

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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

**RESPONSE TO LPLOA’S FIRST MOTION TO STRIKE**

**COMES NOW** Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers” or “Company”), and, in response to the Lake Perry Lot Owners Association’s (“LPLOA”) *Motion to Strike and for Other Sanctions* (“LPLOA Motion”), states as follows to the Missouri Public Service Commission (“Commission”):

1. On September 20, 2019, the LPLOA Motion was filed with the Commission. The LPLOA requests that certain specific statements in the direct testimony of Confluence Rivers witnesses Josiah Cox and Todd Thomas be stricken. LPLOA further makes allegations concerning deposition subpoenas issued to Mr. Yamnitz and Mr. Moll and requests “sanctions” related to those subpoenas.

2. First, while the deposition situation is not the primary stated reason for the LPLOA Motion, Confluence Rivers would like to add to the background surrounding the depositions referenced by the LPLOA Motion. A key fact that is left out of the LPLOA Motion is that an objection to those depositions was provided to all parties in this case, including LPLOA’s counsel, on August 21, 2019, by Michael Pendergast, the attorney for Mr. Yamnitz and Mr. Moll (*See Appendix A*). At that point, because Mr. Yamnitz and Mr. Moll are not parties to this case, Commission Rule 20 CSR 4240-2.100(3) and (5) (*See Missouri Rule of Civil*

Procedure 57.09(c) Subpoena to a Non-Party<sup>1</sup>) would require LPLOA to take further steps to either resolve the objections with the individuals or bring the objections before the Commission.

3. Commission Rule 20 CSR 4240-2.100(3) provides that “objections to a subpoena or subpoena duces tecum or motions to quash a subpoena or subpoena duces tecum shall be made within ten (10) days from the date the subpoena or subpoena duces tecum is served.” Such objections were provided by Mr. Yamnitz and Mr. Moll’s attorney in a timely manner. The next step, in the case of a non-party, is to bring the objections before the Commission. Commission Rule 20 CSR 4240-2.100(5) provides for consequences only where there is a failure to comply with a subpoena or subpoena duces tecum “after objections or a motion to quash have been determined by the commission.” Counsel is unsure what steps were taken to discuss the objections made by the witnesses. However, LPLOA did not bring the matter before the Commission for a ruling on the objections.<sup>2</sup>

4. As to the specific statements that the LPLOA Motion asks be stricken, the LPLOA Motion alleges that the statements are hearsay and that the witnesses “attempt to speak for the owners of Port Perry Service Company, Mr. Yamnitz and Mr. Moll, with statements presented for the truth of what is being stated.” (LPLOA Motion, para. 8)

5. The three statements from Mr. Cox’s direct testimony identified by the LPLOA Motion represent his expert opinions related to the existing operations at Port Perry Service Company and the owners’ motivations. His extensive experience in inspecting, owning and

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<sup>1</sup> “A non-party commanded to produce and permit inspection and copying may serve the party who issued and served the subpoena with a written objection to inspection and copying of any or all of the designated items. . . . If a timely and specific objection is made, the party who issued and served the subpoena shall not be entitled to inspect or copy the subpoenaed items except pursuant to an order of the court. Upon notice to the non-party commanded to produce, the party who issued and served the subpoena may move at any time for an order to compel production.”

<sup>2</sup> It further should be noted that the subpoenas attached to the LPLOA Motion concern depositions that were cancelled by the LPLOA (*See* EFIS Item No. 23 – Notice Cancelling Deposition and Subpoena Duces Tecum).

operating water and sewer systems, and negotiating with owners, allows him to provide his opinion on such matters.

6. The statement from Mr. Thomas concerning an inspection of the well on March 2, 2018, and issues associated with the existing well is similarly a statement of his expert opinion, in this case, based on a well inspection performed for the Company. Mr. Thomas is an engineer and has many years of experience operating water and sewer systems. Given that training and experience, he may provide his opinion on matters such as the sufficiency of an existing well.

