

**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) **File No. WA-2019-0299**
Acquire Certain Water and Sewer Assets and for a)
Certificate of Convenience and Necessity)

STAFF’S INITIAL POST HEARING BRIEF

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

BACKGROUND

The subject water and wastewater utilities are currently owned by Port Perry Service Company, LLC (PPSC) and are located near Perryville, Missouri, on Lake Perry. Currently, the systems have approximately 370 water customers and 248 wastewater customers.¹ Because it no longer wishes to own the systems, PPSC negotiated the sale of the assets to Confluence Rivers Utility Operating Company, Inc. (Confluence).² The systems are not troubled, but they do require maintenance and repairs to ensure good operation and preserve their normal lives.³ Confluence filed its *Application and Request for Waiver* on March 29, 2019, requesting Commission authorization, pursuant to § 393.190, RSMo and 20 CSR 4240-10.105, to purchase

¹ Ex. 1, Cox Direct, P. 11:7-13.

² Ex. 1, Cox Direct, P.11:14-17.

³ Ex. 100, Dietrich Direct, Sch. ND-d2, P. 3. The water system has two wells. Well 1 does not properly chlorinate and requires a new chlorination system. Well 2 is a backup well, but it is nonoperational and not connected to the system. Well 2 requires an overhaul. The wastewater system is a no discharge system utilizing land irrigation. The treatment system consists of a four cell lagoon, and lagoon effluent is applied over an acre of land. Not all sprinklers work properly, creating standing polluted water. Fencing and signage around the wastewater lagoon is inadequate. Ex.1, Cox Direct, P. 12:11 –13:12 and Ex. 4, Thomas Direct, P 4:17 – 10:11 for descriptions and conditions of the systems. Kristi Savage-Clarke, a Missouri Department of Natural Resources (MDNR) environmental manager, stated that the wastewater system’s improperly working sprinklers would be a MDNR violation. Tr. 101:1 – 103:3 and Tr. 109:3-18.

PPSC's water and wastewater assets and acquire the accompanying CCNs. Confluence attached the purchase and sale agreement with PPSC to its Application.

On April 3, 2019, the Lake Perry Lot Owners Association (Association) moved to intervene. The Association is a group of lot owners who formed a nonprofit organization, the Lake Perry Service Company, with the goal to purchase and operate the systems. Most, but not all, lot owners, receive water and/or wastewater service from PPSC. The Association opposes the proposed sale to Confluence. The Lake Perry Service Company extended an offer to PPSC to purchase the systems, contingent on the PPSC-Confluence transaction not consummating.⁴ PPSC has not responded to the Association's offer.⁵ The Commission granted intervention on April 15, 2019.

Staff investigated Confluence's Application. Staff reviewed Confluence's proposed improvements and repair cost estimates. Consistent with normal practice in acquisition cases, Staff did not examine the prudence of Confluence's planned improvements. Confluence's planned improvements are preliminary, and could change in the future if and when it takes ownership of, and begins operating, the systems. Staff will examine the prudence of any improvements after they are put into service and the utility requests recovery of their investments in rates, consistent with the ratemaking process before this Commission. That being said, with the available information, Staff found Confluence's proposed improvements not unreasonable and consistent with similarly situated water and wastewater utilities.⁶

⁴ Ex. 309 DeWilde Rebuttal, Sch. RD 8, "Asset Purchase Agreement," P. 1.

⁵ Ex. 309 DeWilde Rebuttal, P. 10:15-16.

⁶ Ex. 105, Roos Surrebuttal, P. 3:9 – 4:17.

Staff determined that Confluence possesses the necessary technical, managerial, and financial (TMF) capacities to operate the systems and satisfies the requirements of the Tartan Factors.⁷ In summary, Staff opined that approval of the utilities' sale and CCN transfers is not detrimental to the public interest. Staff recommended that the Commission approve Confluence's Application, with recommendations as detailed in issue two of this brief.

The Office of the Public Counsel (OPC) and the Association responded to Staff's *Memorandum*. OPC and the Association believe that Staff insufficiently considered the Association's proposal to purchase and operate the systems and that "promotion of the public interest" necessitates consideration of the Association as an alternative operator.⁸

OPC and the Association requested an evidentiary hearing. In prefiled testimony the Association stated that it desires water and wastewater utilities that are "1) locally controlled and managed, 2) high quality in terms of water quality and customer service, and 3) provided at reasonable and affordable prices."⁹ OPC notes that Association members do not wish the systems sold to Confluence and have shown "they are another viable alternative to purchase the water and sewer systems." OPC also believes that rates under Confluence would be higher than those under the Association.¹⁰

⁷ The factors are referred to as the "Tartan Factors" or the "Tartan Energy Criteria." Missouri Public Service Commission, *Report and Order*, In re Application of Tartan Energy Company, L.C., 3 Mo. P.S.C. 173 (Sept. 16, 1994), 1994 WL 762883. The Tartan Factors weigh (1) the need for service, (2) the utility's qualification, (3) the utility's financial ability, (4) the proposal's feasibility, and (5) promotion of the public interest.

