

**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

STATEMENT OF POSITIONS OF THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel (“OPC”) and for its *Statement of Positions*, states as follows:

The OPC will respond to the issues identified by the *Joint List of Issues, List and Order of Witnesses, Order of Opening, and Order of Cross-Examination* in the order they are set forth.

Issue 1. Should the Commission find that Confluence Rivers Utility Operating Company, Inc.’s (“Confluence Rivers”) acquisition of the Port Perry Service Company’s (“Port Perry”) water and wastewater assets and certificates of convenience and necessity is not detrimental to the public interest, and approve the transaction?

No. The Commission should instead find that Confluence Rivers’ acquisition of the Port Perry water and wastewater assets and certificates of convenience and necessity is detrimental to the public interest and deny approval of the transaction. The key to understanding why goes to the heart of the whole regulatory process. The

purpose of the Public Service Commission is to stand in the place of competition in the otherwise non-competitive public utility market:

To be sure, the government influence the functioning of the private competitive sectors of the economy as well in many ways – for example, by regulating the supply and availability of money, enforcing contracts, protecting property, providing subsidies or tariff protection, prohibiting unfair competition, providing market information, imposing standards for packaging and product content, and insisting on the right of employees to join unions and bargain collectively. In principle, these influences, however pervasive, are intended to operate essentially at the periphery of the markets affected. Their role is generally conceived as one of maintaining the institutions *within whose* framework the free market can continue to function, of enforcing supplementing, and removing the imperfections of competition – not supplanting it. In these sectors the government does not, or is not supposed to, decide what should be produced and how or by whom; it does not fix prices itself, nor does it control investment or entry on the basis of its own calculations of how much is economically desirable; the government does not specifically control who should be permitted to do what jobs, nor does it specify the permissible dimensions and characteristics of the product.

In contrast, the government does do all these things with the public utilities. Here the primary guarantor of acceptable performance is conceived to be (whatever it is in truth) not competition or self-restraint but direct governmental prescription of major aspects of their structure and economic performance.

Alfred E. Kahn, [The Economics of Regulation: Principles and Institutions](#) Vol 1 pgs. 2 – 3 (1970). Because consumers are generally not able to pick and choose their utility providers, an appointed arbiter (the Missouri Public Service Commission) is tasked with ensuring that consumers receive a level of service at an appropriate cost that is in line with what would have occurred had a free market for utility services existed. While this is normally a very complex and difficult thing to do, it is made significantly easier in the present case because the relevant consumers have come together as one

united body to tell the Commission exactly which company they would prefer to receive utility services from. To deny the consumers their ability to choose their utility provider would thus fundamentally undermine the underlying purpose for this Commission, and indeed, the entire utility regulatory scheme.

The principles laid out in the foregoing paragraph are reduced to actual, tangible effects in the present case through the medium of the legal standard the Commission must employ when considering whether or not to approve the sale of the Port Perry assets to Confluence Rivers. That standard “is set forth in *Fee Fee Trunk Sewer, Inc. v. Litz*: “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.” *Envtl. Utils., LLC. v. PSC of Mo.*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007) (quoting *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980)). In light of this standard, the OPC puts forth this very simple argument: 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, howsoever expressed. It is by listening to the **actual expressed opinion of the public** that the Commission can best discern what would have occurred had there been a free market to provide competition among water utilities and thereby fulfill the essential aim of its own existence. And when the public comes together and unites in a single resounding voice to tell the Commission that they are staunchly opposed to the

acquisition of the Port Perry water and sewer assets by Confluence Rivers, how can it possibly be said that such an acquisition is still in the public's interest?¹

To put the matter bluntly: the acquisition of the Port Perry water and sewer assets by Confluence Rivers is detrimental to the public interest because the public has expressly and overwhelmingly stated that they are opposed to the acquisition. The public have instead expressed their strong desire that the Lake Perry Service Company, an organization created “for the specific purpose of acquiring and operating the Lake Perry water and wastewater systems,” be in control. *Rebuttal*, Glen Justis, pg. 5. Moreover, the evidence will readily show that the Lake Perry Service Company is, by far, the better alternative to be operating the Port Perry water and service assets. This is important because this Commission has previously determined that the existence of better alternatives is one ground for determining a proposed transaction is “detrimental to the public interest.” *Report and Order*, EO-2008-0046 pgs. 27 – 28 (“The detriment to the public interest occurs, in part, because Aquila's plan to join Midwest ISO would preclude it from joining Southwest. Power Pool. As established by the independent and credible cost benefit analysis performed by CRA International, the net benefit to Aquila of joining Midwest ISO would be

