

**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

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Case No. WA-2019-0299
Consolidated with SA-2019-0300

REPLY BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL

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The Missouri Public Service Commission is not just a rubber stamp for the Missouri Department of Natural Resources:

The initial briefs of both the Commission Staff (“Staff”) and Confluence Rivers Utility Operating Company, Inc. (“Confluence”) rely heavily on the testimony submitted by the Missouri Department of Natural Resources (“the MDNR”) showing that the MDNR would “prefer” that Confluence acquire the Port Perry Service Company LLC (“Port Perry”) assets. Confluence, *Initial Brief*, pgs. 16 – 20; Staff, *Initial Brief*, pgs. 9 – 10. Both parties essentially argue that the MDNR’s preference should control on this issue and that there is no reason that the Commission should dare question the MDNR’s authority. *Id.* However, this kind of mentality ignores the very real and important differences between the MDNR and this Commission. Chief among these differences is the fact that this Commission has to examine the **financial** impacts of the decisions it makes on Missouri rate-payers, which is something that the MDNR does not do. Tr. vol. 2 pg. 93 lns. 12 – 20.

As will be discussed in greater detail momentarily, the reality of this case is that rate-payers will almost certainly end up paying substantially more under Confluence than under the Lake Perry Service Company (“Lake Perry”). *Compare* Roth, *Surrebuttal*, Schedule KNR-6 (showing that Confluence is currently seeking approximate monthly rates of \$61 for water and \$68 for wastewater services consolidated across all of its systems), and *Rebuttal*, Glen Justis, pg. 18 (showing that Lake Perry’s proposed monthly rate for combined water and wastewater services is just \$64.24). This, again, is something that the MDNR did not bother to consider

when it developed its testimony. Tr. vol. 2 pg. 93 lns. 12 – 20 (“Q. . . . Did you consider rate impact when determining whether this application was detrimental to the public interests? A. No, I did not. Q. Do you know what the long-term rate impact for this system could potentially be? A. No, I do not.”). Moreover, it is **because** the MDNR did not consider the rate impact of Confluence’s acquisition of the Port Perry assets that this Commission has a reason to reach a different conclusion. If the proposed Confluence acquisition is going to hurt customers by forcing them to pay more than they otherwise would have for the same level of service, then the acquisition is detrimental to the public interest and should be denied, no matter what the MDNR would “prefer.” *See Report and Order*, EO-2004-0108, pg. 43 (“A detriment [to the public interest], 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.”).

In addition, the evidence concerning the MDNR’s “preference” really refers to nothing more than the MDNR’s stated belief that what it considers to be “higher ranked” continuing authorities are more likely to meet the MDNR’s technical, managerial, and financial (“TMF”) capacity standards than what it calls “lower ranked” continuing authorities. Savage-Clarke, *Surrebuttal*, pg. 5. But this does not matter as the OPC has already shown that Lake Perry possesses the necessary TMF capacity to **at least** the same extent as Confluence.¹ OPC, *Initial Brief*, pgs. 14 – 16.

¹ This is as good a point as any to remind the Commission that Confluence basically does not perform **any** operation and maintenance tasks related to its water and wastewater systems itself and instead relies on third parties to continue both the technical upkeep of the systems as well as the billing and customer support. Cox, *Direct*, pgs. 8 - 9. The suggestion that any other company would lack TMF

Thus, the MDNR's stated "preference" is immaterial because both companies have TMF capacity.

This Commission has an obligation to **independently** consider the impact of the proposed acquisition in this case. As such, the Commission should not just issue a rubber stamp approval of the acquisition because that is what the MDNR would "prefer." This remains true no matter what Confluence and Staff may claim to the contrary.

Staff's argument that the Lake Perry competing bid cannot be considered ignores the plain reality of this case:

As predicted, Staff continues to argue that it was absolved of any duty to present or even consider competing offers in this case because Lake Perry did not file a competing application for Commission approval to purchase the Port Perry system. Staff, *Initial Brief*, pgs. 9 – 10. To start off with, the OPC would again point the Commission to the actual language of section 393.190 which requires the **seller** to file an application, not the **buyer**. RSMo. § 393.190.1 ("No . . . water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of **its** franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first

capacity when compared to Confluence, who has to depend exclusively on outside contractors to provide that capacity, is thus completely illogical and highly misleading.

secured from the commission an order authorizing it so to do.” (emphasis added)). Thus, there was no reason why Lake Perry would ever file an application to buy the Port Perry assets and instead would only have had to intervene in the case that the seller should have brought seeking Commission approval for the sale of its assets. For as much as this case has managed to conform to the statutory guidelines, this is exactly what Lake Perry did. *See Application to Intervene of Lake Perry Lot Owners Association* pgs. 1 – 2.

In addition to the foregoing, it is also necessary to point out, again, that the reason that Lake Perry did not file an application is because there was no purchase agreement, which is itself the result of the interference of Confluence. *See DeWilde, Rebuttal*, pgs. 10 – 11, Schedule RD-8, Schedule RD-10; Roth, *Surrebuttal*, pg. 13. After getting the current Port Perry owners to agree to the deal, Confluence had its legal representatives instruct the Port Perry owners not to consider or even discuss any other proposed offer for the systems and then went even further by threatening Lake Perry with legal action if it continued its attempt to buy the Port Perry system. *Id.* Given all of that, there is no reason to believe that there would ever be a competing purchase agreement for Staff to consider in this case, which should obviously present a significant problem to any Commission who legitimately values competition in a market.