⁸ OPC, *Response to Staff Recommendation* (June 10, 2019) P. 2. Association, *Response to Staff Recommendation, Request for Hearing and Renewal of Its Motion to Dismiss of Lake Perry Lot Owners Association* (June 4, 2019) Para 8 – 12.

⁹ Ex. 309, DeWilde Rebuttal, P. 5:10-12.

¹⁰ Ex. 300, Roth Rebuttal, P. 2:18-20 – 3:2.

A local public hearing was held September 10, 2019, in Perryville, Missouri. An evidentiary hearing was held October 7 and 8, 2019.

DISCUSSION

I. Should the Commission find that Confluence’s acquisition of the PPSC’s water and wastewater assets and certificates of convenience and necessity are not detrimental to the public interest, and approve the transaction?

A. Introduction and Relevant Law

The transaction before the Commission is PPSC’s sale of its water and wastewater assets to Confluence and transfer of associated CCNs authorizing PPSC to provide service. Confluence’s acquisition of the Port Perry systems and CCNs would not be detrimental to the public interest, and the Commission should approve the transaction.

The Commission is familiar with Confluence, its affiliates, and its parent company, Central States Water Resources, Inc. (CSWR). CSWR owns 13 water systems providing service to approximately 2900 customers¹¹ and 22 wastewater utilities providing service to approximately 2800 customers.¹² Confluence and its affiliates provide safe and adequate services meeting Missouri Department of Natural Resources (MDNR) standards. Earlier this year, the Commission found Confluence’s acquisition of eighteen (18) separate water and wastewater systems to be “not detrimental to the public interest:”

The Commission finds that Josiah Cox is the President of Central States Water Resources, which is the managing entity of First Round CSWR, LLC, which is the holding company of other water and sewer companies. He will be the person managing the utilities. The Commission finds he has a good track record of acquiring and improving existing systems in Missouri to the benefit of the ratepayers.

¹¹ Ex. 1, Cox Direct, P. 6:2-5.

¹² Ex. 1, Cox Direct, P. 5:2-5.

...

With respect to the proposed sale of assets, the question presented is whether the sale will be “detrimental to the public interest.” The Commission finds that the proposed sale is not detrimental to the public interest. Considering the present troubled nature of the systems at issue, the Company’s sound track record in rehabilitating similarly situated systems, the Company’s ability to acquire, maintain, and operate the systems, and the statutory obligation of the Commission to ensure safe and adequate service, allowing the Company to acquire the Selling Companies’ assets per the terms and conditions of the Stipulation will not be detrimental to the public.¹³

Section 393.190.1, RSMo, requires the Commission to issue an order before a regulated utility may sell any part of its system necessary or useful in the performance of its duties to the public. The applicable standard is defined in caselaw. Perhaps ironically, one of the relevant appellate cases, *State ex rel. City of St. Louis v. Public Service Com’n*, involved a claim that local control was superior to out of state control. The City of St. Louis intervened in a utility transfer case, arguing it was against public policy for an unlicensed Virginia corporation to own two St. Louis utilities without an affirmative Commission finding that the acquisition is in the public interest. The Court disagreed, stating:

To uphold the appellant's contention we would have to read into this section that the commission cannot approve a sale of stock to a foreign corporation unless the commission affirmatively found that such purchase was in public interest. If the Legislature had such an intention, surely proper words showing such an intention would have been found in the act itself, “and the contrary intent is made conspicuous by their absence. The language actually used is so plain as to leave no room for construction. In such case we should not read into the enactment words that are not found therein either by express inclusion or by fair implication.” *Elsas v. Montgomery Elevator Co. et al.*, 330 Mo. 596, 50 S.W.(2d) 130, 133.¹⁴

¹³ Missouri Public Service Commission, *Order Approving Stipulation and Agreement and Granting Certificates of Convenience and Necessity*, WM-2018-0116 (Feb. 14, 2019) P. 5-6.

¹⁴ *State ex rel. City of St. Louis v. Public Serv. Com’n*, 73 S.W.2d 393, 399 (Mo. banc 1934).

The Missouri Supreme Court reiterated that the Public Service Commission Act's purpose is to protect the public.¹⁵ The Court accepted the Commission's finding that the transfers would have no effect on utility customers' service and allowed the sale to proceed. The Court emphasized the strength of the utility owners' rights, stating that "property owners should be allowed to sell [their] property *unless it would be detrimental to the public.*"¹⁶

The Court explained this standard:

To prevent injury to the public, in the clashing of private interest with the 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.'¹⁷

The Missouri Court of Appeals reiterated this standard in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, finding the "obvious purpose of [§ 393.190, RSMo] is to ensure the continuation of adequate service to the public served by the utility. The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."¹⁸ "The standard of 'not detrimental to the public' ... balances the rights of private investors to transfer their interests in a regulated

¹⁵ *Id.*

¹⁶ *Id.* at 400 (emphasis added). The Court stated: "The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny them an incident important to ownership of property." *Id.* (citations omitted). See also Missouri Public Service Commission, *Report and Order*, In the Matter of the Joint Application of Missouri Gas Company, et al., 3 Mo. P.S.C.3rd 216, 221 (Oct. 12, 1994) ("[T]he Commission is unwilling to deny private, investor-owned companies an important incident of ownership of property unless there is compelling evidence on the record tending to show that a public detriment will occur.").

