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	)))))	**Case No. WA-2019-0299**

CONFLUENCE RIVERS' REPLY BRIEF

COMES NOW Confluence Rivers Utility Operating Company, Inc. ("Confluence Rivers" or "Company"), and, as its *Reply Brief,* respectfully states as follows to the Missouri Public Service Commission ("Commission"):

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Initial briefs have been filed in this case by the Staff of the Commission ("Staff"), Office of the Public Counsel ("OPC") and Lake Perry Lot Owners' Association ("LPLOA"). Confluence Rivers will respond to the initial briefs of the OPC and LPLOA.

REPLY SUMMARY

The initial briefs of the OPC and LPLOA are important for what they do not say. That is, there is no serious challenge to the qualifications of Confluence Rivers to own and operate the Port Perry Service Company ("Port Perry") assets in a safe and adequate manner. This is not surprising as Confluence Rivers is an existing public utility currently operating 9 water and 9 sewer systems in Missouri in a safe and adequate manner. (Exh. 1, Cox Dir., p. 4, ll. 16-18) Confluence Rivers has already acquired small Missouri water and sewer companies, brought capital to improve those systems, upgraded the services provided to customers, and delivered safe and adequate service. (Exh. 5, Cox Sur., p. 9)

Both OPC and LPLOA claim that the proposal of a non-party, the Lake Perry Service Company, is an "alternative" that should be considered by the Commission. While the Commission has indicated that the efforts of the Lake Perry Service Company to purchase Port Perry may be presented in this case,[1] it is not accurate to describe the proposal as a true "alternative." LPSC has no owners, no members, no water and sewer assets, no customers, no permits to operate water or sewer systems, and no contract to buy any water and sewer assets, (Tr. 284, Roth; Tr. 312, ll. 1-18). Moreover, there is no guarantee that LPSC will ever have a contract with Port Perry to buy the water and sewer assets.

[1] *Order Regarding Four Motions to Strike . . .*, p. 2-3, File No. WA-2019-0299 (October 2, 2019).

On the other hand, the one transaction at issue in this case[2] is the contract that would result in Confluence Rivers' ownership of the Port Perry water and sewer assets if approved by the Commission. This is a known, existing agreement that has been entered into by Port Perry with an existing public utility, with an existing record of service.

In this case, the following benefits justify a finding of no detriment:

- Confluence Rivers, an experienced and current owner and operator of 9 water and 9 sewer systems, would acquire the systems;
- Confluence Rivers is an owner/operator with a solid track record of rehabilitating, maintaining and operating small water and sewer systems;
- Confluence Rivers' financial and technical resources are sufficient to provide improved service options for customers;
- Confluence Rivers is a part of a larger organization of affiliated utilities that allows it to bring economies of scale to the bidding of larger projects, which allows the attraction of more bidders and more competitive pricing (to include local bidders); the use of experts and operating personnel; and, the purchasing of supplies for the systems. (Tr. 37-38, 66-67, Cox); and,
- Confluence Rivers' ownership will result in continued regulation of operations and rates by the Commission to ensure safe and adequate service at just and reasonable rates.

[2] *Order Regarding Four Motions to Strike . . .*, p. 3, FN. 5, File No. WA-2019-0299 (October 2, 2019).

Confluence Rivers' acquisition of the Port Perry assets is not detrimental to the public interest and should be approved by the Commission subject to the conditions proposed by the Staff.

In the following pages, Confluence Rivers will respond to certain of the issues raised by the LPLOA and OPC briefs as they relate to the list of issues. The fact that Confluence Rivers does not respond to each and every statement contained in those briefs should not be taken as acquiescence and the matters not addressed. Rather, Confluence Rivers' decision simply reflects the fact that those matters were adequately addressed in its *Initial Brief*.

The Commission should find that Confluence Rivers Utility Operating Company, Inc.'s acquisition of the Port Perry Service Company's water and wastewater assets and certificates of convenience and necessity is not detrimental to the public interest, and approve the transaction.

Cost- Benefit Analysis/No-Net-Detriments Standard

Under applicable law, the Commission must approve those acquisition applications over which it has jurisdiction, unless the transaction is found to be "detrimental to the public interest."

The LPLOA brief refers repeatedly to a "cost-benefit analysis" to be applied by the Commission for this purpose. The Commission has stated that "[w]hat is required is a cost-benefit analysis in which all the benefits and detriments in evidence are considered." *Re Union Electric Company,* Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005). Thus, what is meant by a "cost-benefit analysis" in this context is merely the weighing of benefits and detriments referred to in Confluence Rivers' *Initial*

Brief (the no-net-detriment standard).

The Commission has described this standard as follows:

> 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 safe 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.

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 454-455 (MoPSC July 1, 2008), quoting *Re Union Electric Company,),* Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005).

