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**

STAFF'S REPLY BRIEF

COMES NOW Staff of the Missouri Public Service Commission, through counsel, and files its reply post hearing brief.

INTRODUCTION

Throughout their initial briefs, the Office of the Public Counsel (OPC) and the Lake Perry Lot Owners Association (Association) urge the Commission to compare the Application of Confluence Rivers Utility Operating Company, Inc. (Confluence) to the Association's proposal when determining whether Confluence's acquisition of the Port Perry Service Company (PPSC) systems would be detrimental to the public interest. While the parties opposing Confluence's Application raise various arguments as to why Commission approval of Confluence's Application would be detrimental to the public interest, their overarching themes appear to be that the Commission must consider other proposals of other interested purchasers in addition to the Application before it, and customers would be negatively affected by potential future rate impacts to them under Confluence ownership.

However, while the opposing parties are apt to point out potential detriments, they fail to balance these detriments with the requisite benefits that would come with Confluence's acquisition of the PPSC systems. OPC and the Association would have the Commission believe there are no benefits; however, the weight of the evidence clearly

indicates otherwise. When making its decision, Staff requests that the Commission heed its own words as stated in its *Report and Order* in case number EM-2007-0374: "The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service."[1] Even so, there is also no evidence that Confluence would not be the least cost alternative.

Based on the positions and arguments outlined in its initial brief, Staff shares Confluence's opinion that acquisition of the PPSC systems by Confluence will not be detrimental to the public interest, and it will not burden the Commission with repetition of those points. However, in response to the other parties' initial briefs, Staff lays out its points in opposition.

DISCUSSION

I. The surrebuttal testimony of Kristi Savage-Clarke should not be stricken.

OPC renews its motion to strike the surrebuttal testimony of Missouri Department of Natural Resources (MDNR) manager Kristi Savage-Clarke on the basis that MDNR did not request intervention in this case and that OPC was unable to conduct discovery on her testimony.[2] OPC initially filed this motion on September 27, 2019, and the

[1] Missouri Public Service Commission, *Report and Order*, In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief., 266 P.U.R.4th 1 (July 1, 2008) (quoting Re Union Electric Company, Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005)).
[2] OPC's Initial Brief, P. 2-3.

Commission denied it, finding Ms. Savage-Clarke's testimony relevant and responsive to rebuttal testimony.[3]

Commission Rule 20 CSR 4240-2.130(7)(D) provides that surrebuttal testimony "shall be limited to material which is responsive to matters raised in another party's rebuttal testimony." The Commission's rule does not require a witness to be a company employee. Ms. Savage-Clarke's testimony is clearly relevant and responsive to the rebuttal testimony filed by Mr. DeWilde, Mr. Sayre, and Mr. Justis. The Commission should continue to deny this motion.

II. Arguments raised by OPC and the Association regarding public detriment are without merit.

In applying the "not detrimental to the public" standard, OPC and the Association raise the specter of large rate increases directly resulting from the sale of the Port Perry systems to Confluence. They also state that the Commission must consider the Association's proposal for the Lake Perry Service Company to own and operate the utilities. OPC's and the Association's arguments can be summarized in three main points: 1. The Commission must compare Confluence's Application to the Association's proposal in order to determine whether a detriment would occur as a result of the acquisition; 2. Confluence's reports regarding improvements are duplicitous and rates will rise under Confluence ownership; and 3. The history of Central States Water Resources, Inc. (CSWR) affiliates requesting relatively high costs of debt is a detriment to the public.

[3] Missouri Public Service Commission, *Order Regarding Four Motions to Strike Testimony, Request to Limit Issues, Request for Discovery Sanctions, and Request to Delay Evidentiary Hearing,* WA-2019-0299 (Oct. 2, 2019) P. 6.