Confluence and Staff have jointly developed a simple mechanism that prevents customers from protecting their own interests when surprised with an attempted acquisition of their water and wastewater systems that they intensely oppose. First,

Confluence seeks out a prospective company and offers whatever price necessary to encourage the utility to sell while simultaneously directing the seller to not consider any other potential offers or face legal action. Tr. vol. 2, pg. 126 lns. 13 – 15; DeWilde, *Rebuttal*, pgs. 10 – 11, Schedule RD-8, Schedule RD-10; Roth, *Surrebuttal*, pg. 13. As a result, there is no formalized competing purchase agreement and Staff can therefore declare itself absolved of the need to consider any possible alternative to the Confluence’s application. See Staff, *Initial Brief*, pg. 10. This outcome is contrary to advancing any public interest because Missouri rate-payers are denied a fair and impartial evaluation of possible competing bids.

The OPC will go no further down this inquiry as it has already discussed this issue in its initial brief. OPC, *Initial Brief*, pgs. 12 – 13. The OPC will instead simply urge the Commission to please not buy into Staff’s argument that no other competing bids need to be considered because Confluence has managed to threaten or cajole the sellers. This is true even if the Commission ultimately determines that the Confluence acquisition is not detrimental to the public interest. It is imperative that the Commission (and by extension its Staff) actually consider the other viable alternatives to any given acquisition and thus stand by the Commission’s own mission statement related to promoting the values of competition. Missouri Public Service Commission, About the PSC, (Nov. 7, 2019), https://psc.mo.gov/General/About_The_PSC.

Confluence's acquisition of the Port Perry water and wastewater assets will almost certainly result in higher rates than what would otherwise be charged by Lake Perry without any attendant benefit to rate-payers and is thus, by definition, detrimental to the public interest:

Both Staff and Confluence cling to the fanciful notion that it is entirely impossible to determine what effect Confluence's acquisition will have on customer rates. Confluence, *Initial Brief*, pgs. 27 – 28; Staff, *Initial Brief*, pg. 16. This is an absurd argument. Confluence is presently engaged in a rate case before this Commission. Roth, *Surrebuttal*, pg. 6; *see also* WR-2020-0053. As part of that rate case, Confluence is seeking consolidated rates across all of its systems that initial data suggests will result in average monthly rates of \$61 for water and \$68 for wastewater services. Roth, *Surrebuttal*, Schedule KNR-6. It is entirely unreasonable to assume that Confluence will not ultimately try to subject customers of the Port Perry system to these same (if not higher) rates. This is especially true given the fact that the current requested rate increases are driven primarily by operation and maintenance costs that the proposed Port Perry acquisition will necessarily increase. Roth, *Surrebuttal*, pgs. 6 – 7. Consequently, there is an overwhelming likelihood that current Port Perry customers will eventually end up paying twice as much under Confluence as what Lake Perry's evidence shows that it would charge customers. *Compare* Roth, *Surrebuttal*, Schedule KNR-6 (showing that Confluence is currently seeking approximate monthly rates of \$61 for water and \$68 for wastewater services consolidated across all of its systems), and *Rebuttal*, Glen Justis, pg. 18 (showing that

Lake Perry's proposed monthly rate for combined water and wastewater services is just \$64.24).

The Commission has previously defined a detriment to the public interest as any transaction that makes service "less safe or less adequate, or which tends to make rates less just or less reasonable." *Report and Order*, EO-2004-0108, pg. 43. The Commission went on to note, however, that "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 where the transaction will confer benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of service." *Id.* Because Confluence's acquisition is practically guaranteed to increase rates above what Lake Perry intends to charge, the critical question, therefore, becomes what attendant "benefit of equal or greater value" does Confluence's acquisition of the Port Perry assets provide over Lake Perry's acquisition to justify the massive rate increase? The simple answer: nothing.

The detailed engineering report and business plan developed by Lake Perry shows that it can easily provide the same, if not better, quality of service as Confluence, but at a much lower price. Justis, *Rebuttal*, pgs. 4 – 6, Schedule GJ-01; Sayre, *Rebuttal*, Schedule CWS-2. Moreover, there is no problem Confluence intends to resolve with the existing water or wastewater systems that threatens the safety or adequacy of the service being provided that Lake Perry has not also planned to resolve. *Compare* Sayre, *Rebuttal*, Schedule CWS-2, *and* Justis, *Rebuttal*, Schedule GJ-04. There is consequently no attendant benefit to be supplied to the current Port

Perry customers by having Confluence manage the system instead of Lake Perry that counter balances the near certainty of paying substantially more in rates under Confluence. As the Commission has already found, an increase in rates without an attending benefit to justify that increase is the very definition of a transaction being detrimental to the public interest. *Report and Order*, EO-2004-0108, pg. 43.

If the Commission approves Confluence's application, then Confluence will eventually return seeking joint water and sewer rates that are well in excess of the \$64.24 average monthly rates proposed by Lake Perry. At that time, the Commission and its Staff will be required to explain to the citizens currently being served by Port Perry why they allowed a clearly detrimental acquisition to occur when they had a viable alternative before them to help keep rates affordable (and thus serve the public interest) by allowing the public to take control of their own systems. Alternatively, the Commission can avoid this difficult and most likely awkward problem by carefully considering the evidence now before it and coming to the only logical conclusion, which is that the proposed Confluence acquisition is detrimental to the public interest and should thus be denied.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Reply Brief* and rule in the OPC's favor on all issues presented in this case.

