

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

CONFLUENCE RIVERS' INITIAL BRIEF

COMES NOW Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers” or “Company”), and, as its *Initial Brief*, respectfully states as follows to the Missouri Public Service Commission (“Commission”):

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The Commission should find that Confluence Rivers Utility Operating Company, Inc.’s acquisition of the Port Perry Service Company’s water and wastewater assets and certificates of convenience and necessity is not detrimental to the public interest, and approve the transaction. 24

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INTRODUCTION

Port Perry Service Company, LLC, (Port Perry) has agreed to sell its water and sewer assets and certificates of convenience and necessity to Confluence Rivers pursuant to an *Agreement For Sale of Utility System*. Port Perry is an existing water and sewer corporation, regulated by the Commission. Confluence Rivers is also an existing water and sewer corporation, regulated by the Commission. As observed by the Commission, this is the only transaction at issue in this case.¹

“Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. § 393.190 RSMo. (1969). The obvious purpose of this provision is to ensure the continuation of adequate

¹ *Order Regarding Four Motions to Strike . . .*, p. 3, FN. 5, File No. WA-2019-0299 (October 2, 2019).

service to the public served by the utility. The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest. *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).²

Thus, at its essence, this a straight-forward case - under applicable law, the Commission *must approve* the sale of Port Perry’s assets to Confluence Rivers, unless the transaction is shown to be “detrimental to the public interest.” The Commission’s primary focus should be to ensure the continuation of adequate service to the public.

As will be discussed in greater detail below, not only is Confluence Rivers’ acquisition of Port Perry’s water and sewer assets “not detrimental” to the public interest it is, in fact, a benefit to the Port Perry systems, customers, and public interest as compared to the status quo and the preferred option for the Missouri Department of Natural Resources (MDNR) as evidenced by both MDNR regulation and experience with Confluence Rivers and its affiliates.

Confluence Rivers is today a “public utility,” “water corporations,” and “sewer corporation,” within the meaning of Section 386.020, RSMo. It currently provides safe and adequate service to the customers of 9 water systems and 9 sewer systems and would bring proven experience in the rehabilitation, operation, management, and investment in small water and sewer facilities to the Port Perry systems.

While the *Fee Fee Trunk Sewer* case seems to assume the provision of

² *In the Matter of the Joint Application of Great Plains Energy Incorporated . . .*, Report and Order, FN. 902 (July 1, 2008).

adequate service by the selling company, there are improvements that need to be made to the Port Perry systems to address the MDNR Design Guidelines and the requirements of Port Perry's wastewater permit. Confluence Rivers has analyzed the Port Perry systems and has a comprehensive plan for addressing the repair and replacement needs of all those systems. Again, its track record of successfully completing rehabilitation of Missouri water and sewer systems acquired in the past should give the Commission comfort that Confluence Rivers has the funds necessary to make, and will make, the repairs and replacements it has identified as necessary ensure safe and adequate service in the future.

Confluence Rivers seeks to provide service after closing the proposed transaction under the same water and sewer tariffs currently applicable to the Port Perry service area and charge Port Perry's current rates. As a check on the process, the Port Perry systems would remain subject to regulation by the Commission on a going-forward basis should Confluence Rivers be authorized to acquire the systems and neither the rates nor the tariff provisions may be changed without approval of the Commission.

Confluence Rivers' acquisition of the Port Perry utility assets and certificates of convenience and necessity should be approved by the Commission, subject to the conditions proposed by the Staff of the Commission.

This brief will discuss in detail Confluence Rivers' qualifications to own and operate the Port Perry water and sewer assets, the current condition of the Port Perry assets, the MDNR regulatory preference for a Commission-regulated entity to act as

operating authority for water and sewer assets and its experience with Confluence Rivers and its affiliates, the applicable legal standard to be applied by the Commission, and specifically address the List of Issues identified by the parties.