A. Consideration of alternative proposals.

In its initial brief, Confluence states that its acquisition of the Port Perry water and wastewater assets is not only "not detrimental" to the public interest; it is a benefit to the Port Perry systems, customers, and public interest compared to the status quo and it is MDNR's preferred operator.[4] Staff agrees. The existence of another interested purchaser of these systems, even one that would not include a return on equity in their rates, does not necessarily cause Confluence's Application to be detrimental to the public interest. The other parties, however, view otherwise, believing that an alternative, interested purchaser must be considered. Without any authority, OPC states that "[t]he Commission needs to consider the alternative buyers for a system, even if it ultimately determines that those alternative bids do not render the current proposal 'detrimental to the public interest.'"[5] The Association asserts that "[f]oreclosing [the Association's proposal] before the proposed non-profit service company has had an opportunity to sit at the bargaining table is detrimental to the public interest."[6] OPC and the Association essentially request that the Commission be part of the sale process, infringing on PPSC's authority to manage its company.[7] Their contention that the Commission must consider other interested purchasers – even if the seller does not want to sell to them – is a restriction on the seller's right to sell its property that is in excess of that prescribed by the courts in the "not detrimental to the public" standard.

---

[4] Confluence's Initial Brief, P. 3.
[5] OPC's Initial Brief, P. 13.
[6] Association's Initial Brief, P. 20.
[7] "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." State of Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, ___ (1923). "It is obvious that the P.S.C. has no authority to take over the general management of any utility." State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n, 600 S.W.2d 222, 228 (Mo. App., W.D. 1980).

It is important to remember that the Association has no contract to purchase the systems, and the Association's offer states that it is contingent upon the PPSC-Confluence transaction not consummating.[8] In other words, according to the terms of the Association's own proposal, PPSC should not consider the Association as a potential purchaser unless Confluence cannot complete the sale. Nevertheless, OPC and the Association believe that Confluence's and the Association's proposals should be compared in order to determine which will better serve the public. By misappropriating the "no detriment" standard, OPC and the Association attempt to move the goalposts. However, the Missouri Supreme Court clearly stated in *State ex rel. St. Louis v. Public Service Commission* that it is not the Commission's role to determine the "better" purchaser in these cases: "It is not [the Public Service Commissions'] 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."[9]

OPC's reliance on *State ex rel. Kansas City Power & Light Co. v. Public Service Commission* and *Application of the Gas Service Company/Application of Missouri Public Service Company* is misplaced.

In support of its contention that the Commission must consider alternatives when determining whether a utility sale would be detrimental to the public interest, OPC relies upon *State ex rel. Kansas City Power & Light Co. v. Public Service Commission* and *Application of the Gas Service Company/Application of Missouri Public Service*

[8] "Lake Perry desires to purchase the Systems from Port Perry and agrees to purchase the Systems from Port Perry in the event Port Perry and Confluence Rivers fails for any reason to consummate the Confluence Rivers Agreement." Ex. 309, DeWilde Rebuttal, Sch. RD-8, "Asset Purchase Agreement," P. 1
[9] *State ex rel. City of St. Louis v. Public Serv. Com'n,*73 S.W.2d 393, 400 (Mo. banc 1934).

Company.[10] While OPC is correct that the Commission considered competing offers in these cases,[11] they are easily distinguishable from the present case. Most prominently, these appellate cases involved requests for new CCNs for territory without service, not to dispose of assets in a territory already with service, as is the case here. *State ex rel. Kansas City Power & Light, Co.* involved building a new transmission line to a gas company pumping station. *Application of the Gas Service Company/Application of Missouri Public Service Company* involved two competing companies wanting to build a new gas line. As Staff stated in its initial brief, while the application standard for awarding a CCN involves a public interest determination, it is not the same as a "no detriment" standard.[12]

In the matter at hand, there is no new system to be constructed; the systems at issue already exist. This is an enormous distinction. The Missouri Supreme Court in *State ex rel. Kansas City Power & Light Co.* distinguished between CCNs for new service and a utility moving into an established territory:

> It is contended that to allow the St. Joseph Company to serve this station permits competition with established service in occupied territory and duplication of investment and service in violation of correct principles of regulation. Most of the cases cited, by protestants, in this connection, deal with facts showing an attempt by one utility to enter a field already being adequately served by another company with an established service, so that to admit the applicant would result in injurious competition, economic waste,

[10] OPC's Initial Brief, P. 7-8.
[11] *Id.*
[12] Staff's Initial Brief, P. 6-7. The Court in *State ex rel. Intercon Gas, Inc. v. Public Serv. Com'n* explained the standard to apply in new CCN cases:

> The term "necessity" does not mean "essential" or "absolutely indispensable," but that an additional service would be an improvement justifying its cost. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate.

