

Exhibit No. _____
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Witness: Bradley M. Seltzer
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Sponsoring Party: Confluence Rivers Utility
Operating Company, Inc
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Missouri Public Service Commission

Rebuttal Testimony

of

Bradley M. Seltzer

On Behalf of

Confluence Rivers Utility Operating Company, Inc

June 29, 2023

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1 **I. WITNESS INTRODUCTION**

2
3 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

4
5 A. My name is Bradley M. Seltzer. My business address is 800 17th St., N.W., Washington,
6 D.C. 20006. I also maintain an office at 4675 MacArthur Court, Newport Beach, CA
7 92660.

8 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

9 A. I am an equity partner in the law firm of Holland & Knight LLP.

10 **Q. PLEASE DESCRIBE YOUR CURRENT RESPONSIBILITIES AT HOLLAND &
11 KNIGHT.**

12 A. I am engaged in the general practice of tax law and am the co-Chair of our Energy Tax
13 Group. I specialize in the taxation of, and the tax issues relating to, regulated public
14 utilities. Included in this area of specialization is the treatment of deferred taxes in
15 ratemaking and the normalization rules of the Internal Revenue Code addressing deferred
16 taxes.

17 **Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS TESTIMONY?**

18 A. I am submitting this testimony on behalf of Confluence Rivers Utility Operating
19 Company, Inc. (“Confluence Rivers” or “Company”).

20 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL BACKGROUND**

21 A. For more than 40 years I have been involved in the provision of tax services principally
22 to companies in various segments of the utility industry. I joined the firm then known as
23 Sutherland, Asbill & Brennan (“SAB”) in 1978 as an associate directly out of law school,
24 was later promoted to partner, and continued in that capacity until 1997, when I left to

1 join Deloitte Tax as the U.S. and Global Leader of the Energy Tax practice. Deloitte is
2 the largest professional services company in the world. In 2016, upon reaching
3 mandatory retirement at Deloitte, I rejoined SAB as a partner shortly before its merger
4 into what is now the firm of Eversheds Sutherland (U.S.) LLP. In December of 2022,
5 together with the rest of the Eversheds Sutherland Energy Tax, Transactional and
6 Regulatory practice, I joined Holland & Knight LLP.

7 Throughout my career, I have provided planning and controversy-based tax
8 services primarily to electric, gas, telephone, and water industry clients. The first major
9 matter I was assigned to upon joining SAB was then, and remains, the largest
10 normalization controversy in history, and, in the Surface Transportation Act of 1982,
11 successfully received clarifying normalization legislation and a material reduction in the
12 assessed deficiency against Pacific Telephone and its parent AT&T.

13 My practice has included tax planning for the acquisition and transfer of business
14 assets, including public utility property, operational planning, and the representation of
15 clients in tax controversies with the Internal Revenue Service (“IRS”) at the audit and
16 appeals levels, and, at times, in tax litigation. I have been responsible for procuring
17 private letter rulings and technical advice memoranda from the IRS National Office,
18 including multiple normalization compliance requests. On several occasions I have
19 represented one or more segments of the utility industry before the IRS and/or the
20 Department of Treasury regarding certain tax positions under consideration or adopted by
21 the Federal government.
22

1 I have submitted written comments and have testified at Department of Treasury
2 hearings regarding legislative and administrative tax issues of significance to the utility
3 industry, including consolidated tax adjustments, interest synchronization, deregulation
4 of public utility property, the treatment of qualified nuclear decommissioning funds,
5 contributions to capital, the provisions of the Tax Cuts and Jobs Act of 2017 (“TCJA”)
6 relating to so-called bonus depreciation and the limitations on business interest
7 deductions under section 163(j) as amended by the TCJA, and the numerous energy-
8 related provisions of the Inflation Reduction Act of 2022. While at Deloitte Tax, I co-
9 developed and taught multiple sections, including the normalization modules, of the two-
10 day utility book and tax training for auditors, Deloitte Tax personnel, and audit and tax
11 clients.

12 I am a member in good standing of the District of Columbia and California bars.
13 I am a member of the American Bar Association, Section of Taxation, where I am a past
14 chair of the Committee on Regulated Public Utilities and its Normalization
15 Subcommittee, and regularly make presentations before the current Energy &
16 Environmental Tax Committee.

17 **Q. HAVE YOU PREVIOUSLY TESTIFIED OR PARTICIPATED IN ANY**
18 **REGULATORY PROCEEDINGS REGARDING TAX ISSUES RELEVANT TO**
19 **REGULATED PUBLIC UTILITIES?**

20 **A.** Yes, I have. I have testified regarding tax, tax accounting and regulatory tax matters
21 before regulatory commissions in California, Missouri, Oklahoma, Texas, and Arizona,
22 as well as the Federal Energy Regulatory Commission. I have also assisted several
23 company-sponsored witnesses in the preparation of their testimony in proceedings before

1 utility commissions in North Carolina, Alaska, Louisiana, Indiana, Michigan, Oklahoma.
2 and Texas.