Thus, benefits that outweigh detriments will support a finding that a transaction is "not detrimental." LPLOA alleges that Confluence Rivers "has yet to produce a cost benefit analysis in this case." (LPLOA Brf., p. 8) In fact, Confluence Rivers' pre-filed testimony and the testimony of its witnesses at the hearing specifically addressed the benefits associated with Confluence Rivers' acquisition of the Port Perry assets and, hence, the cost-benefit analysis/no-net-detriment standard that must be considered by the Commission. Ultimately, this is merely a weighing of the benefits identified by the Company's evidence against any detriments the Commission might find to exist associated with the proposed transaction.

When the benefits are considered, Confluence Rivers' acquisition of the Port Perry utility assets and certificates of convenience and necessity is not detrimental to the public interest and should be approved by the Commission.

Customer Service

Confluence Rivers provided evidence of the improvements in customer service systems and benefits its ownership would bring to the Port Perry systems. (Exh. 1, Cox Dir., p. 7) However, LPLOA alleges that there is no testimony in the record as to Confluence Rivers' "prompt customer service." (LPLOA Brf., p. 15)

As a regulated utility, Confluence Rivers is, and would continue to be, subject to the Commission rules that protect customers and provide customer service guidelines. (Exh. 104, Parish Sur., p. 2) Confluence Rivers' personnel are available to address customer concerns during normal nosiness hours and the Company provides an emergency toll free number is available 24 hours a day, seven days a week for potential service issues, as well as on-call emergency service contractor personnel. (*Id*.; Exh. 1, Cox Dir., p. 7). The Company also implements a computerized maintenance management system for wastewater and drinking water utility assets, real time remote monitoring to ensure service stability, customer dissemination of Missouri Department of Natural Resources drinking water testing information, on-line bill-pay options, and provides up-to-date website bulletins about current service status. (*Id*. at p. 7-8)

Customer service is very much a known aspect of Confluence Rivers' operations and has been addressed by the testimony in this case.

Financing

The LPLOA brief recites the testimony provided by Mr. Cox indicating that Confluence Rivers proposes to acquire the Port Perry assets utilizing equity and alleges that there is no other evidence of Confluence Rivers' debt financing. (LPLOA Brf., p. 16)

First, because equity is being used to complete the transaction before the Commission, there is no need for debt financing associated with this transaction and no need for a request for the Commission to approve financing. However, having said this, Confluence Rivers' testimony does discuss the changes to its ownership that have occurred since the last time the financing of one of its affiliates was reviewed by the Commission and how that change has improved financing opportunities.

Mr. Cox testified that in 2018 Confluence Rivers' corporate parent was able to secure a large institutional private equity investor, Sciens Capital Management, to provide the funds necessary to purchase and finance the acquisition of additional small water and wastewater systems. These investors invest equity capital necessary to make the acquisitions and, in the event group members are unable to attract commercial financing from non-affiliated sources, also have pledged to provide debt capital necessary to make necessary system improvements. As a result, Confluence Rivers now has more options available than did it or its affiliates when the organization was getting started. (Exh. 2, Cox Sur., p. 23-24; Tr. 49-50, 68-69, Cox)

Confluence Rivers and its affiliated companies have shown the ability in the past to obtain financing for the acquisition and rehabilitation of small water and sewer

systems. And, as a result of changes in their ownership, have even better opportunities to do so as needed in the future.

Aquila MISO/SPP Case – No Real Alternative

The LPLOA suggests that a previous Commission case concerning Aquila's potential exit from the Southwest Power Pool ("SPP") to join the Midwest ISO ("MISO") (the "*Aquila MISO/SPP Case*")[3] included an observation that when alternatives are presented they must be considered. (LPLOA Brf., p. 3) The OPC similarly uses the *Aquila MISO/SPP Case* to argue that the "Commission must examine the probable results of any proposed acquisition and compare those probable results to any other realistic alternatives. . . ." (OPC Brf., p. 7) What is truly evident from the *Aquila MISO/SPP Case* is that the Lake Perry Service Company proposal is not an "alternative," nevertheless a "realistic alternative," in comparison to what was at issue in that case.

Aquila was already a member of SPP and contracting with SPP for certain services. The agreement to join MISO had arisen six years before as a result of a Federal Energy Regulatory Commission ("FERC") requirement that Aquila file a plan to join a Regional Transmission Organization ("RTO"). At the time Aquila entered into the contract to join MISO, MISO was the only FERC-approved RTO in the area. This later changed and SPP became an approved RTO. As part of its Commission application, Aquila itself provided a comparison of the costs of joining MISO with continued

[3] *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*., Case No. EO-2008-0046 (2008) ("*Aquila MISO/SPP Case*").

membership in SPP and participation in the SPP EIS market. Finally, Aquila and Kansas City Power & Light ("KCPL"), subsequent to the MISO agreement, announced a transaction where Aquila would be purchased by KCPL, an existing member of SPP. The Commission observed that "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."