¹⁷ *State ex rel. City of St. Louis* at 400 (internal citations omitted).

¹⁸ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo.App. E.D. 1980) (citing *State ex rel. City of St. Louis*, 73 S.W.2d at 400).

utility against the right of the public served by the utility not to be harmed by such a transfer.”¹⁹

In an acquisition case involving a transfer of assets to Union Electric Company, the Commission clarified the not detrimental to the public standard:

What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. 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.

...

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides sale [sic] and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission’s ultimate decision because detriments can be offset by attendant benefits. 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.²⁰

Staff applies the TMF capacities in considering whether the transfer of assets of an existing regulated water or wastewater utility to another would ensure adequate service.²¹ The Commission generally uses the Tartan Criteria in evaluating new certificates of convenience and necessity (CCN). Although Confluence does not request

¹⁹ *State ex rel. AG Processing, Inc. v. Pub. Serv. Com’n*, 2003 WL 1906385 at 7 (Mo.App. May 27, 2003, as modified) (citing *State ex rel. City of St. Louis*, 73 S.W.2d at 400).

²⁰ Missouri Public Service Commission, *Report and Order*, In Re Union Elec. Co., EO-2004-0108 (Oct. 6, 2004) P. 42-43.

²¹ Ex. 100, Dietrich Direct, Sch. ND-d2, P. 4-5.

a new CCN here, Staff posits that the Tartan Criteria, as well as the TMF capacities offer the Commission guidance, because the Commission has historically considered similar factors (such as the applicant's experience in the utility industry, service history, financial capacities, and ability to operate the assets efficiently and economically) in determining whether there is "substantial and competent evidence sufficient to find the proposed sale to be detrimental to the public interest sufficient to deny the sellers their incident of ownership."²²

C. Technical, Managerial, and Financial Capacity

As stated above, the TMF capacities consider the technical, managerial, and financial capacities of the acquiring utility.

i. Technical Capacity

No evidence was presented at the evidentiary hearing disputing Confluence Rivers' qualifications to provide service. OPC cannot reasonably dispute Confluence's technical capacity; it was recently a signatory to a unanimous stipulation and agreement in case number WM-2018-0116 approving Confluence's acquisition of eighteen (18) water and wastewater systems.²³

At the evidentiary hearing in this matter, Confluence witness Josiah Cox explained the company's technical capacity:

²² Missouri Public Service Commission, *Report and Order*, In the Matter of the Joint Application of Missouri Gas Company, et al., 3 Mo. P.S.C.3rd 216, 220-221 (Oct. 12, 1994) and Ex. 100, Dietrich Direct Testimony, Sch. ND-d2, P. 5-6

²³ Confluence Rivers Utility Operating Company, Inc., Office of the Public Counsel, Lake Perry Lot Owners' Association, and Staff of the Missouri Public Service Commission, *Unanimous Stipulation and Agreement*, WM-2018-0116 (Dec. 14, 2018). See also Tr. 179:11-15:

Mr. Johnson: Is it your opinion that Confluence Rivers has the technical capacity to operate a Port Perry system?

Mr. Justis: That is my belief. I don't know that for a fact, but I believe that's correct based on the information I have seen so far.

We have experience in the design and operation of water and sewer systems. Confluence Rivers intends to utilize a contract operator for plant operations, utilizing the services of appropriately qualified and licensed utility operators (for water and for sewer) ultimately supervised by me. The contract operator would undertake routine day-to-day inspections, checks, sampling, reporting, and meter reading for the water and sewer systems, as well as accomplish most system repairs and extraordinary operations tasks as needs arise, to address proper facility operations and customer service matters. All these activities would be tracked inside CSWR's computerized maintenance management system. Computerized maintenance monitoring also feeds in remote monitoring data from individual plants, which together with the maintenance data, integrate with a water information management system for all CSWR facilities.²⁴

As stated supra, the Missouri Court of Appeals has stated that the “obvious purpose of [§ 393.190, RSMo] is to ensure the continuation of adequate service to the public served by the utility.”²⁵ Kristi Savage-Clarke, a MDNR environmental manager, testified on behalf of Confluence that she and her staff have worked with CSWR.²⁶ She testified that systems improve once CSWR takes ownership, which helps public health and the environment.²⁷ CSWR has a track record of investing in improvements to keep its systems in compliance with Missouri law and regulations.²⁸

Ms. Savage-Clarke also explained that MDNR ranks water and wastewater systems by preferential order of owner. MDNR prefers Commission-regulated utilities, such as Confluence, over those owned by a property owners' association. She stated that higher ranked facilities typically have greater technical, managerial, and financial capacities than lower ranked ones. A higher ranked facility “is more likely to provide

²⁴ Ex. 1, Cox Direct, P. 8:3-17.

