

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

In the Matter of the Application of)	
Confluence Rivers Utility Operating)	
Company, Inc. to Acquire Certain)	<u>Case No. WM-2018-0116</u>
Water and Sewer Assets, For a Certificate)	
Of Convenience and Necessity, and, in)	<u>Case No. SM-2018-0117</u>
Connection Therewith, To Issue)	
Indebtedness and Encumber Assets)	

STAFF’S RESPONSE

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response* in this matter hereby states:

Procedural History

Confluence Rivers Utility Operating Company, Inc. (CRU) filed an *Application* November 2, 2017, to purchase all of the water and/or sewer assets of Missouri Public Service Commission-regulated utilities: Smithview H2O Company, M.P.B., Inc., Mill Creek Sewers, Inc., Roy-L Utilities, Inc., Port Perry Service Company, Gladlo Water & Sewer Co., Inc., The Willows Utility Company, Inc., and Evergreen Lakes Water Supply Co.. Confluence also seeks to purchase all of the water and sewer assets of non-Missouri Public Service Commission-regulated Majestic Lakes Homeowners Association, Inc. (Majestic Lakes) and requests a Certificate of Convenience and Necessity (CCN) for the systems.

Staff filed a *Recommendation* in the matter pursuant to Commission Order on March 6, 2018. The Office of the Public Counsel (OPC) and CRU filed responses to Staff’s *Recommendation* on March 15th and 16th, respectively.

The Commission ordered the parties to file a response to OPC and gave the option of filing a response to CRU no later than March 29, 2018. *Public Counsel's*

Response to Staff's Recommendation and Motion for Hearing, (“*OPC’s Response*”) raises one procedural question that the *Application* is procedurally deficient, necessitating dismissal.¹ Nevertheless, OPC then, contradictorily, seeks hearing on the merits of the *Application*.² The remaining arguments raised by OPC are wholly irrelevant to the procedural question, as they are essentially arguments on the merits of the Application for hearing.³ Staff now responds.

I. A transfer of assets application does not require both parties to the transaction

OPC in its *Response to Order Directing Filing* argues that certain parties are absent from this proceeding and therefore, recommends the Commission dismiss this *Application*. It creatively interprets Section 393.190.1’s Commission authorization requirement, regarding the sale, assignment, lease, transfer, mortgage or disposal of water or sewer assets, to imply that the legislature intended to limit the filing for Commission authorization to only that party granted a certificate of service over the assets.⁴ Nowhere in the statute does the language specify that a seller or purchaser must both be party to the proceeding, only that approval of the Commission must be sought prior to the transaction. The Eastern District interprets the purpose of 393.190; “The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.”⁵

Furthermore, the Eastern District addressed an argument similar to this involving the City of Mexico attempting to exercise eminent domain over a water utility owned by

¹ WM-2018-0116, EFIS Item 22, *OPC’s Response*, ¶ 13, 14.

² *Id.*, at ¶ 16.

³ *Id.*, p. 4 – 9.

⁴ Section 393.190.1, RSMo.

⁵ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

a realtor.⁶ The realtor argued that the seller, himself, was the one required to bring an action before the Commission for approval and to show how the public interest would be harmed.⁷ However, the Court determined, citing *Fee Fee*, that this was not the case and that the Commission possessed the necessary expertise to determine whether the service to the public would continue to be adequate.⁸ The Commission should also determine in this matter that the determination of whether the seller or purchaser of the utilities filed for its approval is irrelevant to the overall determination of whether this transaction would be detrimental to the public interest, which the Commission has full discretion to determine.

Commission Rule 4 CSR 240-3.310 governs the sale, assignment, lease or transfer of sewer utility assets and 4 CSR 240-3.605 governs the same for water utility assets. These sections do not specify any scenario in which the seller of sewer or water assets is required to be party to a proceeding before the Commission.⁹ The requirements of the rules in plain English are that a copy of the contract/agreement must be included with the application including evidence of the proper authority of the signatory of the contract to sign on behalf of the utility.¹⁰ The sections do specify occasions when the purchaser of the property must be a party, and require the applicant to show that the sale of the assets will not be detrimental to the public interest.¹¹ All of

⁶ ***State ex rel. Missouri Cities Water Co. v. Hodge***, 147 P.U.R.4th 224, 1993 WL 326586, 11 (Mo. App. Writ Div. Four), The determination of the right to exercise eminent domain over a public utility was ultimately overturned by the Supreme Court of Missouri on appeal, however, there was no mention of the language regarding the powers of the Commission in the opinion overturning the ruling.

⁷ ***State ex rel. Missouri Cities Water Co. v. Hodge***, 147 P.U.R.4th 224, 1993 WL 326586, 11.

⁸ *Id.*

⁹ 4 CSR 240-3.310 and 4 CSR 240-3.605.