The *Aquila MISO/SPP Case* bears little resemblance to the asset sale before the Commission in this case. Here, neither the LPLOA nor Lake Perry Service Company is an existing utility, nor do either one of them have a contract in place to purchase the assets. There is no evidence that Port Perry considers the Lake Perry Service Company offer to be reasonable or would be willing to sell its assets for that price. The only purchase price we know Port Perry believes is reasonable and will accept is the amount stated in the executed *Agreement For Sale of Utility System* between Port Perry and CSWR. (Exh. 2, Cox Sur., p. 7) There is no true alternative for comparison, as was present in the *Aquila MISO/SPP Case*.

Environmental Utilities, LLC Case

The OPC also cites *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W.3d 256 (Mo.App. 2007) as support for the concept that rate increases should be considered as a part of acquisition cases. (OPC Brf., p. 7) In fact, there is no holding in *Environmental Utilities* that supports OPC's claim that the Commission should consider future rates as part of an acquisition case.

In *Environmental Utilities*, Missouri-American Water Company ("MAWC") had contracted to buy most of the Osage Water Company ("OWC") properties. However, MAWC requested a rate increase as a part of the acquisition, and it did not want to purchase the Cedar Glen sewer system. (*Id*. at 259-260) The Court of Appeals noted that "[t]he case before the Commission was not a standard transfer of utility assets case and, therefore, raised a number of unique issues – not least among that of the bootstrapped rate increase." (*Id*. at 261)

The only questions presented to the Court of Appeals for resolution in *Environmental Utilities* were: 1) Did the Commission hold an evidentiary hearing as required by § 393.190?; and, 2) Was the Commission's order supported by competent and substantial evidence? As to the rate increase requested by MAWC, the Court merely stated that "[w]hether the Commission even had the authority to bootstrap a rate increase into the sale application process is unclear at best." (*Id*. at 260) OPC's reliance on that case is unfounded and without merit.

Neither the *Aquila MISO/SPP Case* nor the *Environmental Utilities* case are applicable to the facts at hand, nor do they drive any particular result in this case.

Lake Perry Service Company Proposal Not Ignored

In spite of suggestions to the contrary, the evidence in this case shows the parties have not "ignored" the Lake Perry Service Company proposal. As evidence of that fact, the following table comparing several aspects of Confluence Rivers' experience and background to that of Lake Perry Service Company was excerpted from Mr. Cox's surrebuttal testimony in this case:

ITEM	CONFLUENCE RIVERS	LPSC PROPOSAL
Contract to Purchase Assets	Yes – The Company has a contract in place with Port Perry	No. LPLOA/Lake Perry Service Company ("LPSC") has made a contingent offer to purchase that has not been accepted by Port Perry
Existing Utility Operations	Yes – The Company currently owns and operates 9 water and 9 sewer systems. Its affiliated companies own and operate many more systems in the state of Missouri	No – neither the LPLOA nor the LPSC currently, or in the past, have owned or operated water or sewer systems
Customer Service systems in place	Yes – CSWR companies have implemented customer service system and processes that provide numerous services and compliance with Chapter 13 of the Commission's rules	No – LPSC currently has no customers
Financing Available/Experience	Yes. CSWR companies have invested over $10.1 million to date in Missouri water and sewer systems and have access to capital for Port Perry purchase and improvements	LPSC has not provided any evidence of investment in Missouri water or sewer systems[4]
Deemed by Missouri Department of Natural Resources to have technical, managerial and financial ability to operate Missouri water and sewer systems	Yes – Confluence Rivers is currently permitted by MDNR to provide both water and sewer service in the State of Missouri	No – neither LPLOA nor LPSC hold any MDNR "permits" to provide water or sewer service in the State of Missouri

[4] The financing "commitment" provided by the LPLOA was dated May 3, 2019, and "was based on the loan closing within 60 days from the date of [the] letter." Thus, the LPLOA loan commitment expired in early July of this year. (Exh. 309, DeWilde Reb., Sched. RD 2C; Tr. 309, DeWilde)

Organizational experience constructing, maintaining and operating Missouri water and sewer systems	Yes – CSWR companies have provided water and sewer service in Missouri for approximately four and a half years	No - neither the LPLOA nor the Lake Perry Service Company currently, or in the past, have owned or operated water or sewer systems
Existing Financial Resources	Yes-CSWR companies have the capital required to purchase the Port Perry utility assets	No-neither the LPLOA nor the LPSC have enough capital currently to purchase and operate the water and sewer systems

(Exh. 2, Cox Sur., p. 5-6; Tr. 184-185, Justis; Tr. 312, DeWilde)

A comparison of the qualifications of the entities shows that Confluence Rivers and its affiliates have a great amount of experience in providing water and sewer service in the state of Missouri, while the Lake Perry Service Company has none.

