

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 2<sup>nd</sup> day of October, 2019.

In the Matter of the Application of	)	
Confluence Rivers Utility Operating Company, Inc.,	)	<b><u>File No. WA-2019-0299</u></b>
for Authority to Acquire Certain Water and Sewer	)	
Assets and for a Certificate of Convenience and	)	
Necessity	)	

**ORDER REGARDING FOUR MOTIONS TO STRIKE TESTIMONY, REQUEST TO LIMIT ISSUES, REQUEST FOR DISCOVERY SANCTIONS, AND REQUEST TO DELAY EVIDENTIARY HEARING**

Issue Date: October 2, 2019

Effective Date: October 2, 2019

**Background**

On March 29, 2019, Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers”) filed an application with the Missouri Public Service Commission (“Commission”) to acquire the water and sewer systems of Port Perry Service Company in Perry County, Missouri (“Application”). As part of the Application, Confluence Rivers also seeks a related Certificate of Convenience and Necessity. Port Perry Service Company’s (“Port Perry”) sewer and water systems include as customers some of the 600 residents of the Lake Perry Lot Owners’ Association (“Lot Owners”). Lot Owners intervened and have objected to the sale.

Direct testimony was filed July 25, 2019. Rebuttal testimony was filed August 23, 2019, with surrebuttal testimony following on September 23, 2019<sup>1</sup>. The Commission

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<sup>1</sup> Surrebuttal testimony was expanded to allow response to testimony and evidence presented at the local

has denied contested dismissal motions and a motion to make Port Perry a party.<sup>2</sup> The Commission has granted a contested request for a local public hearing. A local public hearing was held in Perryville, Missouri on September 10, 2019.

Following are the motions addressed by this Order:

- *Motion to Strike and/or to Limit Scope of Proceeding (Confluence Rivers)*
- *Lake Perry Lot Owners Association's Motion to Strike and for Other Sanctions*
- *Lake Perry Lot Owners Association's Motion to Strike [or Postpone Hearing]*
- *Motion to Strike Surrebuttal Testimony of Kristi Savage-Clarke (Public Counsel)*

**Motion to Strike and/or to Limit Scope of Proceeding**

On September 6, 2019, Confluence Rivers filed its motion to strike portions of testimony<sup>3</sup> in response to testimony provided on behalf of Lot Owners. The testimony at issue concerns Lot Owners' business plan and proposed effort to purchase Port Perry. Confluence Rivers argues the standard in the case of a sale of a utility is whether the sale is "not detrimental to the public"<sup>4</sup>. Confluence Rivers states that only one transaction is at issue, and that offers suggested as an alternative to that transaction are irrelevant. Lot Owners state that the Commission must consider all possible alternatives. Confluence Rivers states the alternative offer is speculative, and not a true alternative. Lot Owners also state that Lot Owners' business plan shows the weaknesses of Confluence Rivers'

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public hearing, and was also delayed to September 23, 2019, due to the scheduling of the local public hearing. See *Order Scheduling Local Public Hearing*, issued August 29, 2019.

<sup>2</sup> Order Addressing Motions, issued June 24, 2019.

<sup>3</sup> The motion seeks to strike the following: DeWilde Rebuttal – p. 3, line 10 – p. 3, line 13; p. 4, line 20–p. 12, line 1; p. 12, line 21-22; p. 13, line 17 - p. 14, line 15 (to include Schedules RD-2C, RD-3C, RD-4, RD-5, RD-6, RD-7, RD-8, RD-9. And RD-10); Justis Rebuttal – p. 3, line 12-15; p. 4, line 15 –p. 11, line 21; p. 12, line 17 – p. 13, line 7; p. 17, line 23 – p. 18, line 8; p. 19, line 9 –p. 21, line 14 (to include Schedule GJ-01); Sayre Rebuttal – All (to include Schedules CWS-1, CWS-2, and CWS-3);and Francis Rebuttal - p. 3, lines 10-16; p. 5, line 1 – p. 6, line 7. Generally, this testimony relates to Lot Owners' incorporation of a non-profit and production of a business plan to move forward its attempt to purchase Port Perry.

<sup>4</sup> *State ex rel. St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. 1934).

