

**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 ) File No. WA-2019-0299  
Assets and for a Certificate of Convenience and )  
Necessity )

**LAKE PERRY LOT OWNERS ASSOCIATION  
REPLY BRIEF**

**LIST OF ISSUES**

**1. What is the net book value of the Port Perry Service Company’s (“Port Perry”) water and wastewater assets?**

There is no disagreement among the parties on this issue. “[T]he net book value for the Port Perry assets as of December 31, 2019, is \$20,070 for water and \$57,866 for sewer. The net book value amounts for both water and sewer assets will be used as the starting amounts for the calculation of rate base (with regard to the Port Perry assets) in Confluence River’s next rate case.”<sup>1</sup>

**2. Given the answer to the first question, 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. Confluence Rivers’ initial brief is as vacuous as its testimony is. Confluence Rivers’ argument is it will not recover the acquisition premium, it is capable, and the Commission owes

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<sup>1</sup> *Stipulation and Agreement as to Net Book Value*, p. 2

Confluence Rivers this because of its altruistic motivation or “charity complex.”<sup>2</sup> Staff’s initial brief is simply wrong. Neither has presented evidence showing why this transaction is not detrimental to the public interest.

### **Legal Standard**

The Commission must remember its obligation in this case. Its obligation is set forth in *Ag Processing v. Public Service Com'n.*, 120 S.W.3d 732 (Mo., 2003).

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of **deciding it as a relevant and critical issue** when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it **can determine whether the acquisition premium was reasonable**, and it should have considered it **as part of the cost analysis** when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue **in conjunction with the other issues** raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, **primarily** the issue of UtiliCorp's being allowed to recoup the acquisition premium. [emphasis added]

120 S.W.3d at 736. Up until now, the Association has taken an analytic approach to this case, describing how the Commission must do a cost-benefit analysis. However, there is a sense in which *Ag Processing* is setting forth another perspective for the Commission. The Court is saying, when your decision is made, the Commission should assure the public that there will be “no regrets.”

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<sup>2</sup> At the hearing on May 19, 2020, Josiah Cox made the following statement in response to a question from Chairman Silvey:

Chairman Silvey, there are two reasons why we still want to do consummate this transaction. One is that Port Perry, is, you know, the typical type of system that we specialize in. They are under 500 individual connections. And really our company, our mission vision, is to bring safe and reliable water resources to every committee in the US. And small communities, particularly those under 500, they really represent the communities that are most at risk for a lack of safe and reliable service.

Tr. Pg. 379. This is a “charity complex,” not justification for a public service. And it certainly does not constitute an analysis for a service that will be safe and reliable at just and reasonable rates.

## Argument

Confluence Rivers has placed the Commission in a position of having regrets if it approves this Application. As OPC pointed out in its initial brief, Confluence Rivers and its affiliated entities have previously overspent in their efforts to acquire water and sewer systems.<sup>3</sup> This places Confluence Rivers in a difficult financial situation as the Association described in its initial brief. And Confluence Rivers has dramatically overspent on this transaction and created a significant acquisition premium which they will not be able to recover.<sup>4</sup> And Confluence Rivers has no plans on how to overcome that fact and assure there will be no regrets.<sup>5</sup>

Confluence Rivers' initial brief provides no solace. The Summary of Confluence Rivers' brief outlines their argument. In three paragraphs, Confluence Rivers argues the net book value is agreed to by all parties. Confluence Rivers has waived its right to collect the acquisition premium. Confluence Rivers is capable. There is no discussion about what the net book value says about the transaction. This is not the reasoning the Court expects of the Commission as outlined in *Ag Processing* on how to avoid regrets.

Staff's initial brief does no better. Staff cites *In re UtiliCorp United, Inc.* as follows for the proposition that the Commission does not need to look beyond Confluence Rivers waiver of the acquisition premium to determine the transaction is not detrimental to the public interest:

**There is no evidence in the record by which the Commission could determine that the price UtiliCorp chose to pay to acquire SJLP was not reasonable.** Much of UtiliCorp's interest in acquiring SJLP may have been **based on unregulated properties and businesses over which the Commission has no authority.** Indeed, since today's decision makes it clear that it is the responsibility of UtiliCorp's shareholders to pay any acquisition premium, there is no need for the Commission to determine whether the price that UtiliCorp chose to pay for SJLP is reasonable.

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<sup>3</sup> See *Second Brief of the Missouri Office of the Public Counsel*, p. 5.

<sup>4</sup> Exhibit No. 701, p. 6, *Rebuttal Testimony of Richard Dewilde*.

<sup>5</sup> Exhibit No. 701, p. 4. *Rebuttal Testimony of Richard DeWilde*. See also *Lake Perry Lot Owners Association Initial Brief*, p. 8.

With the Commission having decided that UtiliCorp will not be allowed to recover any acquisition premium from its ratepayers, the existence of an acquisition premium cannot alter the Commission's evaluation of whether the merger would be detrimental to the public. Therefore, the Commission will reaffirm its determination from its initial Report and Order that the merger between UtiliCorp and SJLP is in the public interest because it is not detrimental to the public.<sup>6</sup> [emphasis added]

But the quoted discussion clearly indicated that the Commission considered the evidence on whether the price was reasonable. More fundamentally, Staff's argument misses the purpose of the *Second Report and Order*. The *Second Report and Order* stated its purpose:

The purpose of this report and order on remand is thus to determine whether UtiliCorp should be allowed to recoup the acquisition premium and whether its ability, or inability, to recoup the premium will have any effect on the Commission's determination that the merger is **not detrimental to the public interest**. [emphasis added]

The *Second Report and Order* had a limited purpose, to evaluate how the acquisition premium decision would impact its previous judgment that the transaction was not detrimental to the public interest. In that case all other necessary and essential issues had presumably been resolved. It remained for the Commission to decide how one factor affected its determination.

