

**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 Water and Sewer Assets,)	Case No. WM-2018-0116
For a Certificate Of Convenience and Necessity,)	Case No. SM-2018-0117
and, in Connection Therewith, To Issue)	
Indebtedness and Encumber Assets)	

**PUBLIC COUNSEL RESPONSE TO STAFF'S
RECOMMENDATION AND MOTION FOR HEARING**

COMES NOW the Office the of Public Counsel (“Public Counsel”) for its response to the *Recommendation* filed by the Staff of the Public Service Commission (“Staff”) regarding the application of Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers” or “Applicant”), and for its request for a contested hearing and the scheduling of a prehearing conference, and states the following:

1. On November 2, 2017, Confluence Rivers filed its *Application and Motion for Waiver*, wherein the newly formed corporate entity seeks the Public Service Commission’s (“Commission”) approval purchase substantially all of the water and/or sewer assets of the Commission regulated systems of Smithview H2O Company, M.P.B., Inc., Mill Creek Sewers, Inc. (“Mill Creek”), Roy-L Utilities, Inc., Port Perry Service Company, LLC, Gladlo Utilities, Inc., The Willows Utility Company, Inc., and the Evergreen Lakes Water Supply Co. Additionally the Applicant seeks to purchase non-regulated water and sewer assets operated by Majestic Lakes Homeowners Association, Inc., and requests a Certificate of Convenience and Necessity (“CCN”) to operate the system and provide service to the public. Finally, the Applicant seeks waiver 4 CSR 240-4.017(1).

2. On November 21, 2017, the Commission directed Staff to file a Recommendation or alternative pleading no later than December 21.

3. On December 21, 2017, Staff filed a request for extension, and the Commission granted, to provide a recommendation on February 20, 2018.

4. On February 16, 2018, Staff filed a request for extension, and the Commission granted, to provide a recommendation on March 6.

5. On March 6, 2018, Staff filed its *Recommendation*, wherein it recommends approval of the application pursuant to several proposed conditions.

6. Pursuant to 4 CSR 240-2.080(13), Public Counsel offers this response to the Staff's *Recommendation*, and notes the absence of necessary parties.

7. Public Counsel requests a hearing on the application and an order scheduling of a prehearing conference. Furthermore, Public Counsel requests the Commission enjoin necessary parties or suspend the application to be supplemented by the Applicant to include all necessary parties.

Improper Applicant

8. § 393.190.1, RSMo., states that no water or sewer corporation, as defined by § 386.020, RSMo., “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...without having first secured from the commission an order authorizing it so to do.” The statute contemplates that the *possessor* of the certificate of service seek the Commission’s permission and approval to transfer its utility assets.

9. The Applicant in this case is Confluence Rivers, the buyer.¹ In its prayer, the Applicant seeks authorization for “the Selling Utilities to sell and Confluence Rivers to acquire the assets of the Selling Utilities identified herein, to include the CCNs held by the Selling Utilities...”² No such selling utility is a party to this proceeding.

10. Counsel for the Applicant does hold himself out to represent the regulated utilities identified as sellers.

11. The verification filed by the Applicant only asserts to represent the interests of Confluence Rivers.

12. Appendix H-C identifies ***

13. The Commission’s jurisdiction is limited to that proscribed via statute, and without the proper applicant is unable to grant the relief sought by Confluence Rivers, as the statute requires the utility with a possessory interest to be a party to case.

14. The application is materially deficient in that the inappropriate parties are seeking redress from the Commission. No entity identified as a seller in the application is present and represented in this proceeding.

15. In regard to Majestic Lakes, which requires the creation of a new certificate. Pursuant to § 393.170.3, “[t]he commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service.”

16. Public Counsel moves to hold such a hearing on the proposed transfers under § 393.190, RSMo., and the new certificate under § 393.170.

¹ Application, pg. 1 ¶ 1.

² Application, pg. 18.