848 S.W.2d 593, 597-598 (Mo.App. 1993).

> and loss and duplication of investment and service. Such is not the situation here, but, as we have heretofore pointed out, this pump station constitutes a new and distinct field of electrical service in that territory.[13]

It makes sense in a brand new CCN application case for the Commission to consider providers of the same or similar utility service available in the service area requested, because, only in an extraordinary situation would the Commission want to authorize new construction that would overlap existing utility systems and cause the "injurious competition, economic waste, and loss and duplication of investment and service" described in the above quote. However, there is no danger of that happening here, because PPSC is currently the only authorized utility to serve the service area at issue in this case. The Commission already granted PPSC a CCN and thus the service is already "necessary or convenient for the public service."

Additionally, *Application of the Gas Service Company/Application of Missouri Public Service Company* is further distinguishable from the present case because it involved several applications for CCNs from parties requesting Commission approval to construct a new natural gas pipeline. In the present case, there is only one application before the Commission. The Association never submitted an application.

For these reasons, *State ex rel. Kansas City Power & Light Co. v. Public Service Commission* and *Application of the Gas Service Company/Application of Missouri Public Service Company* can be easily distinguished from the issues presented to the Commission in this matter. The Missouri appellate courts and this Commission have

[13] *State ex rel. Kansas City Power & Light Co., v. Public Serv. Com'n,* 76 S.W.2d 343, 353 (Mo. 1934).

consistently applied the standard of "not detrimental to the public interest" in all cases involving the transfer or sale of water and wastewater utility assets.[14]

> Case number EO-2008-0046, *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.*, is distinguishable.

The Association also points to case number EO-2008-0046, as support for its contention that the Commission must consider 'hypothetical' transactions to measure potential detriment to the public interest.[15] However, the Aquila MISO/SPP case is unique and concerns a situation much different than that in this case. The following findings of fact included in the Commission's *Report and Order* in that case provide background:

> 5. Aquila is already a member of Southwest Power Pool. Its predecessor companies, Missouri Public Service Company and St. Joseph Light and Power joined that organization in 1951 and 1958, respectively. Aquila currently contracts with Southwest Power Pool for certain services. Specifically, Aquila receives tariff administration, OASIS administration, available transmission capacity and total transmission capacity calculations, scheduling agent, and regional transmission planning from Southwest Power Pool. Aquila does not, however, participate in Southwest Power Pool's EIS market.[16]
>
> * * *
>
> 8. In 1999, Aquila, then known as UtiliCorp, agreed to merge with St. Joseph Light & Power Company. That proposed merger required the approval of both this Commission and FERC. In its order approving the merger, FERC required the merged company to file a plan to join an RTO. At the time,

[14] *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo.App. E.D. 1980), and *State ex rel. City of St. Louis v. Public Serv. Com'n*, 73 S.W.2d 393, 399 (Mo. banc 1934).
[15] Association's Initial Brief, P 3-4.
[16] Missouri Public Service Commission, *Report and Order*, In the Matter of the Application of Aquila Networks-MPS and Aquila Networks-L&P for Authority to Transfer Operation Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc., EO-2008-0046 (Oct, 9, 2008) P. 6.