That is not this case. The Commission has rightly determined in this case that the net book value and thus the acquisition premium is a necessary and essential issue in its determination.<sup>7</sup> The Commission must now comply with *Ag Processing* and evaluate all necessary and essential factors and determine whether the transaction is detrimental to the public interest.

Staff's initial brief also confuses who has the burden of proof in this case. Staff claims the Association's arguments are "speculative, equivocal, and lacking in underlying evidentiary

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<sup>6</sup> As quoted in *Staff's Initial Post Hearing Brief*, p. 5.

<sup>7</sup> "[The net book value] determination is necessary as it is a 'relevant and critical' issue as to whether the proposed acquisition is 'detrimental to the public interest.' The Commission's determination that net book value is a relevant and critical issue is separate from the discussion of acquisition premium." *Order Setting Procedural Schedule*, March 24, 2020.

support.”<sup>8</sup> Mr. Justis did not equivocate at all in his assessment that there are five unsavory scenarios that Confluence Rivers may use in getting around its commitment not to recover the acquisition premium. He concluded that Confluence Rivers will be driven to one of these. Based on extensive industry experience, he identified the five unsavory consequences of approving this transaction. His judgments were based on the facts of the acquisition premium and knowledge of the consequences those facts create.

The real problem is that Staff is speculating along with Confluence Rivers. Without any evidence regarding a plan to overcome the hurdle created by the excessive acquisition premium, they say trust Confluence Rivers. Confluence Rivers bears the burden of proof in this case and cannot carry that burden of proof by saying trust us.<sup>9</sup> Mr. Justis’ testimony specifically highlights the consequences that Confluence Rivers has failed to identify in this case and identifies the reasons the Commission should not simply trust Confluence Rivers.

The Association has presented undisputed evidence that the purchase price and acquisition premium are unreasonable.<sup>10</sup> That evidence includes the following: the transaction itself gives Confluence Rivers an option to terminate the agreement if the net book value does not exceed a certain figure;<sup>11</sup> statements of Mr. Todd Thomas that Confluence Rivers did not want to under recover on this transaction;<sup>12</sup> and the testimonies of Mr. DeWilde and Mr. Justis, showing how this purchase price is extreme compared to the net book value, which will put inappropriate financial pressure on Confluence Rivers to obtain recovery in some other way.<sup>13</sup>

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<sup>8</sup> *Staff’s Initial Post Hearing Brief*, p. 5.

<sup>9</sup> *State ex rel. Interstate Transit Lines v. Public Service Comm.*, 132 S.W.2d 1082, 237 Mo.App. 554 (Mo. App. 1939).

<sup>10</sup> Generally, see the rebuttal testimonies of Glen Justis and Richard DeWilde, Exhibit Nos. 700 and 701.

<sup>11</sup> Exhibit No. 701, p. 5, *Rebuttal Testimony of Richard DeWilde*.

<sup>12</sup> *Id.*

<sup>13</sup> See specifically Exhibit No. 700, p. 4, *Rebuttal Testimony of Glen Justis*.

The Association’s initial brief then explained why Confluence Rivers is in no financial position to bear this financial burden.

If the Commission wants to approve this transaction, it must explain how Confluence Rivers can overcome these hurdles. The Commission must explain how the Lake Perry community will be no worse off after the Commission approves the transaction than it is now. It must conclude there will be “no regrets.” And it must base its decision on evidence in the record.

But there is no evidence showing there will be “no regrets.” Confluence Rivers has assiduously opposed the introduction of any such evidence in the record.<sup>14</sup> Rather, the OPC aptly stated in its initial brief,

If the Commission should approve this sale, then the customers of the Port Perry system will invariably end up paying far more than they otherwise would ever have needed to pay had this sale been denied. Moreover, when that inevitable, overly-large price-hike comes, the concerns of the people who put so much effort into having their voices heard – only to be ultimately ignored – will be vindicated. Unfortunately, one must assume this fact will be rather cold comfort to those Missouri citizens that are about to be harmed.

Confluence Rivers and Staff have turned a blind eye to the public, arguing the Commission need not consider the public but simply Confluence Rivers’ promise and desire. They have failed to produce any evidence showing there will be no detriment to the public interest from this transaction.

## CONCLUSION

The Commission must do a cost analysis of all necessary and essential issues and determine whether the transaction will not be detrimental to the **public**. It may not defer to Confluence Rivers or make the customers’ rights subservient to Confluence Rivers’ “charity”

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<sup>14</sup> See *Lake Perry Lot Owners Association Initial Brief*.

complex.<sup>15</sup> It may not encourage extravagant spending simply for the sake of encouraging other entities to do the same. It must be realistic and pragmatic, and it must evaluate this transaction and the impact this transaction will have on the public. The Commission itself should not turn a blind eye to the public as Confluence Rivers and the Staff have done. If Confluence Rivers has not proven that this transaction will cause no regrets, the Commission must deny the Application. Since Confluence Rivers has not carried its burden of proof, the Commission must deny this Application.

WHEREFORE, the Association respectfully requests the Commission deny the Application.

Respectfully submitted,



By: \_\_\_\_\_

David C. Linton, #32198  
314 Romaine Spring View  
Fenton, MO 63026  
Telephone: 314-341-5769  
Email: [jdinton@reagan.com](mailto:jdinton@reagan.com)

Attorney for Lake Perry Lot Owners  
Association

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<sup>15</sup> *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all parties of record in File No. WA-2019-0299 via electronic transmission this 9th day of June 2020.

  

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