²⁵ *State ex rel. Fee Fee Trunk Sewer, Inc.*, 596 S.W.2d at 468 (citing *State ex rel. City of St. Louis*, 73 S.W.2d at 400).

²⁶ Tr. 77:14-22.

²⁷ Tr. 78:18 – 79:6.

²⁸ Ex. 3, Savage-Clarke Surrebuttal, P. 11:13 – 2:3.

consistent asset management, which will in turn better protect the interests of human health and the environment.”²⁹

As explained by Mr. Cox, and verified by Ms. Savage-Clarke, Confluence possesses the technical capacities to operate the systems.

ii. Managerial Capacity

Staff found that Confluence affiliates have the ability to manage its systems and provide adequate service to its customers.³⁰ Confluence customers are protected by Chapter 13 of the Commission’s rules regarding service and billing practices.³¹ Again, OPC cannot reasonably dispute Confluence’s managerial capacity, because it is a signatory to the unanimous stipulation and agreement in case number WM-2018-0116 approving a large Confluence acquisition.³² Mr. Cox explained the services CSWR offers to its customers: Customers have company access via customer service representatives during business hours and a 24 hour phone line for after-hours emergency calls. Service issue calls are transferred into a computerized maintenance management system and converted into work orders. Confluence customers will have a utility-specific webpage and social media page to keep them informed about their utility. Customers may pay bills by e-checks, debit card, and credit card.³³ Confluence will also utilize real time monitoring of the systems to ensure service stability.³⁴

²⁹ Ex. 3, Savage-Clarke Surrebuttal, P. 5:20 – 6:3.

³⁰ Ex. 100, Dietrich Direct, Sch. ND-d2, P. 4-5

³¹ Ex. 104, Parish Surrebuttal, P. 2:1-13.

³² Confluence Rivers Utility Operating Company, Inc., Office of the Public Counsel, Lake Perry Lot Owners’ Association, and Staff of the Missouri Public Service Commission, *Unanimous Stipulation and Agreement*, WM-2018-0116 (Dec. 14, 2018).

³³ Ex. 1, Cox Surrebuttal, P. 4:6-21 and Ex. 104, Parish Surrebuttal, P. 2:14-25.

³⁴ Ex. 1, Cox Direct, P. 7:17 – 8:2.

Richard DeWilde, Association president, testified that the Association is concerned about delayed maintenance and repairs if customers deal with “a large entity spanning five (5) states.”³⁵ Staff offers the testimony of Ms. Savage-Clarke who stated the following in response to a question whether MDNR has seen maintenance and repairs suffer under ownership by a large entity:

No, this has not been our experience with Confluence Rivers and its affiliates, or other large entities that operate drinking water and wastewater systems in Missouri and multiple other states. The larger entities have access to operational experts who are available to consult on all matters of repairs. These operational experts can readily identify operational improvements when necessary. Also, the larger entities often maintain 24-hour telephone lines for reporting system malfunctions. MDNR has found that Central States Water Resources, Inc. (Central States) also recognizes the importance of environmental compliance.³⁶

Ms. Savage-Clarke also related that her department has not had to take action against CSWR for a maintenance failure and that all CSWR systems currently operate without a problem.³⁷ Confluence has the managerial capacity to operate its systems and provide adequate service to its customers, and the Association’s concern is unfounded.

iii. Financial Capacity

Confluence presented evidence that it has the financial ability to acquire and operate the systems. Mr. Cox testified that Confluence has attracted investment capital to construct and maintain facilities.³⁸ He testified that Confluence would purchase the systems using equity from CSWR, and because Confluence is moving toward a capital

³⁵ Ex. 309, DeWilde Rebuttal, P. 11:5-7 and P. 12:14.

³⁶ Ex. 3, Savage-Clarke Surrebuttal, P. 7:21 – 8:6.

³⁷ Tr. 111:4-11.