17. The only new CCN sought by the Applicant is for Majestic Lakes, a non-regulated utility.³

18. As such, Staff's *Recommendation* generally evaluated the technical, managerial and financial capacity ("TMF") of the affiliates in prior cases, stating "Staff's position on TMF remains positive regarding those affiliates, and similarly takes the position that [Confluence Rivers] has adequate TMF capability."⁴

19. Staff admits that its evaluation of the management and operational capabilities contemplated in this application is based on Staff's prior recommendations regarding different companies. Applying Staff's logic, there should no additional need for the Commission to consider the issue after approval of an initial utility operation. Public Counsel disagrees.

20. In WR-2017-0259, Public Counsel witness Keri Roth testified that Indian Hills', an affiliate of Confluence Rivers, failed to comply with four conditions of its acquisition order in WO-2016-0045:

Q. With regard to Paragraph 18 of the Order in W0-2016-0045, please describe OPC's concern of Indian Hills' failure to comply.

A. Paragraph 18 states, "Within 10 days after the issuance of any financing authorized by the order, Indian Hills Utility Operating Company, Inc. shall

³ According to *Staff's Recommendation*, on page 13, Staff appears to have gone through considerable efforts to create a metes and bounds written description and a map to be used as a service area boundary. Pursuant to the terms of the agreement for sale of the utility system:

While the contract clearly articulated which party's obligation it is to prepare and finance the creation of the substantiating documentation to support the application; Public Counsel notes that the application did not include that information and is concerned about the reliance on state resources to supplement the record and assume a liability that the terms of the contract assigned to ***

⁴ *Staff Recommendation*, Page 3 (March 6 2018).

file a report including the amount of financing issued, date of issuance, stated return required, maturity date, redemption schedules or special terms, if any, use of proceeds, estimated expenses and the final executed financing agreement." OPC was unable to find this report in EFIS in case number W0-2016-0045, therefore OPC believes Indian Hills did not comply.

Q. With regard to Paragraph 20 of the Order in W0-2016-0045, please describe OPC's concern of Indian Hills' failure to comply.

A. Paragraph 20 states, "Indian Hills Utility Operating Company, Inc. shall file with the Missouri Public Service Commission all documentation required pursuant to the terms of the financing agreement. In the event that Indian Hills Utility Operating Company, Inc. is in violation of...[any terms of the financing agreement, it shall file a report with the Commission indicating]... its plan to cure such violation. If such violation is waived, then Indian Hills Utility Operating Company, Inc. shall indicate why the violation is waived and how long the waiver shall be effective." After further discovery, OPC learned that Indian Hills was not making timely loan payments. It was revealed by the Company that terms of repayment had been renegotiated to begin after new rates went into effect. OPC believes this information should have been filed in EFIS to comply with the Commission Order.

Q. With regard to Paragraph 21 of the Order in W0-2016-0045, please describe OPC's concern of Indian Hills' failure to comply.

A. Paragraph 21 states, "The proceeds from the proposed financing shall be used only for the acquisition of I.H. Utilities, Inc.'s water utility assets, and the proposed tangible improvement to the water system that can be booked to plant in service for purposes of ratemaking." Please refer to OPC witness Mr. Meyer's direct testimony for details regarding intra-company transfers. OPC is unable to prove that all funds have been utilized as ordered in case W0-2016-0045.

Q. With regard to Paragraph 22 of the Order in W0-2016-0045, please describe OPC's concern of Indian Hills' failure to comply.

A. Paragraph 22 states, "Indian Hills Utility Operating Company, Inc. shall notify the Commission immediately if there are any changes to the current investment structure of investors in Indian Hills Utility Operating Company, Inc. or its affiliate investors. This notice shall include all documents executed to complete such investment structure or ownership changes." Although individual investors have not changed, OPC witness Mr. Meyer describes in his testimony various journal entries of equity infusions. OPC believes this affects the investment structure of investors.⁵

⁵ WR-2017-0259, Exhibit 200, Direct Testimony of Keri Roth, Pg. 12-14 (October 13, 2017).