Midwest ISO was the only FERC approved RTO in the area, so Aquila entered into an agreement to join Midwest ISO on July 16, 2001.[17]

* * *

13. In its testimony, Aquila confirmed that it filed the application currently before the Commission to satisfy its obligation under the 2003 FERC settlement with Midwest ISO. At the hearing, Aquila's witness, Dennis Odell, indicated Aquila's concern that it would be required to pay financial penalties to Midwest ISO if it breached its contractual obligation to again apply for membership in Midwest ISO. When asked at the hearing whether Aquila would have applied for membership in Midwest ISO in the absence of its obligation under the 2003 settlement, Odell replied that he did not know.[18]

* * *

14. As part of its application, Aquila submitted the results of a cost-benefit analysis performed by CRA International. CRA is an independent consulting firm hired by Aquila to analyze the costs and benefits of Aquila's various options for joining, or not joining, an RTO. After consulting with a stakeholder group that included Midwest ISO, Southwest Power Pool, Staff, and Public Counsel, Aquila instructed CRA to consider three scenarios: membership in Midwest ISO; membership in Southwest Power Pool; and a move to a stand-alone status in which Aquila would perform transmission and reliability related functions on its own. CRA completed the study on March 28, 2007, and Aquila submitted a copy of the study as part of its application, and as an attachment to Dennis Odell's direct testimony.[19]

* * *

25. One other development that occurred during the course of this case will have a definite impact on the possible benefits to Aquila from joining Midwest ISO. On July 1, 2008, in Case No. EM-2007-0374, the Commission approved the acquisition of Aquila by Great Plains Energy Incorporated, the parent company of Kansas City Power & Light Company (KCPL). KCPL is currently a member of Southwest Power Pool.[20]

---

[17] *Id.* at 7.
[18] *Id.* at 8.
[19] *Id.* at 9.
[20] *Id.* at 13-14.

The Commission's decision also included the following:

> Nevertheless, Aquila has asked for permission to join Midwest ISO. Under other circumstances, the Commission might be inclined to defer to the business judgment of Aquila if there were a good reason to do so. However, it is clear that the only reason Aquila has applied to join Midwest ISO instead of Southwest Power Pool is its obligation to do so under a six-year-old agreement with Midwest ISO in a case before FERC.[21]
>
> Aquila is now free to apply to the Commission for authority to join whichever RTO best meets its needs.[22]

It is important to note that Aquila was already a member of SPP, the agreement to join MISO had arisen many years before and under much different circumstances, Aquila itself provided the evidence of the various options it had for RTO membership, and, more recently, Aquila and KCPL had announced a transaction where Aquila would be purchased by KCPL, an existing member of SPP. This current case bears little resemblance to the asset transfer case that was before the Commission in case number EO-2008-0046, and should not be relied upon.

The Commission should of course heed the guidance of the Court in *AG Processing,* and consider and decide all necessary and essential issues;[23] should the Commission believe aspects of the Association's proposal show detriment regarding Confluence's Application, it should consider them in making its decision. However, again, it is not the role of the Commission in this matter to choose the most beneficial outcome by weighing competing proposals against each other. As the Missouri Supreme Court stated in *Stated ex rel. City of St. Louis*, "it is not [Public Service Commissions'] province

[21] *Id.* at 18.
[22] *Id.* at 19.
[23] *State ex rel. AG Processing, Inc. v. Public Service Commission of the State of Missouri*, 120 S.W.3d 732, 736 (Mo. Banc 2003).

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."[24] What the Commission must do is consider all possible benefits and detriments to approval of Confluence's Application on its own merits, and determine whether the proposed transaction is likely to be a net benefit, or a net detriment to the public.[25]

B. Proposed Improvements.

In its initial brief, the Association focuses on "iterative and duplicitous engineering reports" implying that Confluence is attempting a slight of hand in presenting different reports for different purposes.[26] The Association states that to obtain MDNR approval, Confluence gave MDNR a sealed engineering report dated July 11, 2018, listing ** _____ ** in water system repairs. Confluence also states that in response to a discovery request (DR) in case number WM-2018-0116 Confluence provided Staff with an unstamped report listing ** _____ ** in water system repairs[27] and Confluence witness' Todd Thomas' Direct Testimony (dated November 19, 2018) lists ** _____ ** in water system repairs.[28] Confluence explained the discrepancy in its