³⁸ Ex. 1, Cox Direct, P. 8:20-22. See also Elm Hills Operating Co., Inc., *Notice*, In Re the Application of Elm Hills Utility Operating Company, Inc., SM-2017-0150 (Nov. 28, 2018).

structure of 50/50 equity to debt, improvements would be funded only partially with debt.³⁹

Nevertheless, OPC asserts that Confluence has never been able to obtain traditional bank financing, which led to a higher cost of debt.⁴⁰ OPC overlooks CSWR's new ownership structure. This omission is curious, considering OPC was a signatory to the *Unanimous Stipulation and Agreement* in case number WM-2018-0116 outlining CSWR's change in ownership structure.⁴¹ In this Agreement, Confluence represented that its new ownership structure should facilitate a move to a 50/50 equity-debt capital structure and obtaining debt financing at a lower cost.⁴² The Commission found that Confluence's ownership restructuring, set forth in the Agreement, has improved its financial status and should facilitate the goals outlined in the Unanimous Agreement.⁴³

All in all, Confluence has demonstrated that it possesses the financial capacities to provide customers with safe and adequate service.

D. Tartan Criteria

As stated above, the Tartan Criteria consider the (1) need for service, (2) the applicant's qualification, (3) the applicant's financial ability, (4) economic feasibility of the proposal, and (5) promotion of the public interest. While a different standard is applied by the Commission in the context of a new CCN case than that of a transfer of assets

³⁹ Ex. 1, Cox Surrebuttal, P. 10:1-7.

⁴⁰ Ex. 200, Roth Surrebuttal, P. 4:12 – 5:6.

⁴¹ Confluence Rivers Utility Operating Company, Inc., Office of the Public Counsel, Lake Perry Lot Owners' Association, and Staff of the Missouri Public Service Commission, *Unanimous Stipulation and Agreement*, WM-2018-0116 (Dec. 14, 2018).

⁴² *Id.* at Para. 7.

⁴³ 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.

case,⁴⁴ application of the Tartan Criteria provides additional analysis in a case including a proposed transfer of CCNs. In its Memorandum, Staff concluded that Confluence has met the Tartan Criteria, and therefore, its proposal to acquire the assets of the PPSC water and wastewater systems is not detrimental to the public interest.

i. Need for Service

No evidence was presented at the evidentiary hearing disputing the customers' need for service and that no other services are readily available. Existing water and wastewater customers of PPSC have a desire and need for continued water and wastewater service.

ii. Applicant's Qualifications

As described above, Confluence has the requisite TMF capacities to own and operate the PPSC systems. No evidence was presented at the hearing disputing the fact that Confluence is qualified to provide water and wastewater services.

iii. Applicant's Financial Ability

As described above, Confluence has the financial ability to provide water and wastewater services. OPC's concern about Confluence's ability to secure financing (see above) is shortsighted.

iv. Economic Feasibility of the Proposal

No evidence was presented at the evidentiary hearing disputing the economic feasibility of Confluence's proposal. PPSC submitted the required feasibility information when it obtained its original CCNs and Confluence proposes to assume PPSC's obligation to provide safe and adequate water and wastewater service going forward.

⁴⁴ See § 393.140, RSMo.

v. Promotion of the Public Interest

The Port Perry customers and the public at large have a strong public interest in ensuring that the systems provide clean drinking water and safely discharge effluent, in order to protect the public health and the environment.

In the Tartan case, the Commission stated regarding this fifth criteria:

The requirement that an applicant's proposal promote the public interest is in essence a conclusory finding as there is no specific definition of what constitutes the public interest. Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest.⁴⁵

On this basis alone, when considering the issuance of a new CCN, the Commission may find that positive findings the prior four criteria support a finding that the transfer is in the public interest. In this case, considering the Tartan Criteria in conjunction with the TMF capacities, and based upon Confluence's and CSWR's history of ensuring safe and adequate service, Staff believes Confluence's proposed acquisition is not detrimental to the public interest.

However, OPC and the Association believe the transfer would be detrimental, because they claim that members are entitled to control their utilities and Confluence will raise rates.⁴⁶ There are at least four problems with this position.

To state the obvious, the systems are currently operated by PPSC, which is a private, for-profit company that the Commission regulates. The rates currently charged

⁴⁵ Missouri Public Service Commission, *Report and Order*, In re Application of Tartan Energy Company, L.C., Case No. 3 Mo. P.S.C. 173 (Sept. 16, 1994), 1994 WL 762882 at 3.

⁴⁶ Ex. 307, Justis Rebuttal, P. 11:5-16. OPC states that in order to determine what is detrimental to the public interest, "the Commission should (if not must) consider the hopes, wants, and desires (i.e. the *interests*) of those members of the public that are to be served by the utility in question." OPC, *Statement of Positions of the Office of the Public Counsel* (Sept. 30, 2019), P. 3 (emphasis in original).

by PPSC were set by this Commission, and PPSC is entitled to make its own managerial decisions. In this respect, transfer to Confluence would maintain the status quo.