Further, Confluence Rivers addressed in its Initial Brief both the Lake Perry Service Company proposal and the public comments that were received in this case. (Confluence Rivers Ini. Brf., p. 25-27, 28-30) Ultimately, these matters do not change the fact the evidence in this case compels a finding that the Confluence Rivers' acquisition of the Port Perry assets is not detrimental to the public interest.

The Commission should condition its approval of Confluence Rivers' acquisition of Port Perry on those conditions proposed by the Staff, and should not include those proposed by the LPLOA.

Confluence Rivers has indicated its acceptance of the conditions proposed by the Staff. (Exh. 1, Cox Dir., p. 15, ll. 14-25; p. 16, ll. 1-8). However, both OPC and the LPLOA suggest the Commission order the following additional conditions proposed by the LPLOA:

a. Limit Confluence Rivers' starting rate base to Staff's recommended net book value.

b. Require Confluence Rivers to develop a clear capital investment plan for Lake Perry that is endorsed by both LPLOA and the Office of Public Council (OPC).

c. Require Confluence Rivers to establish a customer advisory board and associated governance processes, satisfactory to both LPLOA and OPC, that allows meaningful customer input into future capital investments before they are incurred.

d. Require Confluence Rivers to undergo a biannual independent audit, using an auditor and audit plan acceptable to both LPLOA and OPC, to review the reasonableness of operating costs and to confirm that all goods and services are being procured appropriately.

(OPC Brf., p. 20; LPLOA Brf., p. 21) These conditions are unnecessary and, in some cases, contrary to approaches and processes used by the Commission for many years.

Inappropriate to Limit Rate Base

Ultimately, the rate base for rate making purposes will be established in a rate case where rates are being set for the Port Perry service area. While it is necessary for the Commission to have an idea of what rate base might be in comparison to the purchase price, the Commission need not (and, perhaps, may not) order a rate base amount during an acquisition case. That is especially true in this case where no rate base for ratemaking purposes has been established by the Commission for the Port Perry since 2002. (Tr. 163, Bolin; Tr. 71, Cox) That means that there are 17 years of property records to examine as a part of a rate base determination. (*Id*.) The Company believes that based on its examination of records there appears to be more investment than is reflected in Staff's estimate of rate base. (Tr. 40, Cox) However, this is something that will be more appropriately examined within a rate case after Confluence

Rivers has full access to the records that exist and parties have the time to focus on this issue.

Capital Plan

The proposal that Confluence Rivers be required to develop a "capital investment plan for Lake Perry that is endorsed by both LPLOA and [OPC]" goes beyond Commission's authority or what is necessary for the provision of safe and adequate service. Moreover, this sort of "pre-approval" of investments is something that OPC has historically shied away from, wanting instead to examine the prudence of investments within rate cases where recovery is sought and, at that time, to take a position as to the prudence of investments.[5]

Confluence Rivers is not opposed to periodically submitting its capital plan to the Commission (something its affiliate, Indian Hills Utility operating Company, Inc., currently does). (Tr. 41, Cox) However, any requirement that such plans be "endorsed" by third parties would violate the requirement that the Commission not invade the province of utility management by dictating how safe and adequate service is to be provided. "The company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo banc 1930).

[5] In the context of a rate case, the Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 194 (1985).

Customer Board

LPLOA further proposes that the Commission order a "customer advisory board and associated governance processes" with a required sign-off by "both LPLOA and OPC." Again, giving a third party (in this case, LPLOA and OPC) veto power over a utility's operational decisions invades the management prerogative of the utility. Public utilities are already heavily regulated by the Missouri Department of Natural Resources, this Commission, and others. No additional third-party regulation is necessary for the Company to provide safe and adequate service at just and reasonable rates in the manner required by law. (Tr. 42, Cox)

Audit

The last LPLOA-proposed condition is duplicative of the entire regulatory process. (Tr. 42, Cox) LPLOA and OPC suggest that Confluence Rivers be required to "undergo a biannual independent audit" "using an auditor and audit plan acceptable to both LPLOA and OPC," "to review the reasonableness of operating costs and to confirm that all goods and services are being procured appropriately." This is, of course, exactly what happens in a rate case before the Commission. Therefore, the LPLOA-proposed condition to require additional audits is an attempt to substitute LPLOA and OPC for the statutorily established Commission and is not necessary or appropriate. Such an audit would add costs – which ultimately would be passed on to customers – without providing any corresponding customer benefit. Further, with respect to its compliance with health, safety, and environmental regulations, Confluence Rivers and its affiliates already have an annual investor-required third-party audit. (*Id.*)

WHEREFORE, Confluence Rivers respectfully submits this *Reply Brief* for the Commission's consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served electronically on counsel for the parties of record herein on this 7th day of November, 2019.