7. Lastly, the LPLOA Motion alleges that “Port Perry Service Company” “has violated a subpoena of the Commission.” First, as stated above, it appears there is no violation of a subpoena. However, further, “Port Perry Service Company” was not served with a subpoena; Mr. Yamnitz and Mr. Moll were served subpoenas individually. The LPLOA Motion then requests sanctions against “the parties to the agreement for violating the subpoena,” by striking testimony provided by Confluence Rivers. Confluence Rivers was not served any subpoena, did not violate any subpoena, and, consequently, there is no basis to sanction Confluence Rivers or strike its testimony for anything related to the deposition subpoenas.

**WHEREFORE**, Confluence Rivers respectfully requests the Commission deny the LPLOA Motion to Strike.

Respectfully submitted,



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**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 September 30, 2019, to the following:

Office of the General Counsel  
[staffcounsel@psc.mo.gov](mailto:staffcounsel@psc.mo.gov)  
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David Linton  
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**Dean Cooper**

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**From:** Michael Pendergast <mcp2015law@icloud.com>  
**Sent:** Wednesday, August 21, 2019 4:58 PM  
**To:** dlinton@mlklaw.com; 'Bretz, Karen'; Dean Cooper; jhernandez@bydonlaw.com; 'Clizer, John'  
**Cc:** 'Jim Fischer'  
**Subject:** Objection Letter, File Nos. WA-2019-0299; SA-2019-0300  
**Attachments:** Objection to Notice of Deposition and Subpoena 082119.pdf

Good afternoon Counsel;

Attached for your information is a copy of our objections to the Notices of Deposition and Subpoena Duces Tecum directed at Mr. Michael Yamnitz and Mr. Brad Moll in the above-referenced proceedings. Please do not hesitate to contact me if you have any questions.

Sincerely,

*Michael C. Pendergast*  
*Of Counsel*  
*Fischer & Dority, P.C.*  
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[Mcp2015law@icloud.com](mailto:Mcp2015law@icloud.com)

August 21, 2019

Mr. David C. Linton  
314 Romaine Spring View  
Fenton, MO 6302  
[Dlinton@mlklaw.com](mailto:Dlinton@mlklaw.com)

Re: File Nos. WA-2019-0299 and SA-2019-0300; Objection to Notice of Deposition and Subpoena Duces Tecum

Dear Mr. Linton,

I am writing on behalf of Mr. Michael Yamnitz and Mr. Brad Moll, the owners of Port Perry Service Company, to object to the Notice of Deposition and Subpoena Duces Tecum that you served on August 12, 2019 in connection with the proceedings in File Nos. WA-2019-0299 and SA-2019-0300. The Notices purport to direct Mr. Yamnitz and Mr. Moll to appear for separate depositions on Wednesday, September 18, 2019 and to bring with them certain documents. Pursuant to Rules 57.09 (c) and 58.02 (e) of the Missouri Rules of Civil Procedure, Mr. Yamnitz and Mr. Moll object to both Notices of Deposition and the Subpoenas, including the requested inspection and copying of such documents, for several reasons: .

First, we renew the objections we made to the prior Notices of Deposition and Subpoenas submitted on behalf of the Lake Perry Lot Owners Association (LOA) since they apply with equal force to the information and documents sought in your August 12 discovery request. Specifically, we object because the information sought in the Subpoenas (and that would presumably be the subject of the depositions) can be obtained from entities, or their principals, that are already parties to the above-referenced cases (subject to normal discovery objections). There is accordingly no need to obtain them from Mr. Yamnitz or Mr. Moll. Moreover, the request to do so under these circumstances is contrary to your obligation under Rule 58.02 (e) to “take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.” Second, we object because the requests seek information that is not reasonably calculated to produce evidence of relevance to the issues in the above referenced cases. Finally, we object because a number of the requests are overly broad and burdensome in that they seek voluminous information without any limitation as to time or scope.