Second and most importantly, the Commission has a duty to ensure safe and adequate service, which may not be consistent with the Association members' hopes and dreams.⁴⁷ The public that may be harmed by irresponsible ownership extends beyond the gates of the Lake Perry lots. "Waters of the state are a shared resource and system owners must be good neighbors to others who use the water of the state."⁴⁸

Third, OPC and the Association gloss over the fact that the Association does not have a purchase agreement and there is no indication that PPSC will accept its offer if the Commission denies this Application. There is not a ready purchaser of the systems standing behind Confluence, and despite Mr. DeWilde's statement that the Association would evaluate any potential purchaser,⁴⁹ it seems likely that the Association will object to any entity other than itself on the grounds of lack of local control. The Commission cannot force PPSC to sell the systems to the Association.⁵⁰ PPSC no longer wants to operate the systems,⁵¹ and it is not in customers' best interest for the utilities to be operated by a reluctant owner. While Staff maintains that the Association's business plan and interest in purchasing the PPSC systems should not be used as a "measuring stick"

⁴⁷ OPC, *Statement of Positions of the Office of the Public Counsel* (Sept. 30, 2019) P. 3

⁴⁸ Ex. 3, *Savage-Clarke Surrebuttal*, P. 9:6-8.

⁴⁹ Tr. 310:25 – 311.2

⁵⁰ "[T]he 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." 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 3, Note 5.

⁵¹ Ex. 1, *Cox Direct*, P. 11:14-17.

when considering Confluence's applications, the Commission should note that the Association has never owned a utility and lacks Confluence's breadth of experience. The evidence presented in this case suggests the Association has no plan for handling customer service. Further, a lack of funds and financing would delay needed repairs at least five years, and the Association would have zero reserve funds for emergencies.⁵²

And finally, it is incredulous that the Association and OPC object to Confluence ownership on the basis that Confluence will raise customers' rates, while the Association states it would immediately raise rates 84%.⁵³ Further, the Association's rate comparisons of Confluence-owned systems⁵⁴ is misleading, because most of the listed systems were troubled when Confluence purchased them, needing substantial improvements. The Commission sets rates on a cost-of-service basis. The PPSC systems are not troubled and will not require this magnitude of improvements.⁵⁵ Thus, the Association's rate comparisons are inapposite. While Confluence admits that it would likely seek increased rates to pay for maintenance and upgrades,⁵⁶ Confluence will charge existing rates until a future general rate case is completed. During a rate case the Commission will determine reasonable and adequate rates after Staff reviews Confluence's financial data, invoices, and other relevant factors to make

⁵² Tr. 92:20-24.

⁵³ Ex. 307, Justis Surrebuttal, P. 18:17-20.

⁵⁴ Ex. 307, Justis Surrebuttal, Sch. GJ-07, "Water & Sewer Rate Comparisons."

⁵⁵ Ex. 102, Bolin Surrebuttal, P. 4:1-7.

⁵⁶ Ex. 1, Cox Direct, P. 14:21-27. Lake Perry water and wastewater rates are unchanged since May, 2002. Ex. 100, Dietrich Surrebuttal, Sch. ND-D2, P. 2-3. The monthly charge for water is \$13.23 for 2000 gallons through a 5/8" line. All usage above 2000 gallons is billed at \$3.58 per 1000 gallons. The monthly wastewater charge for a full time residential site is \$18.94 and \$14.21 for a part time residential site. Ex. 1, Cox Direct, P. 13:17 – 14:20.

recommendations.⁵⁷ In contrast, the Association would operate the systems without Commission oversight and could charge rates unrestrained by any prudence determination.

Related to the rate issue, OPC and the Association argue that Confluence's proposed improvements are more than necessary and that Confluence is "goldplating" the systems.⁵⁸ This is a curious position because the Association's proposed improvements are over two times more expensive than Confluence's.⁵⁹ The OPC witness making this assertion admitted at the evidentiary hearing that OPC did not perform an independent review of proposed improvements. In fact, OPC did not even visit the systems to conduct a visual inspection.⁶⁰

Weighing the benefits and detriments to the public of Confluence ownership, Staff asserts that the Commission's duty to ensure the customers receive safe and adequate service at just and reasonable rates overrides the Association's wish to operate the utilities themselves.

E. The Association's proposal.

In response to OPC and the Association's claim that Staff did not sufficiently consider the Association's interest in owning and operating the systems, Staff's position

⁵⁷ Ex. 102, Bolin Surrebuttal, P. 2:13-16 and P. 4:8-10.

⁵⁸ Ex. 307, Justis Rebuttal P. 13:17-19 and Ex. 200, Roth Rebuttal P. 9:1-16.

⁵⁹ Confluence proposes \$217,575 in improvements for the water system and \$78,000 in improvements for the wastewater system. $\$217,575 + \$78,000 = \$295,575$. Ex. 105, Roos Surrebuttal, P. 2:10 – 3:8.