[24] *State ex rel. City of St. Louis* at 400.
[25] Missouri Public Service Commission, *Report and Order*, 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, EO-2004-0108 (Oct. 6, 2004) P. 42.
[26] Association's Initial Brief, P. 9-12.
[27] The DR question does not request an engineering report: "Please provide the feasibility study containing plans and specifications for the utility system and estimated cost of Port Perry during the first three (3) years of construction; plans for financing; proposed rates and charges and an estimate of the number of customers, revenues and expenses during the first three (3) years of operations. See 4 CSR 240-3.305((1)(A)5 and 4 CSR 240-3.600(1)(A)5."
[28] Direct Testimony of Todd Thomas, WM-2018-0116, P. 21:10 – 22:13.

> Q. Does Confluence Rivers have a plan to remedy these issues?
> A. Yes. Confluence Rivers plans to address wastewater issues by replacing the defective sprinkler heads, replacing the automated valving for the application area, and repairing fencing as needed. Confluence Rivers plans to address water issues in the most cost-effective manner by drilling a new well at the existing ground water storage tank and building a new well at the existing ground water storage tank and building a well house that

response to the Association's DR 4.1, stating that its initial report included the cost for a third well, but later reports eliminated the well.[29]

Mr. Cox consistently discussed the well change decision in his surrebuttal testimony and at the hearing. In his surrebuttal testimony he stated that Confluence planned to drill the third well to facilitate disinfection and later discovered that although water from well one is being disinfected, MDNR does not require disinfection for the Port Perry system.[30] He explained that plans and estimates at this stage are not conclusive and it is CSWR practice to operate acquired systems to see whether improved operations may alleviate the need for repairs.[31] At the evidentiary hearing Mr. Cox again explained the difference between the two estimates was due to the cost of installing a third well to facilitate disinfection.[32] Staff recognized the difference in these two estimates and although they noted concern, found them reconcilable.[33] Nevertheless, according to the Association, "[u]sing one report for one purpose and another unsealed report for another is the height of self-dealing."[34]

There is no Commission rule or statute requiring a party to submit stamped engineering reports. Looking at the document which the Association purports to be an

---

> will house a chlorination system that provides the second source of chlorination. The water pumped from the new well will be chlorinated and pumped into the ground storage tank. This project will ensure that in the event a power outage, an adequate supply of water is available that is chlorinated with proper detention time. This will also alleviate any concerns of inadequate water turn over in the ground storage tank.
> Q. What is the projected cost of those improvements?
> A.. The estimated cost of such improvements is approximately ** _____ ** for the water system upgrades and ** ____ ** for the water sewer system upgrades.

[29] Ex. 307, Justis Rebuttal, Sch. GJ 06.
[30] Ex. 2. Cox Surrebuttal, P. 12:1-7.
[31] *Id.* at 12:8-12.
[32] Tr: 50:23 – 52:25.
[33] Ex. 105, Roos Surrebuttal, P. 2:1-9.
[34] Association's Initial Brief, P. 11.

engineering report,[35] there is nothing stating that it is an engineering report. It is titled "Port Perry Water System Water Report" and its introduction reads that "[t]his report will discuss the recommendations needed to meet those Design standards."[36] An engineering report conveys technical information with graphical depictions of design and associated data. This report does not contain any construction specifications. It describes the system and recommends improvements and upgrades. It is a preliminary report intended to move Confluence toward a final technical discussion. It is arguably not an engineering report and therefore, would not, even in its final version, require a stamp.