Item 1, for example, seeks information regarding any written agreements between Port Perry Land Company and Port Perry Service Company. Neither Mr. Yamnitz nor Mr. Moll are aware of what agreement or agreements this item may be referring to, especially relating to transactions that took place more between them approximately 17 years ago. To the extent any such agreement exists, however, it should be in the possession of Rich DeWilde, who is or was a principal of both the LOA, which is a party to the case, and the Port Perry Land Company. There should accordingly be no need to seek them from Mr. Yamnitz or Mr. Moll. We also object to item 1, because any such agreement, to the extent it exists, has no relevance to the value or operational integrity of the assets being purchased in this proceeding, the fitness of the proposed buyer to operate the systems being sold or other issue of actual relevance to this proceeding. Nor would any such agreement remain in effect once the sale of these assets is completed. Moreover,

the costs of such assets have been subject to prior review and auditing by the Staff of the Missouri Public Service Commission and have been reviewed again in this proceeding. Given these considerations, any such agreements are simply irrelevant to this proceeding.

In terms of item 2, any non-privileged documents, correspondence or communications between Confluence Rivers and Port Perry Service Company can be obtained from Confluence River, again subject to normal discovery objections. Again, there is no need to obtain such materials from Mr. Yamnitz or Mr. Moll.

So too can the information sought in Item 3 regarding the assets being transferred since they are an integral part of Confluence River's application in the above reference cases and are specifically referenced in the confidential Agreement for Sale of Utility Assets to which you have access. Moreover, requiring Mr. Yamnitz and Mr. Moll to reproduce every document in the Recorder of Deeds office relating such assets would serve no purpose and would be extremely burdensome on Mr. Yamnitz and Mr. Moll. This is particularly true since these are public documents that you can access on your own.

The 2019 Abatement Order on Consent issued by the Missouri Department of Natural Resources and referenced in Item 4 speaks for itself and no purpose would be served by delving into any privileged or confidential negotiations that may have been conducted in arriving at the Abatement Order. The Abatement Order can also be obtained from Confluence River since it will be abiding by the Order once the purchase of assets is completed.

Finally, we firmly believe that *none* of the requested documents are being sought in a good faith effort to address the core issues in these cases – namely whether Confluence Rivers is qualified and able to operate the systems being sold and whether the sale of the systems to Confluence Rivers would be detrimental to the public interest on the terms proposed. Instead, they are part and parcel of a cynical and ongoing effort by certain members of the LOA to use the Commission's regulatory process to thwart an eminently reasonable sale of utility assets from one regulated utility to another regulated. Amazingly, the end goal of this exercise is to acquire the utility services for themselves and then permanently remove them from the very Commission oversight that they are now relying on to advance this objective.

Unfortunately, this entire effort is being undertaken in an opaque and biased manner that only reinforces the need for continued oversight by the Commission. As you know, the Board of Trustees of the LOA sent out a letter urging lot owners to attend a "town hall" meeting and to sign a petition opposing the proposed sale of the water and sewer facilities to Confluence Rivers. The letter falsely stated that the sale would take "our utility services away from us". In fact, the sale will simply ensure that residents of Lake Perry continue to receive affordable and dependable utility service without the risk of higher utility-related assessments by the LOA and without the loss of the consumer protections afforded by Commission regulation. The leaders of the LOA have gone to considerable lengths to conceal these critical considerations from their members as evidenced, in part, by their sudden decision to convert these "town hall" gatherings into "closed" meetings when one of the lot owners supporting the sale asked to have a representative familiar with Commission regulation speak at the meeting and answer member questions. That request was summarily rejected and the representative was denied access to the meetings.

In light of these events, we consider your most recent discovery request to be nothing more than an attempt to harass two people who have worked diligently over the past decade and a half to build up and operate these utility businesses and to frustrate their basic right to sell those businesses to a very capable buyer. While the leaders of the LOA have pledged to spend up to \$100,000 in LOA resources on these kind of litigation tactics – money that could be used to pave roads and improve public areas at Lake Perry – we do not believe those resources, nor the limited resources of my clients, should be further squandered on unnecessary and irrelevant discovery requests.

Please do not hesitate to contact me if you have any questions or comments regarding the matters addressed in this letter.

Sincerely,

**/s/Michael C. Pendergast**

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Cc: Parties of Record

**Certificate of Service**

I hereby certify that a copy of this objection letter was electronically served on all parties of record to File Nos. WA-2019-0299 and SA-2019-0300 on this 21<sup>st</sup> day of August 2019.

**/s/Michael C. Pendergast**