¹⁰ *Id.*

¹¹ *Id.*

these requirements were met by the Applicant to this proceeding and considered in Staff's *Recommendation* filed March 6, 2018.

II. Remaining arguments in OPC's *Response* concern the merits of the Application and are irrelevant to the raised procedural question

The remainder of OPC's arguments, whether the Applicant has sufficient managerial, technical and financial abilities to purchase and operate the utility systems at issue,¹² all regard the merits of the Application; that is, whether or not the transfer is detrimental to the public interest. At no point in *OPC's Response* does OPC identify how any of the raised merit arguments rise to a detriment to the public interest. While a response on the merits of the *Application* isn't necessary to address the procedural question, Staff nevertheless must correct some assertions made by OPC.

OPC misinterprets Staff's *Recommendation* to imply that once the Commission grants a Certificate of Convenience and Necessity (CCN) to a utility that Staff no longer investigates the management and operational capabilities of such utility. That is a gross mischaracterization of Staff's filing. Commission Staff consistently inspect and review the activities of its regulated water and sewer utilities in accordance with proceedings before the Commission. Central States Water Resources (CSWR), the parent company of CRU, was before the Commission for the WR-2017-0259 matter that closed only 11 days prior to this filing. Staff has no reason to believe that a new investigation of CSWR would reveal any information not already present in that docket. OPC itself offers no evidence in its response of a new investigation into CSWR and, in complete contradiction to its own argument, relies heavily on information also gathered from that recently closed docket.

¹² See, WM-2018-0116, EFIS Item No. 22, p. 4-9.

OPC feigns support for its arguments against Staff's *Recommendation* using a series of its admonishments of CRU in the WR-2017-0259 docket, however, none are supported with concrete evidence of CRU's failure to complete the tasks. OPC combines this with examples from its testimony filed in that same docket of CSWR's transfers of money between the CSWR affiliates. Staff in its *Recommendation* has already expressed a desire to see CSWR file future rate cases concurrently between its affiliates for the purposes of corporate allocations and would suggest that this should also alleviate some of OPC's concerns about determining the financial operations of the utilities.

OPC finally challenges Staff's proposal that several of the small water and sewer utilities comprising CRU's application have health and/or safety concerns. Staff's Attachment A to its *Recommendation* outlines specifically the current state of each of the utilities comprising this application in detail. Within that document, for each of the utilities which OPC identified as not having a health or safety concern, Staff identifies that:

- M.P.B., Inc. has two systems that are out of compliance with the Clean Water Law and the Clean Water Commission Regulations as well as having a notice of violation from the Department of Natural Resources (DNR) against them.
- Mill Creek is currently operating without a permit in violation of the Clean Water Law and does not meet discharge effluent limitations consistently which will likely lead to a DNR violation if not fixed.

- The Willows does not meet discharge effluent limitations consistently which will likely lead to a DNR violation if not fixed. Additionally, Staff has received calls from its customers voicing concerns.
- Evergreen Lake is described as an aged system.

Staff is unaware of any threshold requirement for the “harm” described in 4 CSR 240-4.017(1), which may be used to show good cause for waiver of notice as opposed to delaying the proceeding by 60 days to meet the notice requirement. The descriptions of violations above coupled with those OPC acknowledges in its pleading would seem to meet any level of harm based on a plain language definition; “harm – Injury, loss, damage; material or tangible detriment.”¹³ The Commission is charged with ensuring safe and adequate service to all utility customers, in essence, to prevent such harm as the rules consider.¹⁴

III. Intervention

Staff acknowledges that the Lake Perry Lot Owners’ Association filed to intervene in this matter just one day prior to this filing. The Association expresses its desire to be involved in the matter following notice of the pending sale and this case before the Commission. Staff would recommend that to the extent any of the other eight utilities CRU seeks to acquire in relation to this proceeding wish to intervene, they have as much right and ability as the Association. Staff supports the Association’s right to intervene, however, Staff would dispute its suggestion that this case be dismissed in the alternative to their intervention being granted. Despite the fact that Port Perry Service Company is in good standing with DNR, several of the other utilities in this matter do

¹³ Black’s Law Dictionary: Abridged Eighth Edition, Bryan A Garner, Thomson/West 2005, p. 595.

¹⁴ Section 393.130, RSMo.

have immediate concerns that need to be addressed, and dismissing this matter will only prolong the problems customers of those utilities are facing. As stated in its *Recommendation*, CRU intends to provide improvements to Port Perry as well to ensure better functioning systems.

WHEREFORE, Staff prays that the Commission will accept this *Response*; and grant such other and further relief as the Commission considers just in the circumstances.

/s/ Whitney Payne

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 30th day of March, 2018 to all counsel of record.

/s/ Whitney Payne