But even if the report is an engineering report, not all engineering reports require an engineer's stamp. At the hearing, there was discussion with Mr. Sayre about engineers' requirements to stamp their reports:

> **Judge Hatcher:** Something is just nagging at me about the signed and the sealed. Is there any requirement that when engineers produce a report that it needs to be sealed?
> **Mr. Sayre:** If that report is being published and being for consumption by the public or your client and it involves engineering data, then my interpretation from my dad, who is also an engineer, and my company is that you shall seal that work. If it is preliminary, then you sign and seal it and stamp it preliminary, which to Chairman Silvey's point, you know it is still preliminary, then you sign and seal it and stamp it preliminary or draft, but you know who the design professional is that's responsible for that work.[37]

Commission Kenney had follow up questions:

> **Commission Kenney:** I didn't know that you answered his question. Is there -- I know you are a company. I understand that. Is any violation or ethics rule that's broken when they don't seal it? Is there any law that was broken?
> **Mr. Sayre:** I am not a lawyer.
> Q: But you know -- you are licensed engineer?
> A: In my opinion, again --

[35] Ex. 307, Justis Rebuttal, Sch. GJ 04.
[36] *Id.* at Sch. GJ 04, P. 2.
[37] Tr. 224:16 – 225:1.

> Q. I don't want your opinion. I'm not asking for your opinion. I'm just asking for -- whether there's -- if it's a violation of any law?
> A. It's a violation of a standard for the Missouri Society of Professional Engineers.[38]
> Q. So it is a standard for the Missouri Society of Professional Engineers?
> A. And they adopt the National Society of Professional Engineers.[39]

Missouri law requires only final engineer technical submissions be stamped. Section 327.411.1, RSMo states that professional engineers "shall have a personal seal in a form prescribed by the board, and he or she shall affix the seal to all final technical submissions." Furthermore, § 327.411.4, RSMo states that "[n]othing in this section, or any rule or regulation of the board shall require any professional to seal preliminary or incomplete documents." Although it may be customary at his company for all versions of all reports to be stamped, when twice given the opportunity, Mr. Sayre did not inform the judge and the Commission that Missouri law does not require all engineering reports to be signed, only those that are final. It is the Association's testimony that is misleading.

OPC claims that the Association's repairs will be less than Confluence's because "Lake Perry intends to make use of local resources to minimize costs" and has an incentive to be thrifty.[40] In response to the obvious argument that the parties' reports show the Association's repair estimate is more than double Confluence's, OPC claims that "given that Lake Perry's initial estimates were lower than Confluence Rivers, its re-assessed costs are likely to be less as well."[41] Staff is unsure what "initial estimates" OPC

[38] Information about the Missouri Society of Professional Engineers (MSPE) can be found at mspe.org. MSPE is a trade advocacy and educational organization. Membership is voluntary, and it does not promulgate state regulations governing professional engineers.
[39] Tr. 225:17 – 226:6.
[40] OPC's Initial Brief, P. 17.
[41] *Id. at* 18.

refers to, because all of the Association's cost estimates are in Mr. Sayre's report.[42] Perhaps OPC is referring to the phases of work described in Mr. Sayre's report, and in that case, it fails to consider the project as a whole. At any rate, Confluence's improvements would require Commission approval before their costs are recovered in rates; there would be no oversight over the Association's improvements or rates.

The Association also cites a rate analysis of CSWR systems for the proposition that lot owners' rates will increase dramatically.[43] The most dramatic increase was at Confluence's Hillcrest systems. Ms. Savage-Clarke testified to the troubled nature of the Hillcrest systems – people could not sell their homes because lenders became aware that the systems had major environmental issues.[44] Staff understands that customers do not favor rate increases. At the same time, Ms. Savage-Clarke testified that safe and adequate service does not necessarily equate to the lowest rates. She testified that property owners' associations and non-profits often do not make prudent investments in infrastructure in an attempt to keep rates low. "The longer a system is allowed to deteriorate, the more expensive upgrades can be in the long run for customers."[45] Focusing on rates in a vacuum is misguided.