¹ The OPC acknowledges that there are some instances where the public might be opposed to something that is still necessary for the public interest, such as when the public opposes a rate increased needed to permit a utility company to continue providing service. In that instance, the problem lies with the fact that the public is unwilling to choose between keeping the lower rate and continuing to receive service. The public **wants** both, but the two are mutually exclusive, hence the dilemma. It is the mutual exclusivity that gives rise to the Commission's need to take some action that the public is vocally opposed to. However, this scenario is not at play in the present case. The public is not seeking to simultaneously obtain two mutually exclusive objectives. They are instead actively requesting one and only one thing: sale of the Port Perry water and sewer company to someone **other** than Confluence Rivers.

approximately \$ 65 million less over ten years than the net benefit it could obtain by joining Southwest Power Pool.”).

Before considering the ways that the Lake Perry Service Company would be a better operator for the Port Perry water and sewer system, though, let us first consider the steps that the public (acting thorough the legal entity of the Lake Perry Lot Owners Association (“the Association”)) have taken to express their opposition to Confluence Rivers’ acquisition. To say that the Association has gone to extraordinary steps would certainly be an understatement. As pointed out in the surrebuttal testimony of OPC witness Ms. Keri Roth:

[t]he following actions were taken by the Association to do its due diligence on whether it could undertake the acquisition: 1) developed an engineering review, 2) developed a business plan, 3) solicited and obtained a bank financing commitment, 4) solicited and obtained commitments for initial seed money, and 5) formed the not-for-profit LPSC.

Surrebuttal, Keri Roth, pg. 3. In addition, the Association has collected the names and petitions of hundreds of would-be customers of Confluence Rivers who are in opposition to the acquisition. *Id.* pg. 4, Schedule KNR-2. Further, a multitude of people attended the local public hearing set for this case to voice their animosity toward the proposed Confluence Rivers’ acquisition. *See generally* Tr. Vol. (Local Public Hearing - Perryville 09-10-2019). The vast majority of these individuals even came wearing red shirts in a sign of solidarity regarding this opposition. Tr. Vol 1 pg. 35 lns. 18 – 22, pg. 60 lns. 18 – 21, pg. 62 lns. 9 – 19. Yet not a single voice has been heard from the affected community to support the acquisition. There can be no

question, therefore, that the public is strongly, if not vehemently, opposed to Confluence Rivers acquiring the Port Perry water and sewer assets.

The public's strong opposition is hardly surprising given the comparison between Confluence Rivers and the Lake Perry Service Company. For example, the Lake Perry Service Company has so far managed to find financing for the acquisition of the Port Perry water and sewer assets with fixed rates of 3.65% and 4.45%. *Surrebuttal*, Keri Roth, pg. 4. Confluence Rivers, meanwhile, is owned by a company whose other affiliate small water utilities have repeatedly requested Commission approval for financing terms of 14%, more than three times as high. *Id.* In addition, Confluence Rivers' proposed purchase price is almost five times what the Commission's Staff ("Staff") have estimated the rate base of the Port Perry water and sewer assets to be, which is important because Confluence Rivers has made it clear that they intend to argue about Staff's estimate in the future. *Id.* at 6. In other words, Confluence Rivers has all but stated that it intends to seek more money in the future based on nothing more than the price it intends to pay for these systems now. Moreover, such an increase would surely come on the back of the increase to rates that Confluence is almost guaranteed to request given that it "has already recently filed a rate case with respect to its operations and maintenance expense for systems acquired approximately three to five months ago." *Id.* It is no wonder, therefore, that the Lake Perry Service Company believes that it can "maintain operating and maintenance expenses at a much lower cost." *Id.*