21. In addition to concerns relating the ability of the affiliates of Confluence Rivers to comply with conditions imposed by the Commission in similar acquisition cases, Public Counsel witness Greg Meyer identified a concern regarding transfers of monies amongst affiliates. Mr. Meyer's testimony, appended as Attachment A-C for the benefit of reviewing the charts on pages 7-9, in pertinent part states:

22. Given the foregoing, Public Counsel has concerns regarding the management and financing practices of an affiliate operations of Confluence Rivers, and disagrees with Staff's assessment of the Applicant's capability in this application. Should the Commission proceed with the application, Public Counsel believes it is imperative to address these concerns in this proceeding.

Financing Terms

23. The Applicant seeks authority to issue up to \$2,600,000 of secured indebtedness pursuant to terms state din Appendix R-C. ***

24. Staff recommends the Commission “[a]uthorize [Confluence Rivers] to finance

*** consistent with Appendix R-C to the Application.”⁶

25. Public Counsel does not believe the terms in Appendix R-C are just and reasonable, given the Commission’s recent decision in the Indian Hills case authorizing a 6.75% cost of debt.⁷

26. In prior cases the Commission has instructed the Applicant that the financing terms approved in prior affiliate cases, such as Hillcrest, Elm Hills, and Raccoon Creek, were not to become a business model and competitive financing terms had to be sought in future cases. The applicant has failed to provide any such attestation or evidence indicating such an effort was made.

27. Furthermore, the Appendix R-C term sheet was executed prior to the Commission’s order in Indian Hills. The Applicant did not have the benefit of considering the Indian Hills decision in preparation of this application, and have not provided a supplement to address the Commission’s concerns expressed in that *Report and Order* subsequent thereto.

28. While Staff asks the Commission to impose a condition in Paragraph 16 that would preclude any determination of ratemaking treatment of any matters, Public Counsel is concerned of the Commission’s willingness to disallow or impute an imprudent cost of debt amount when the same order is authorizing the financing terms “consistent with Appendix R-C”.

⁶ *Staff Recommendation*, Page 13.

⁷ *Report and Order*, WR-2017-0259.

29. In addition, Public Counsel questions the amount of financing necessary to meet the needs of the proposed utility operations. The Applicant has asserted to purchase the entities an estimated net book value of *** *** is necessary. Staff's estimate of the net book value is \$411,433.⁸ However, according the purchasing agreements, the net book value is the *minimum* purchase price; ***

***⁹ At this time, Public Counsel is still conducting discovery to determine what those liabilities may be.

30. Finally, the Applicant asserts as its good cause justification for waiver of its notice requirement that "there are a number of health and safety issues involved with these small companies."¹⁰ However, a review of the application does not indicate that all the seller utilities are subject to such precarious circumstances. For example, it appears that in the past Smithview had encountered service quality issues necessitating some undefined contact with the Missouri Department of Natural Resources ("DNR"), however its current operations are maintained by Central States Water Resources, Inc., an affiliate of Confluence Rivers. Majestic Lakes purports to be subject to an enforcement action by the Missouri Attorney General's Office, a copy of which is not included in the application, and also subject to a building moratorium from the DNR. Finally, Gladlo Water and Sewer Company, Inc. and Roy-L Utilities, Inc., are purportedly under DNR schedule of compliance for ammonia removal and disinfection, however. The remainder; M.P.B., Inc., Mill Creek, Port Perry, The Willows, and Evergreen Lake, are not being held out by the Applicant as encountering a safety or health concern.

⁸ *Staff Recommendation*, Page 5.

⁹ *Application*, Appendices B-C – K-C.

¹⁰ *Application*, Page .

31. Suffice it to say, Public Counsel has concerns about terms and representations made within the application, and should the Commission proceed with the application, believes it necessary to set a hearing.

32. The Commission should enjoin the necessary parties, or in the alternative suspend the application to permit the Applicant to rectify these deficiencies and amend its application, and subsequent thereto a new procedural schedule should be set.

WHEREFORE, OPC respectfully submits its response to the Staff's Recommendation, and moves for the enjoinder of necessary parties, or in the alternative to suspend the application and direct the Applicant to correct deficiencies, and requests a hearing and order a prehearing conference.

Respectfully submitted,

/s/ Hampton Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 15th day of March 2018.

/s/ Hampton Williams