CONFLUENCE RIVERS' IS QUALIFIED TO OWN AND OPERATE THE PORT PERRY SYSTEMS

On February 14, 2019, in Commission File No. WM-2018-0116, the Commission granted CCNs to Confluence Rivers to operate water and sewer utilities and authorized the transfer of 9 water systems and 9 sewer systems to Confluence Rivers. (Exh. 1, Cox Dir., p. 4, ll. 14-16). Confluence Rivers today serves approximately 548 water customers and 595 sewer customers and is a “water corporation,” a “sewer corporation,” and a “public utility” as those terms are defined in Section 386.020, RSMo, and is subject to the jurisdiction and supervision of the Commission as provided by law. (Exh. 1, Cox Dir., p. 4, ll. 16-18). Confluence Rivers is an affiliate of Central States Water Resources, Inc. (“Central States”). (Exh. 1, Cox Dir., p. 3, l. 16).

Confluence Rivers has already acquired small Missouri water and sewer companies, brought capital to improve those systems, upgraded the services provided to customers, and delivered safe and adequate service where that was not the case prior to acquisitions. Central States companies have purchased multiple systems in Missouri that were in state-appointed receivership, with numerous MDNR deficiencies and brought those systems back into regulatory compliance for the provision of safe and reliable service. (Exh. 5, Cox Sur., p. 9)

On the wastewater side of the business, Central States has purchased 22

wastewater treatment plants with associated sewer pumping stations, gravity force mains, and gravity conveyance lines. In Missouri, Central States-affiliated companies have designed, permitted, and completed construction, with MDNR approval, of approximately \$5.1 million of sanitary sewer investments since March of 2015. (Exh. 1, Cox Dir., p. 5)

On the drinking water side of the business, Central States-affiliated companies have purchased 13 drinking water systems in Missouri and Arkansas. In Missouri, Central States-affiliated companies have designed, permitted, and completed construction, with MDNR approval, of approximately \$4.1 million of investments in drinking water systems since March 2015. (Exh. 1, Cox Dir., p. 6)

Central States has customer service systems at each Missouri utility it currently operates that provide benefits to the customers and comply with the Commission's Chapter 13 rules. (Exh. 1, Cox Dir., p. 7) This includes 24-hour emergency service phone lines for potential service issues, on-call emergency service contractor personnel, implementation of a computerized maintenance management system for wastewater and drinking water utility assets, real-time remote monitoring to ensure service stability, customer dissemination of MDNR drinking water testing information, on-line bill-pay options, up-to-date website bulletins about current service status, and service initiation or discontinuance procedures. (Exh. 1, Cox Dir., p. 7)

Central States has extensive experience in the design and operation of water and sewer systems. As it does with all its water and wastewater systems, Confluence Rivers intends to hire a contract operator for plant operations, utilizing the services of

appropriately qualified and licensed utility system operators (for water and for sewer). The contract operator will undertake routine day-to-day inspections, checks, sampling, reporting, and meter reading for the water and sewer systems, as well as accomplish most system repairs and extraordinary operations tasks as needs arise, to address proper facility operations and customer service matters. All these activities will be tracked inside Central States' computerized maintenance management system. Computerized maintenance monitoring also feeds in remote monitoring data from individual plants, which together with the maintenance data, integrate with a water information management system for all Central States facilities. (Exh. 1, Cox Dir., p. 8)

If the Commission grants Confluence Rivers the authority it seeks in the Application, Confluence Rivers and Central States have access to adequate capital and are willing and able to invest the capital necessary to bring the water and wastewater systems at issue in this case up to standard and maintain compliance with applicable MDNR regulations. (Exh. 1, Cox Dir., p. 10). Confluence Rivers plans to fund the purchases using equity infused by Confluence Rivers' parent company, Central States (Exh. 1, Cox Dir., p. 10). Additionally, Confluence Rivers has committed to move toward a 50-50 mix of equity and debt for its capital structure in future rate cases. Therefore, debt would be needed only to fund some part of the cost of improvements. (Exh. 2, Cox Sur., p. 10, ll. 3-7).

In each of their previous applications, the Commission has determined Central States-affiliated companies have the technical, managerial, and financial capability to own and operate water and wastewater systems in Missouri. Confluence Rivers,

Central States, and Missouri companies Hillcrest Utility Operating Company, Inc., Raccoon Creek Utility Operating Company, Inc., Elm Hills Utility Operating Company, Inc., and Indian Hills Utility Operating Company, Inc., have acquired small Missouri water and sewer companies, brought capital required to improve those systems, upgraded the services provided to customers, and delivered safe and adequate service where, in most cases, that was not the situation prior to acquisition. (Exh. 2, Cox Sur., p. 2, ll. 14-21).