3 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND.**

4 A. I earned a Secondary Education Teaching Degree with a Bachelor of Arts in Russian
5 Language and Social Studies *magna cum laude* from the State University of N.Y. at
6 Albany in 1974 and a Juris Doctor *with high honors* from the National Law Center at
7 George Washington University in 1978.

8 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

9 A. My testimony responds to the Direct Testimony proffered by Ms. Kimberly K. Bolin in
10 the instant case.

11 **II. INCOME TAXES**

12 **Q. DO YOU AGREE WITH MS. BOLIN'S TESTIMONY?**

13 A. Partially. I agree with the entity-by-entity income and loss figures presented and that the
14 losses generated were not attributable to accelerated depreciation. Indeed, in an effort not
15 to produce incremental operating losses, Confluence Rivers' entities elected not to claim
16 accelerated depreciation for federal income tax purposes. Finally, I agree that, given that
17 election, the net operating loss balance does not reflect deferred taxes attributable to
18 accelerated depreciation and that, therefore, the normalization rules of the Internal
19 Revenue Code to not apply to the instant situation.

20 **Q. WHAT SPECIFIC DISAGREEMENTS DO YOU HAVE WITH THE**
21 **TESTIMONY OF MS. BOLIN?**

22 A. Ms. Bolin's testimony starts from an erroneous and unsupported proposition that net
23 operating losses ("NOLs") such as those incurred by Confluence Rivers are "not

1 technically “tax timing differences.”” Secondly, this conclusion essentially reflects a
2 misinterpretation and misapplication of the “actual taxes” doctrine by failing to
3 acknowledge the deferred tax liability for future taxes and the related deferred tax asset
4 that the NOLs represent. Finally, the proposed disallowance of any tax expense in cost of
5 service fails to appreciate that the NOLs in this case reflect actual increased operating
6 expenses attributable to the distressed assets acquired by Confluence Rivers that have
7 been borne by Confluence Rivers but have inured to the benefit of its customers.

8 **Q. WHAT IS THE BASIS FOR YOUR CONCLUSION THAT NOLs ARE A “TAX**
9 **TIMING DIFFERENCE”?**

10 A. Most importantly, in *Missouri-American Water Co., v. P.S.C.*,¹ the Missouri Court of
11 Appeals for the Western District recognized that, as here, “a company is allowed to
12 deduct certain costs against income for tax purposes at different times than when it is
13 allowed to reflect the same costs as a reduction to income for financial reporting
14 purposes. This is referred to as ‘timing differences.’” That is precisely the situation in
15 the instant case where Confluence Rivers properly deducted its operating expenses for
16 book and financial reporting purposes, but, by reason of its NOLs, was unable to
17 currently deduct such expenses for tax reporting purposes. However, when those net
18 operating losses are limited² or are no longer utilized against future income, the deferred
19 tax liability inherent in the NOLs will become due, demonstrating that they are
20 temporary, not permanent, differences (also referred to as “tax timing differences”).

¹ 591 S.W.3d 485 (Mo. Ct. App. 2019).

² As Ms. Bolin correctly observed, net operating losses arising after December 31, 2017, can only offset 80% of taxable income in any given year.

1 **Q. ARE THERE OTHER AUTHORITIES THAT DEMONSTRATE THAT THE**
2 **DEFERRAL FOR FEDERAL INCOME TAX PURPOSES OF DEDUCTIONS**
3 **CLAIMED FOR FINANCIAL ACCOUNTING PURPOSES IS A TAX TIMING**
4 **DIFFERENCE?**

5 A. Yes. Under Financial Accounting Standard (FAS) 109, a “deferred tax liability or asset is
6 recognized for the estimated future tax effects attributable to temporary differences and
7 carryforwards.” (Paragraph 8). Specific examples of temporary timing differences
8 include “expenses or losses that are deductible [for tax purposes] after they are
9 recognized in financial income.” (Paragraph 11b). Moreover, paragraph 45e provides
10 that the significant components of tax expense must be disclosed including the “benefits
11 of operating loss carryforwards.” Lastly, in AI93-5-000, the Federal Energy Regulatory
12 Commission in paragraph 10 specifically provided rules for the adoption of FAS 109
13 with respect to NOL carryforwards by mandating that “[a]n entity shall record the income
14 tax effects of a NOL carryforward...in a separate account of Account 190, Accumulated
15 Deferred Income Taxes Debit.”