Application, and shows how the Application is lacking and detrimental to the public. Confluence Rivers' motion requests the Commission strike the identified portions of testimony or limit the scope of the proceeding to eliminate the issues raised by the identified portions of Lot Owners' testimony. Neither Staff nor Public Counsel filed responses to the motion.

The Commission agrees that the challenged testimony may be used to allege the weaknesses of the Application. The Commission does not find the request to strike the identified portions of testimony or to limit the scope of the proceeding to be reasonable, and it will not be granted.<sup>5</sup>

**Lake Perry Lot Owners Association's Motion to Strike and for Other Sanctions**

On September 20, 2019, Lot Owners filed its motion to strike certain portions of testimony that it claims are hearsay, as the witnesses speak for the owners of Port Perry.<sup>6</sup> Lot Owners' related request for sanctions arises from the attempted deposition of the owners of Port Perry. The sanctions sought by Lot Owners for the actions of Port Perry in not complying with the subpoena are to strike the portions of Confluence Rivers' testimony it claims are hearsay.

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<sup>5</sup> In the interest of transparency, the Commission will take this opportunity to state that there is only one transaction at issue, and the Commission is unaware of any statute or rule that would allow it to direct the sale of Port Perry's private property to a buyer of the Commission's choosing.

<sup>6</sup> The motion seeks to strike the following from the direct testimony of Josiah Cox: "All the systems lack the financial, technical, and/or managerial capacity needed to provide safe and reliable water or sewer service." page 11, lines 1 – 2; "Due to their lack of utility experience and inability to make the investments necessary to upgrade its systems, Port Perry has concluded it is in the best interest of the Company and its customers to sell the systems to a qualified operator." page 11, lines 14 -17; and "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." page 16, lines 15 -18. The motion also seeks to strike the following from the direct testimony of Todd Thomas: "This well was inspected on March 2, 2018, and concerns were noted regarding the well's capacity. While the well was running continuously during the summer without stopping on the weekends, this well clearly does not have the capacity to be the sole water source for the community. Additionally, the flow meter at Well #1 showed a lower flow rate than expected, which is typically a sign of the well pump and motor nearing failure. This well needs to be pulled, wire replaced, column piping replaced where it has failed, and the well pump inspected to determine the extent of the issues to prevent complete failure, which would leave the system without water." page 5, lines 9 – 17.

Confluence Rivers asserts that the statements of the two witnesses being objected to are statements of two experts relying on their experience in their respective areas of expertise. Confluence Rivers further states that there was no violation of a subpoena as counsel for the two witnesses at issue had submitted a letter of objection in accordance with Commission rules. Confluence Rivers also states there is no basis to sanction Confluence Rivers as the subpoenas were served to persons who are not employees of Confluence Rivers and were subpoenaed in their individual capacities. Neither Staff nor Public Counsel filed responses to the motion.

The Commission will not strike the objected-to portions of testimony, as the administrative hearing process allows ample opportunities to rebut testimony, and the Commission is confident in its ability to discern admissible fact from hearsay.

Lot Owners also raise a discovery process dispute in the above motion. Commission rule 20 CSR 4240-2.090(8)(B) requires a telephone conference between counsel and the presiding officer before a written discovery motion can be filed. Since no telephone conference was held in this discovery dispute, the Commission will decline to entertain this discovery motion to issue sanctions due to non-compliance with a Commission subpoena.

**Lake Perry Lot Owners Association's Motion to Strike [or Postpone Hearing]**

On September 25, 2019, Lot Owners filed a motion to strike certain surrebuttal testimony in its entirety<sup>7</sup>, or in the alternative to delay the evidentiary hearing.<sup>8</sup> Lot Owners also requested certain portions of another witness' testimony stricken.<sup>9</sup> Lot

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<sup>7</sup> The motion seeks in part to strike the entirety of the surrebuttal testimony of Kristi Savage-Clarke.

<sup>8</sup> The Commission ordered a shortened response time to this motion in order to take up this issue prior to the evidentiary hearing, scheduled for October 7-8, 2019.

