

**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’S RESPONSE TO  
WAIVER CONCERNING ACQUISITION PREMIUM**

COMES Now Lake Perry Lot Owners Association (“Association”), and for its Response to Confluence Rivers Utility Operating Company, Inc. (“CRU”) in its Waiver Concerning Acquisition Premium (“Waiver”), states as follows:

**Introduction**

1. While the Association recognizes that CRU has not requested recovery of an acquisition premium and accepts CRU’s assertion once again that it will not seek an acquisition premium, the remainder of CRU’s Waiver is inapt.

2. The issue before this Commission is not the acquisition premium, but whether CRU has carried its burden of proof that the transaction is not detrimental to the public interest, which CRU has clearly failed to do.

3. The Missouri Supreme Court set forth CRU’s burden of proof for this case in *Ag Processing v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo. 2003):

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. [footnote omitted] 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. [footnote omitted] 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]

4. Thereafter, the Commission itself clarified the implementation of the Court's decision in a subsequent case involving Ameren:

The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing "not detrimental to the public" standard. In particular, the Court clarified the analytical use of the standard. What is required is a **cost-benefit analysis** in which all of the benefits and detriments in evidence are considered.<sup>1</sup> [emphasis added]

4. The courts require CRU to provide a cost-benefit analysis of the impact to the public interest in this case. CRU's case is completely lacking in evidence on the cost-benefit analysis the courts require. As a matter of fact, CRU has refused to provide cost data, claiming that it only need do so in a rate case. From the discussion at the agenda meeting held February 13, 2020, it is apparent that the Commission rightly determined that it did not have at least one necessary and essential issue, the net book value calculation. Therefore, it was unable to conduct a cost benefit analysis as the courts require.

#### **CRU's Failure to Carry its Burden of Production**

5. In this case, Port Perry Service Company has the burden of proof that the transaction is not detrimental to the public interest. "In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant."<sup>2</sup>

6. The burden of proof has two parts: the burden of production and the burden of persuasion. *White v. Director of Revenue*, 321 S.W.3d 298, 304 (Mo. banc 2010). The burden of

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<sup>1</sup> *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, Report and Order on Rehearing (February 10, 2005), pp. 48, 49.

<sup>2</sup> *Id.*

production is “a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder.” BLACK'S LAW DICTIONARY 223 (9th ed. 2009).

7. In this case, CRU has failed to carry its burden of production. It has provided no evidence on a cost benefit analysis, including a calculation of net book value. While the Association does not believe that the net book value analysis is sufficient in and of itself to carry Port Perry’s burden of production, the calculation is at least a step in the right direction from the Commission.

**Based on the Evidence so Far, the Application Should be Denied.**

8. This case has been submitted to the Commission, and the Application should be denied. Commission Rule 20 CSR 4240-2.150 Decisions of the Commission specifies that the record of a case shall stand submitted after the filings of briefs and commission orders shall be issued as soon as practicable after the record has been submitted. In this case, the record has been submitted. It is now incumbent upon the Commission to rule on the evidence. If CRU desires a ruling in this case now, the Application must be denied because CRU has failed to carry the burden of production.

9. Not only has CRU failed to carry Port Perry’s burden of production in this case, it has affirmatively attempted to obscure and misrepresent cost and other information in this case. The evidence is clear in this regard, as the Association has shown. The most glaring is CRU’s use of duplicate engineering reports. In addition, CRU has mischaracterized the Missouri DNR’s rules and guidelines and mischaracterized the status of Port Perry Service Company’s compliance with DNR rules and permits. CRU has repeatedly interfered with the Association’s attempts to communicate with Port Perry, its water and sewer utility, with threats and intimidation. The CRU emails reveal its manipulation of the process. This most recent Waiver

is just one more attempt to avoid scrutiny by the Commission. For these many reasons, if the Commission will not deny the Application, it must comply with the dictates of the law and require CRU to produce a full and complete cost benefit analysis.

10. The Association also requests the Commission reconsider its decision to not join Port Perry Service Company as a necessary party. The Association continues to believe that cost data inherently resides with the present owner in this case. Port Perry Service Company's status in this case, combined with CRU's obstructions, have made it exceedingly difficult to obtain true cost information needed in this case. Joining Port Perry Service Company would facilitate obtaining true seller cost data.

WHEREFORE, the Association respectfully requests the Commission deny the Application or, in the alternative, require CRU and Port Perry Service Company to produce a full and complete cost benefit analysis.

Respectfully submitted,



By:

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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 11<sup>th</sup> day of March 2020.

  

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