It is important to consider, that while a future rate increase may be likely, Confluence is not seeking an immediate rate increase in this proceeding. Further, it has a clear plan for improvements to the systems that are necessary to ensure safety and quality services to customers. Confluence's affiliates have consistently provided safe and

[42] Ex. 308, Sayre Rebuttal, "Preliminary Engineering Report Summary," Section 4.0.
[43] Association's Initial Brief, P. 17-18.
[44] Tr. 111:15 – 112:25.
[45] Ex. 3, Savage-Clarke Surrebuttal, P. 10:14 – 11:12.

adequate service, and have proven they have the technical, managerial and financial capability to operate water and wastewater systems. And finally, a regulated system is subject to Commission oversight so there will be opportunities to review any improvements or other costs which are sought to be included in rates going forward. Considering these benefits, along with the preliminary cost estimates for necessary repairs to the Port Perry systems, Staff fails to see a net detriment.

C. Confluence's Financing.

Public Counsel contemplates the rate of debt at which Confluence could, in the future, secure from the Commission as a potential detriment to the public interest and references the returns of equity Confluence's affiliates have received.[46] It is important to note that Confluence has not included a request for financing in this case, however, Confluence may request long-term financing in the future. However, OPC ignores the reality that should the Commission approve Confluence's Application, the Commission must approve any future request for secured long-term debt.[47] Further, any recovery of the costs of such debt will be reviewed by this Commission in a future rate case.

OPC and the Association continue to ignore the fact that Confluence's parent company, CSWR, has a new ownership structure[48] which will bring down Confluence's cost of debt. OPC witness Keri Roth testified that for the Indian Hills Utility Operating Co., Inc., the latest rate case for a CSWR affiliate, Confluence initially requested a 14% cost of debt rate, while the Commission approved a rate of 6.75%.[49] While OPC cites the Indian Hills case as evidence of potentially excessive rates of debt, in reality, the Indian

[46] OPC's Initial Brief, P. 17.
[47] Section 393.200, RSMo.
[48] Association's Initial Brief, P. 16-17.
[49] Ex. 200, Roth Surrebuttal, P 5:5-6 and Tr. 273:1-10.

Hills case is evidence of the benefit of Commission oversight; while a high rate of debt was requested, the Commission felt it was unreasonable, and ordered a significantly lower rate.

Since then, CSWR's new ownership structure has taken effect. The Commission discussed it approvingly in case number WM-2018-0119:

> The Commission finds that the Company's ownership restructuring, as set forth at page 2, paragraph 5 of the Stipulation, has improved the Company's financial status. Its new ownership structure should facilitate (i) a move toward a 50-50 mix of equity and debt for its capital structure in a future rate case; (ii) obtaining debt financing that will result in a lower cost of debt than the rate contained in the Company's initial financing application; and (iii) obtaining debt financing that will result in a debt instrument that does not contain a make whole penalty.[50]

Confluence's cost of debt should be reduced in the future.

Regarding Association financing, OPC asserts that the Association has "secured commitments" for debt financing with a rate of approximately 8.65%.[51] The Association boasts that it "obtained very attractive debt financing terms with its very first attempt" and that the weighted average cost of capital over 10 years is approximately 6%.[52] As Staff writes on pages 18-19 of its initial brief, Association financing is far from secure. The Association has no cash, it has no income, and it has no secured financing. The initial purchase is conditioned upon the Association receiving $300,000 cash from lot owner-investors to purchase a certificate of deposit and leveraging that into a bank loan with a $300,000 balloon payment in three years. The Association hopes to finance the balloon

[50] Missouri Public Service Commission, *Order Approving Stipulation and Agreement and Granting Certificates of Convenience and Necessity*, In Re the Application of Confluence Rivers Utility Operating Co., Inc. WM-2018-0116 (Feb. 14, 2019) P.5.
[51] OPC's Initial Brief, P. 16-17. This rate is composed of the bank proposed interest rates of 3.65% and 4.45%. The Association expects a return of 2.5% on the CD. The Association will pay "investors" a return of 7.5%. Ex. 307, Justis Rebuttal, P. 10:3-13. It is not clear whether paying investors a return will jeopardize the Association's nonprofit status.
[52] Association's Initial Brief, P. 17.