The Association proposes \$580,000 in improvements for the water system and \$90,000 in improvements for the wastewater system. Ex. 308, Sayre Rebuttal, "Preliminary Engineering Report Summary," Sec. 4.0. $\$580,000 + \$90,000 = \$670,000$

⁶⁰ Tr. 261:5-6.

is that the Commission is charged with reviewing the application before it,⁶¹ and the Association did not file an application for Staff to investigate. Furthermore, the Association and PPSC do not have a purchase agreement, and PPSC is not obligated to sell to any entity if the Commission denies Confluence's application.⁶² The Commission would be rendering an impermissible advisory opinion if it makes a determination about a party that has not filed an application. Staff is familiar with the Association's business plan, and did consider the Association's arguments in its investigation and recommendations,⁶³ but it did not make a recommendation as to which party offers the greatest public benefit. As the Missouri Supreme Court stated in *State ex rel. City of St. Louis*, "[i]t is not [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."⁶⁴

However, should the Commission accept the Associations arguments and deny Confluence's Application, Staff would have concerns in regard to potential ownership by the Association; its limited financial capacity could negatively affect service. Despite having no cash or financing, the Association offered to purchase the systems from PPSC for ** _____ **. ⁶⁵ To fund the purchase and perform initial assessments, the

⁶¹ Ex. 103, Busch Surrebuttal, P. 4:13-16.

⁶² "[T]he 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." 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 3, Note 5.

⁶³ Ex. 100, Dietrich Direct, Sch. ND-d2, P. 6.

⁶⁴ *State ex rel. City of St. Louis*, 73 S.W.2d at 40.

⁶⁵ Ex. 309, DeWilde Rebuttal, Sch. RD 8 "Asset Purchase Agreement," P. 1.

Association has a goal of raising ** _____ ** to use as leverage for a bank loan.⁶⁶

The Association would pay interest on the loan for three years with a balloon payment of the principal due after that. The Association plans to obtain a conventional commercial loan to pay the balloon payment.⁶⁷

According to its engineering study, the Association would delay necessary repairs and improvements until 2023 to 2025, when it would spend an estimated \$630,000 for repairs and improvements.⁶⁸ The Association hopes to raise the \$630,000 via a United States Department of Agriculture loan. Therefore, in sum the Association describes a need for approximately ** _____ ** in financing over the next five years, assuming that PPSC would accept its ** _____ ** offer, which is doubtful because it is more than ** _____ ** less than Confluence's proposed purchase price. The Association's purchase and repairs would be funded 100% by debt, and it does not appear that the Association would have any equity in the systems until 2023, at the earliest. There would be no reserve funds for emergency repairs.⁶⁹

As stated above, Staff's position is that the Commission can consider only the Application before it. While the Commission must consider all evidence that would point to potential detriments caused by the sale of the systems to Confluence, based on the

⁶⁶ The Association has ** _____ ** in commitments toward the goal. Mr. DeWilde, Association president, stated at the hearing that he has an additional commitment that will meet the goal. However, Mr. DeWilde also stated that the commitments are only promises are there are no sanctions or enforcement if a lot owner decides not to follow through on his/her commitment. Tr. 302:11 – 306:3.

⁶⁷ Ex. 309, DeWilde Rebuttal, Sch. GJ-01, P. 7.

⁶⁸ Ex. 309, DeWilde Rebuttal, Sch. GJ-01, P. 7. Ms. Savage-Clarke is concerned about the five year maintenance and repair delay because these delays can cause system malfunctions or failure, putting human health and the environment at risk. Ex. 3, Savage-Clarke Surrebuttal, P. 5:20 – 6:3 and P. 10:14 – 11:12.

⁶⁹ Tr. 92:20-24.

information known to Staff at this time, Staff sees no compelling evidence from the Association or OPC that would support denial of Confluence's Application. However, even if the Commission were to determine that it should measure Confluence's Application against the Association's proposal, the evidence before the Commission demonstrates Association ownership would be detrimental to the public interest due to the Association's limited ability to operate and finance the utilities.

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

The Commission should condition its approval of Confluences' acquisition of the utilities with the same conditions as stated in Staff's Memorandum:

1. Authorize Port Perry to sell and transfer utility assets to Confluence Rivers, and transfer the CCN's currently held by Port Perry to Confluence Rivers effective upon closing of the assets;
2. Require Confluence Rivers to file adoption notice tariff sheets for each tariff, water and sewer, currently in effect for Port Perry, as 30-day filings within ten (10) days after closing on the Confluence Rivers assets;
3. Upon closing on the water and sewer systems, authorize Port Perry to cease providing service, and authorize Confluence Rivers to begin providing service, on an interim basis, the existing rates, rules and regulations as outlined in Port Perry's water tariff and sewer tariffs, until the effective date of respective adoption notice tariff sheets, as recommended above;
4. Approve depreciation schedules for Confluence Rivers, as shown on Attachments A and B of Staff's Memorandum⁷⁰, and order Confluence Rivers to depreciate its plant accounts for the appropriate systems as specified by the depreciation schedules;
5. Require Confluence Rivers to ensure adherence to Commission Rule 4 CSR-13 with respect to the Port Perry customers;
6. Require Confluence Rivers to provide an example of its actual communication with Port Perry's customers regarding its acquisition and operations of the system assets, and how customers may reach Confluence Rivers regarding water and sewer matters, within ten (10) days after closing on the assets;
7. Prior to its first billing, require Confluence Rivers to distribute to Port Perry customers an informational brochure detailing the rights and responsibilities of the utility and customers regarding its water and sewer service,

⁷⁰ Also see Ex. 100, Dietrich Direct, Sch. ND-d2, P. 10-11.