16 **Q. MS. BOLIN CLAIMS THAT NO TAX EXPENSE SHOULD BE ALLOWABLE**
17 **BECAUSE OF THE PRESENCE OF THE NOLS. DO YOU AGREE?**

18 A. No, not only is that conclusion contrary to the authorities just cited, that conclusion is
19 inconsistent with fundamental ratemaking principles and economics. Ms. Bolin in
20 essence adopts a long-discredited misinterpretation of the so-called “actual taxes
21 doctrine,” whereas the proper calculation of tax expense is not based merely on “actual
22 taxes” currently payable. This “argument ignores the fact that the total income tax
23 expense component in cost of service measures all taxes payable to the taxing authority

1 — currently and at some future date.” *See* Richard E. Matheny, Taxation of Public
2 Utilities § 3.01 (2022). Rather, tax expense, for ratemaking purposes, is a hypothetical
3 construct whereby rate base is multiplied by the authorized rate of return and then the
4 statutory tax rate is applied to determine tax expense. That formula insures that both
5 current and deferred taxes are reflected in tax expense.

6 **Q. IF THE NOLs UTILIZED ARE REPLACED BY NEW NOLs, DOESN'T THAT**
7 **EFFECTIVELY CONVERT THE TEMPORARY DIFFERENCE INTO A**
8 **PERMANENT DIFFERENCE?**

9 A. No. In Order 144, FERC specifically addressed the fallacy inherent in that argument as
10 follows:

11 The opponents of normalization have confused the accounting of specific
12 individual costs with their prediction of long-range historical patterns.
13 They would lump together all deferrals, regardless of timing differences
14 among them and their application to different service periods; and if the
15 lump grows, they would maintain that there is no reversal as to any
16 deferral. But, determining costs for purposes of ratemaking requires a
17 calculation of pertinent individual costs. The issue is whether individual
18 deferrals really do ‘turn around.’ The Commission’s definition of ‘timing
19 differences’ applies normalization only to true deferrals – to those
20 transactions which really do reverse. As such, there can be no ‘permanent
21 tax savings’ under the ... rules; and, there can be no continual deferral of
22 any individual ‘timing difference.’³
23

24 **Q. YOU PREVIOUSLY REFERRED TO CERTAIN FERC AUTHORITIES IN**
25 **SUPPORT OF YOUR POSITION, BUT FERC DOES NOT HAVE OVERSIGHT**
26 **OF WATER COMPANIES. WHY ARE THE FERC AUTHORITIES RELEVANT**
27 **TO THE INSTANT SITUATION?**

³ Order 144, at 44-45 quoting with approval comments of Appalachian Power.

1 As noted above, the normalization rules under the Internal Revenue Code only address
2 the ratemaking treatment of timing differences attributable to accelerated depreciation
3 and the investment tax credit. However, after careful analysis, in Order 144, FERC
4 determined that proper normalization ratemaking should be extended to most book/tax
5 timing differences, expressly including situations where, as here, expenses are recognized
6 for book purposes prior to when they are properly deductible for tax purposes, a so-called
7 Category 2 timing difference. Moreover, FERC, relying in part on *Memphis Gas, Light
8 and Water Division v. F.P.C.*, 500 F.2d 798 (D.C. Cir, 1974), expressly held that the
9 normalization policy it was adopting not only satisfied the “actual taxes” principle by
10 recognizing both current and future tax liabilities, but also comported with “sound
11 regulatory principles.”⁴

12 In sum, in accordance with FERC Order 144 and 18 C.F.R. § 35.24, the proposal
13 of Ms. Bolin to exclude the future tax liability in the tax allowance of Confluence Rivers
14 violates sound ratemaking principles reflecting the normalization of book/tax timing
15 differences (including net operating loss carryforwards), and is also inconsistent with the
16 “actual taxes” principle upon which she apparently purports to rely.

17 **Q. YOU ALSO MENTIONED THE ECONOMIC FLAW IN THE DISALLOWANCE**
18 **OF TAX EXPENSE AS PROPOSED BY MS. BOLIN. CAN YOU EXPLAIN**
19 **THAT?**

20 **A.** As I previously mentioned, when Confluence Rivers acquired the distressed water and
21 wastewater assets, it adopted the former rates of the utilities whose assets it acquired.

⁴ The definitions of timing differences and the application of normalization principles to all book/tax timing differences (including net operating loss carryforwards) unless specifically excluded, were formally adopted by FERC in 18 C.F.R. § 35.24.

1 The increased operating costs, over and above those reflected in those adopted rates, were
2 borne by Confluence Rivers. Similarly, the significant investment that needed to be
3 incurred to rejuvenate and improve those distressed assets were borne by Confluence
4 Rivers, but the benefits inured to the customers. Those costs are now reflected in the
5 NOLs at issue in this rate case. Under the “matching principle” of ratemaking, having
6 received the benefits of those costs, the customers, not Confluence Rivers, should bear
7 responsibility for the costs reflected in the NOLs generated from those expenditures.
8 Otherwise, the economic effect would be to impermissibly convert what are clearly tax
9 timing differences under the authorities cited above into permanent differences.

10 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

11 **A.** Yes.