<sup>9</sup> The motion seeks in part to strike the following portions of Josiah Cox's surrebuttal testimony: page 2, line 22 through page 4, line 2; page 4, line 3 through page 5, line 6; page 10, lines 1 through 7; page 10, line 22 through page 11, line 4; page 13, lines 7 through 13; page 15, line 3 through page 21, line 1; and

Owners state that certain portions of the filed surrebuttal testimony at issue are in violation of Commission rules regarding information to be filed in a party's case-in-chief, and supplementation of filed testimony. Confluence Rivers states that both witness testimonies at issue are responsive to the rebuttal testimony. Neither Staff nor Public Counsel filed responses to the motion.

In the alternative to striking testimony, Lot Owners requested the Commission delay the evidentiary hearing set for October 7-8, 2019, grant additional time for discovery, and grant the ability to provide additional live testimony at the evidentiary hearing. Confluence Rivers states that as all testimony was filed in accordance with the Commission's rules, there is no justification to delay the hearing, provide additional discovery time, or receive additional live testimony at the evidentiary hearing.

The Commission agrees with Confluence Rivers that it filed its surrebuttal testimony in accordance with the Commission's rules. Lot Owners' request to strike certain portions of the surrebuttal testimony is found not to be reasonable, and will not be granted.

The Commission will allow all parties to present additional live testimony at the evidentiary hearing in response to the entirety of surrebuttal testimony filed by Ms. Kristi Savage-Clarke, and to the portions of Mr. Josiah Cox's surrebuttal testimony as identified in paragraph 4 of *Lake Perry Lot Owners Association's Motion to Strike*, filed on September 25, 2019. The Commission finds that the requests by Lot Owners to delay the hearing and for additional time for discovery are not reasonable and will not grant them. The Commission finds that the request by Lot Owners to present additional live testimony in response to the entirety of Ms. Savage-Clarke's, and identified portions of Mr. Cox's

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page 23, line 1 through page 24, line 19. The cited selections generally address Confluence Rivers' regulatory assessments, plans, or financing.

surrebuttal testimony is reasonable and will grant it.

**Motion to Strike Surrebuttal Testimony of Kristi Savage-Clarke**

On September 27, 2019, Public Counsel filed its *Motion to Strike Surrebuttal Testimony of Kristi Savage-Clarke*. Public Counsel asserts that in order for Ms. Savage-Clarke to present testimony on behalf of the Missouri Department of Natural Resources (“MDNR”), MDNR must be a party to the case. On September 27, 2019, the Commission ordered a shortened response time in order to take up this issue prior to the evidentiary hearing, scheduled for October 7-8, 2019. Lot Owners filed a response stating it agreed with and supports Public Counsel’s motion. Staff did not file a response to the motion.

Confluence Rivers stated that MDNR did not file the testimony at issue; rather Confluence Rivers called Ms. Savage-Clarke as a witness. Confluence Rivers’ motion also states that there is no rule or statutory requirement that witnesses in a case be employees or consultants to a party. Confluence Rivers cites the requirements of the Commission’s rule on evidence for the proposition that the only requirements for a surrebuttal witness is that the proffered testimony is relevant and responsive to rebuttal testimony.<sup>10</sup> Confluence Rivers states Ms. Savage-Clarke’s testimony is both.

The Commission agrees with Confluence Rivers that the testimony is relevant and responsive to rebuttal testimony. The request of the Public Counsel is not reasonable, and will not be granted.

**THE COMMISSION ORDERS THAT:**

1. The *Motion to Strike and/or Limit Scope of Proceeding*, filed by Confluence Rivers Utility Operating Company, Inc. on September 6, 2019, is denied.

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<sup>10</sup> Commission rule 20 CSR 4240-2.130.

2. The *Lake Perry Lot Owners Association's Motion to Strike and for Other Sanctions*, filed September 20, 2019, is denied.

3. The *Lake Perry Lot Owners Association's Motion to Strike*, filed September 25, 2019, is denied in part, and granted in part with respect to additional live testimony as described in the body of this Order.

4. The *Motion to Strike Surrebuttal Testimony of Kristi Savage-Clarke*, filed by the Office of the Public Counsel on September 27, 2019, is denied.

5. This order shall be effective when issued.

**BY THE COMMISSION**



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff  
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and  
Coleman, CC., concur.

Hatcher, Regulatory Law Judge,