Specifically, as to Confluence Rivers, the Commission found in its order in Commission File No. WM-2018-0116 (February 14, 2019) that the proposed sale of water and sewer assets to Confluence Rivers was not detrimental to the public interest and stated in support as follows:

Considering the present troubled nature of the systems at issue, the Company's sound track record in rehabilitating similarly situated systems, the Company's ability to acquire, maintain, and operate the systems, and the statutory obligation of the Commission to ensure safe and adequate service, allowing the Company to acquire the Selling Companies' assets per the terms and conditions of the Stipulation will not be detrimental to the public.

There is no dispute that Confluence Rivers is qualified to own and operate the Port Perry assets and to ensure the provision of safe and adequate service to its customers.

PORT PERRY SERVICE COMPANY SYSTEMS AND CONDITION

Confluence Rivers proposes to acquire substantially all the water and sewer system assets of Port Perry, including its CCNs. On May 18, 1973, Port Perry was granted a CCN to provide water service in Case No. 17681. (Exh. 1, Cox Dir., p. 11, ll.

8-9). Then on June 7, 1973, Port Perry was granted a CCN to provide wastewater service in Case No. 17642. (Exh. 1, Cox Dir., p. 11, ll. 9-10). Port Perry is located near Perryville, Perry County, Missouri, and according to its most recent annual report currently serves approximately 370 water customers and 248 wastewater customers. (Exh. 1, Cox Dir., p. 11, ll. 10-13). The Port Perry systems serve the Lake Perry subdivision.

Lake Perry subdivision is a private, gated, 1800-acre recreational lake development. (Exh. 309, DeWilde Reb., p. 3, ll. 15-16). The development has approximately 11 miles of paved roads, an office building, four multi-unit boat slips, a recreation center with a restaurant and pool as well as other amenities such as two sandy beaches, sand volleyball court and children playgrounds. (Exh. 309, DeWilde Reb., p. 3, ll. 16-21). Many of these homes and lots are second homes and used for vacation/recreation. (Exh. 309, DeWilde Reb., p. 12, ll. 15-16).

The assets Confluence Rivers proposes to acquire from Port Perry are in better shape than some of the other systems Confluence Rivers' and its affiliates have acquired in Missouri and elsewhere. That being said, there are still deficiencies in regard to MDNR design standards and permits that need to be addressed. Again, this does not appear to be in dispute as while Confluence Rivers estimates needed repairs in the amount of \$295,000, Intervenor Lake Perry Lot Owners Association (LPLOA) estimates repairs in the amount of \$670,000 over the next 5 years. (Exh. 2C, Cox Sur., Sched. JC-1C and JC-2C; Exh. 308, Sayre Reb., Sched. CWS 2, Sec. 4.1 and 4.2; Exh. 307, Justis Reb., Sched. GJ-01, p. 6)

Water System

The Port Perry water system was described by the Commission Staff (“Staff”) as follows:

The source of water is two wells. Well #1 produces 60 gallons per minute from a submersible pump and has chlorine disinfection. Well #2 has a submersible pump producing 270 gallons per minute, and is operated as an emergency well. The water system has a 223,000 gallon ground storage tank, with high service pumps and three 800 gallon hydropneumatics tanks to normalize distribution system water pressure.

(Exh. 100, Dietrich Dir., Sched. ND-d2, pp. 2-3). Staff noted that while the Missouri Department of Natural Resources (“MDNR”) found Port Perry to be in compliance with drinking water regulations based on observations made during its last inspection on December 17, 2017, “improvement to the system will likely be needed to maintain compliance good operations and preserve the normal life of the utility assets.” (Exh. 100, Dietrich Dir., Sched. ND-d2, p. 3).

During site visits, Confluence Rivers noted reliability and safety concerns with the water system’s current condition:

- Lack of basic security for drinking water infrastructure. Minimum Design Standard for Missouri Community Water Systems (“Minimum Design Standard”) 2.5 a.5.

provides:

All water system facilities shall be designed to include measures to provide protection against vandalism, sabotage, terrorist acts, or access by unauthorized personnel. Protection measures may include, but is not limited to: ... 5. Fencing around vulnerable areas of drinking water facilities such as treatment and storage facilities, pumping stations and wells with signs prohibiting unauthorized access.