There are other concerns regarding the proposed Confluence Rivers' acquisition that also merit consideration. For example, Confluence Rivers' claims to have economies of scale are somewhat dubious given that they have no apparent intention to consolidate across affiliates. *Surrebuttal*, Keri Roth, pg. 7. There is also a considerable chance that Confluence Rivers' acquisition will have a significant impact on the local economy by hurting local property values and causing other improvements to be put on hold. *Rebuttal*, Richard DeWilde, pg.12. This includes the deferral of local road paving that has already occurred due to this case. *Id.* Finally, several parties to this case (and others) have voiced anxiety over the probability of Confluence Rivers overinvesting or "gold-plating" the water and sewer systems. *Surrebuttal*, Keri Roth, pg. 9. These are all valid issues that the Commission would need to consider when determining if the acquisition of the Port Perry water and sewer assets by Confluence Rivers is "detrimental to the public interest."

In light of all these problems, one might be prompted to ask what has Confluence Rivers done or what evidence they have presented to assuage the public's fears? The answer, sadly, is little to none. In fact, Confluence was fervently opposed to the idea of even having a local public hearing in this case in order to give it the opportunity to talk to the customers it proposes to serve. *See Confluence Rivers' Objection to Lake Perry Lot Owners Association's Proposal for a Local Public Hearing and Reply of Confluence Rivers Utility Operating Company, Inc. to the Responses of OPC and Lake Perry Lot Owners Association Regarding the Proposal for a Local Public Hearing* filed in EFIS. Confluence Rivers has further moved to limit the scope

of these proceedings in a desperate attempt to ensure that the Commission does not even hear the concerns now raised by the public by silencing the public's right to testify. See *Confluence Rivers' Motion to Strike and/or to Limit Scope of Proceeding* filed in EFIS. Of course, such actions are not surprising given that Confluence Rivers has acted repeatedly throughout this case to ensure that no other potential bidder **would ever be considered** by having its lawyers instruct the current Port Perry operators not to even discuss other potential bids and sending out letters demanding the Lake Perry Service Company cease its attempts to purchase the Port Perry water and sewer assets. *Rebuttal*, Richard DeWilde, pg. 11. This is a clear example of why the Commission's mandate to stand in the place of competition is so important because this is a case where the applicant has done everything in its power to impede the free-market and, consequently, thwart the public interest itself.

The Commission Staff has taken the position in this case that it does not need to examine the possibility of other buyers of the Port Perry water and sewer assets because "the standard for Commission review is not which proposal is best, but whether the Application before it is 'not detrimental to the public interest.'" *Surrebuttal*, Natelle Dietrich, pg. 3. This is plainly wrong, however, as the Commission has already found the existence of a better alternative than the one presented in a case can itself be proof that a transaction is detrimental to the public interest. *Report and Order*, EO-2008-0046 pgs. 27 – 28. In this case, there can be no question that the Lake Perry Service Company presents a better alternative than Confluence Rivers for a variety of reasons, not least of which being that the Lake

Perry Service Company is the utility provider **that the public actually wants to receive service from.** Why then should the Commission ignore the numerous and repeated pleas of the people? What possible benefit is it to the State of Missouri to have a Public Service Commission that takes no heed of the desires of its citizens? The answer to these questions, and this case, is clear as day. The Commission should listen to the will of the people and deny Confluence Rivers' acquisition of the Port Perry water and sewer systems so that the Lake Perry Service Company can purchase them in its stead. To deny the expressed desire of the public and instead inflict on them the increased rates that are practically guaranteed to come with Confluence Rivers' acquisition of these assets (while offering no increased benefits in compensation) **is the very definition of "detrimental to the public interest."** Confluence River's request to acquire the water and sewer assets of Port Perry should thus be denied.

Issue 2. If so, should the Commission condition its approval of Confluence Rivers' acquisition of Port Perry and, if so, what should such conditions be?

The Commission should not grant approval of Confluence Rivers' acquisition of the Port Perry water and sewer assets. However, if the Commission makes the unfortunate decision to grant Confluence Rivers' requested application regardless, then it should, at a minimum, place on the acquisition those conditions set forth in Staff's recommendation and the rebuttal testimony of the Association witness Glen Justis. *Rebuttal*, Glen Justis, pgs. 21 – 22.