- consistent with the requirements of Commission Rule 4 CSR 240-13-.040(2)(A-L) within ten (10) days after closing on the assets;
8. Require Confluence Rivers to provide Staff's Customer Service Department a sample of ten (10) billing statements of bills issued to the Port Perry customers within thirty (30) days of such billing;
 9. Require Confluence Rivers to provide adequate training for the correct application of rates and rules to all customer service representatives, including those employed by contractors, prior to the customers receiving their first bill from Confluence Rivers;
 10. Require Confluence Rivers to file notice in this case once Staff recommendations regarding customer communications and billing, listed above, have been completed; and
 11. Make no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the transfers of assets or the CCNs to Confluence Rivers, including past expenditures or future expenditures related to providing service in the applicable service area, in any later proceeding.

Confluence is agreeable to these conditions, but disagrees with Staff's determination that a reasonable estimate of the net book value of the PPSC assets is \$58,133 as of March 31, 2019. However, litigating a different rate base in a subsequent rate case is acceptable to Confluence.⁷¹

The Association proposes four conditions to a PPSC-Confluence sale:⁷²

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

⁷¹ Ex. 1, Cox Direct, P. 15:12 – 16:8.

⁷² Association, *Lake Perry Lot Owners Association's Position Statement on List of Issues* (Sept. 30, 2019) P. 4.

Regarding the proposal to set rate base at Staff's "recommended" book value, Staff presented an estimation of the PPSC assets' net book value in its *Memorandum*,⁷³ but it is not recommending that amount or any other amount be ordered as an appropriate valuation for rate base purposes at this time. Staff believes that a general rate case, when it has more time and information, is a more appropriate time to recommend a net book value. The Commission should decline the Association's invitation to prejudge this matter.

Neither should the Commission require Confluence to develop an Association- and OPC-endorsed capital investment plan or customer advisory board. Staff and Confluence do not oppose Confluence submitting a capital investment plan.⁷⁴ However, Staff sees no reason for the Association and OPC to be involved in Confluence business decisions,⁷⁵ and the Commission generally does not become involved in company management.⁷⁶

The Association's last condition is to require Confluence to be audited biannually by an independent company. Staff believes this is unnecessary, because it will audit Confluence during rate cases. Moreover, the additional, unnecessary costs of these audits would likely be passed onto customers.

⁷³ Ex. 100, Dietrich Direct, Sch. ND-d2, P. 7.

⁷⁴ Ex. 103, Busch Surrebuttal, P. 6:8-16 and Tr. 41:9-16.

⁷⁵ Ex. 103, Busch Surrebuttal, P. 6:8-16.

⁷⁶ The Commission stated in *In the Matter of the Joint Application of Missouri Gas Company* that: [t]he Commission has, in the past, generally avoided interjecting itself in the management of the various investor-owned utilities that it regulates. The Commission currently does not favor becoming engaged in the micro-management of those companies through its regulatory authority.

Missouri Public Service Commission, *Report and Order*, In the Matter of the Joint Application of Missouri Gas Company, et al., 3 Mo. P.S.C.3rd 216, 220-221 (Oct. 12, 1994).

Staff recommends that the Commission accept Staff's proposed conditions and reject the Association's proposed conditions.

CONCLUSION

Confluence is already regulated by this Commission, and its parent company and affiliates have provided utility service to Missouri rate payers for several years. No evidence was presented that Confluence has service or economic difficulties. The evidence that was presented indicates that Confluence is an experienced operator and has a stable financial position, demonstrating that the proposed sale would improve the systems' capacities. There is no challenge to Confluence's financial capacity to absorb this proposed transaction or its ability to successfully operate additional water and wastewater utilities efficiently and economically.

Balancing the customers' rights against the seller's rights, the customers will enjoy the same – and likely a higher – level of service under Confluence ownership. Allowing the sale respects the owner's property rights to sell the systems pursuant to the negotiated transaction. Staff will review future rate increases that Confluence requests in order to recover the cost of improvements; the Commission will ultimately rule on the rate increases in any subsequent rate request proceedings, ensuring future rates are just and reasonable. The benefits of Confluence's acquisition of the Port Perry systems are greater than any perceived detriment the customers may experience from the Association operating the utilities. The PPSC-Confluence transaction promotes the public interest, it is not detrimental to the public interest, and the Commission should approve it.

Respectfully submitted,

/s/ Karen E. Bretz

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all parties and/or counsel of record on this 31st day of October, 2019.

/s/ Karen E. Bretz