purposes of clarity, and to the extent OPC's requested relief is considered to be a motion to add a party, Confluence Rivers below renews its response to LOA's motion to dismiss.

3. LOA additionally points to a new factor in its "renewal." That is an allegation that Port Perry Service Company is "controlled" by Confluence Rivers. On its face, LOA's allegation does not suggest "control" in any legal sense. However, Confluence Rivers would

also dispute the implication as to what may or may not have been said to Mr. Yamnitz (especially since this counsel has had no conversations with Mr. Yamnitz). What LOA's allegation does clearly represent is that the owner of the property in question does not want to talk to LOA about a sale.

4. This is, of course, within the owner's constitutional property rights. The owner of property has a constitutional right to determine whether to sell their property or not. "To deny them that right would be to deny them an incident important to ownership of property. A property owner should be allowed to sell his property unless it would be detrimental to the public." *State ex rel St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. 1934), *citing* *City of Ottawa v. Public Service Commission*, 288 Pac. (Kan.) 556.

5. Because there is no agreement with LOA (or Lake Perry Service Company, as is mentioned without explanation in the LOA's attachment), LOA's proposal is irrelevant to this matter. The Commission previously found competing offers to be irrelevant as follows:

> Staff argues that the Agreement with WNG is detrimental to the public because there were proposals to purchase the pipeline made by *Missouri Gas Energy* (MGE) that the Staff believes were superior to the Agreement. The Commission finds that the MGE proposals are not relevant to the question of whether the transaction at issue in this case is detrimental to the public interest. The record is clear that these proposals had been withdrawn by the time the Williams' proposal was accepted. Simply because there may have been proposals more favorable to ratepayers at some point does not have much bearing on whether or not the current proposal is detrimental. The MGE proposals may form the basis for a challenge in a subsequent rate case to UCU's prudence in not accepting them and accepting the WNG offer instead, but they do not have any relevance to the issues in this case.

In the matter of the Application of UtiliCorp United Inc., d/b/a Missouri Public Service, for authority to sell a part of its franchise, works or system, Case No. GM-97-435 (October 15, 1998).

6. LOA may not use this process in an attempt to bully its way into an agreement where there is already a viable agreement before the Commission. The issue before the Commission is whether that agreement is detrimental to the public. If it is not, the transfer must be approved:

> "To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefited*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"

State ex rel. St. Louis v. Public Service Commission, 73 S.W.2d 393, 400 (Mo. 1934).

Pre-Filing Notice

7. Confluence Rivers acknowledges it did not provide at least sixty days' notice prior to filing its application for authority to acquire the water and sewer 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.

8. 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).

9. 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.

10. 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.

11. 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 . . .."

12. 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.

13. 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

14. LOA's motion and OPC's recommendation also assert § 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.

15. 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.

16. 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.

17. 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."

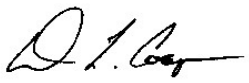
18. As evidenced by the written *Agreement for the Sale of Utility System* between Confluence Rivers and Port Perry,[2] the asset sale transaction under consideration in this case

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

involves both a willing seller and a willing buyer. Therefore, based on the Commission's 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,



Dean L. Cooper, MBE #36592
Jennifer L. Hernandez, MBE #59814
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
jhernandez@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, on June 21, 2019, to the following:

Office of the General Counsel
staffcounselservice@psc.mo.gov
karen.bretz@psc.mo.gov

Office of the Public Counsel
opcservice@ded.mo.gov
john.clizern@ded.mo.gov

David Linton
jdlinton@reagan.com