payment in three years with a commercial loan, and later will seek to finance necessary repairs and delayed maintenance with a United States Department of Agriculture loan. All Association financing is conjecture. Staff would add that not included in the Association's budget are funds for this litigation, which the Association has not budgeted.[53]

While OPC and the Association focus their arguments on the fact that there is a potential for a rate increase in the future should Confluence be granted the authority to acquire the Port Perry assets, these parties fail to acknowledge that the determination of whether an application is "not detrimental to the public interest" involves a balancing test of the net benefits and the net detriments that could or will result from approving a specific application of acquisition.[54] In fact, these parties fail to identify any potential benefits, despite the track record of CSWR affiliates rehabilitating systems in this state. Regardless, the benefits of approving Confluence's application are clear. They include: 1. The Application is presently before the Commission and will result in immediate acquisition once the Commission approves it; 2. Confluence's affiliates have a history of providing safe and adequate service; 3. Confluence's affiliates have proven they have the technical, managerial and financial capability to operate water and sewer systems; and 4. A regulated system is subject to Commission oversight so there will be opportunities to review any improvements or other costs which are sought to be included in rates going forward.[55] As stated supra, the mere fact that a proposed transaction is not the least cost

[53] Tr. 311:11-25.
[54] Missouri Public Service Commission, *Report and Order*, 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, EO-2004-0108 (Oct. 6, 2004) P. 42.
[55] Section 393.190, RSMo.

alternative or will cause rates to increase is not detrimental to the public interest when the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.[56] In the matter at hand, the benefits of the acquisition clearly outweigh any detriment.

CONCLUSION

As stated above, OPC and the Association eagerly point out potential detriments to Confluence ownership, because they cannot see beyond their misguided argument that the Commission must consider alternative purchasers. They are quick to invent scenarios that they purport are evidence of detriment, such as claiming that Confluence thwarted their purchase of the systems.[57] This was simply a matter of Confluence offering more money for the systems with the present ability to purchase them. The Association's offer to purchase is more than ** _____ ** less than Confluence's, and the Association has no cash or financing.[58] Moreover, although the Association became aware of Confluence's Application in early 2018,[59] it did not form the Lake Perry Service Company until February, 2019,[60] and it did not submit its offer to PPSC until March, 2019.[61] The Association had the same opportunity as anyone else to purchase the systems, but it did nothing until the PPSC-Confluence transaction was nearly complete. And even after it discovered the PPSC-Confluence transaction, the Association failed to take substantive

[56] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.,* 266 P.U.R.4th 1 (July 1, 2008) (quoting *Re Union Electric Company,* Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005)).
[57] OPC's Initial Brief, P. 13 and Association's Initial Brief, P. 15.
[58] OPC claims that the Association has significant cash reserves. OPC's Initial Brief, P. 16. In reality, these "reserves" are borrowed funds and the amount is contingent on PPSC accepting the Association's offer, which is unlikely because it is more than ** _____ ** less than Confluence's.
[59] Ex. 309, DeWilde Rebuttal, P. 4
[60] *Id.* at 5.
[61] *Id*. at Sch. RD 8, "Asset Purchase Agreement."

action for another year. This slowness is not indicative of motivated purchasers and operators. Now, two and a half years after PPSC-Confluence signed their purchase agreement, OPC and the Association attempt to nullify a negotiated contract.

The fact of the matter is that Confluence has substantial experience and a history of MDNR compliance. As the owner and operator of the Port Perry systems, Association customers with enjoy more than adequate and safe service. When the requisite benefits are considered, Confluence's acquisition of the PPSC assets and accompanying CCNs is not detrimental to the public interest and should be approved by the Commission, with Staff's recommended conditions.

Respectfully submitted,

/s/ Karen E. Bretz
Karen E. Bretz
Senior Counsel
Missouri Bar No. 70632
Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
573-751-5472 (Voice)
573-751-9285 (Fax)
Karen.Bretz@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been e-mailed to all parties and/or counsel of record on this 7th day of November, 2019.

/s/ Karen E. Bretz