(Exh. 302, p. 16, Chapter 2.5 a.5);

- Need for physical separation of chlorine disinfection systems from other infrastructure (Exh. 4, Thomas Dir., p 7, ll. 15-22; p. 8, ll. 1-6). Minimum Design

Standard 5.1.7.a provides:

Unless otherwise approved by the department chemical feed equipment shall: a. Be located in a properly vented separate room(s) to reduce hazards and just problems;

(Exh. 302, p. 124, Chapter 5.1.7);

- Need for redundant chlorine pumps and ability to monitor residual chlorine levels in drinking water provided to customers for consumption. Minimum Design

Standard 5.1.1.a.1. provides:

Where chemical feed is necessary for the production of safe drinking water, such as chlorination, coagulation, or other essential processes: 1. A minimum of two feeders shall be provided or a standby unit or a combination of units of sufficient capacity shall be available to replace the largest unit during shut downs.

(Exh. 302, p. 121, Chapter 5.1.1).

Also, Minimum Design Standard 4.4.5.d provides:

Chlorine residual test equipment shall meet the requirements established in 10 CSR 60-5.010 and shall be capable of measuring residuals to the nearest 0.2 milligram per liter.

(Exh. 302, p. 83, Chapter 4.4.5); and

- Need for an operational backup well. Minimum Design Standard 3.2.1.2.b provides:

All public water systems that require continuous service and serve 500 or more people shall have more than one well and shall be capable of meeting design average day demand with the largest producing well out of service or an alternate approved source of water capable of meeting the design or actual average day demand.

(Exh. 302, p. 28, Chapter 3.2.1.2).

(Exh. 4, Thomas Dir., p 7, ll. 15-22; p. 8, ll. 1-6).

The Port Perry water system needs to meet the Minimum Design Standards. (Tr. p. 75, ll. 2-4). The Minimum Design Standards were developed to protect human health and the environment. (Tr. p. 75, ll. 2-8). Confluence proposes to remedy these reliability and safety issues in the most cost-effective manner. Anticipated repairs include improvements to Well House #1 to become safer, more secure, and more sanitary; modifications to provide the necessary contact time for chlorine disinfection; provide a redundant chlorine pump, and an active, safe and reliable redundant well pump. (Exh. 4, Thomas Dir., p. 8, ll. 9-15).

Wastewater System

The Port Perry wastewater system was described by the Commission Staff (“Staff”) as follows:

The wastewater treatment system is a “no-discharge” system, utilizing land irrigation. The treatment system consists of a four-cell lagoon, with the lagoon effluent applied as irrigation over one acre of land. Three additional acres are available for irrigation. The collecting sewers are PVC pipe. About half of the collecting sewers are 2 or 2 ½ inch pressure sewers, and the other half are 4-inch small diameter gravity sewers. The pressure collecting sewers operate with electric-powered septic tank effluent pump (STEP) type “pump units” on each customer’s premises, which pump sewage into and through the pressure collecting sewer system.

(Exh. 100, Dietrich Dir., Sched. ND-d2, p. 3). Staff noted that while the Missouri Department of Natural Resources (“MDNR”) found Port Perry to be in compliance with water pollution control regulations based on observations made during its last inspection on December 14, 2016, “improvements to the system will likely be needed to maintain

compliance, good operations, and preserve the normal life of the utility assets.” (Exh. 100, Dietrich Dir., Sched. ND-d2, p. 3).

During site visits, Confluence Rivers also noted safety concerns with the wastewater system’s current condition:

- There was a lack of basic maintenance on the berms of the wastewater storage lagoon cells. Port Perry’s General Operating Permit MOG823126 (“Permit”) provides:

The berms of storage basins shall be mowed and kept free of deep-rooted vegetation, animal dens or other potential sources of damage to the structural integrity of the berms.

(Exh. 308, Schedule CWS-2, Appendix 7.12, page 7 of the Permit, paragraph 6);

- The land application system was not applying the wastewater to the appropriate area. The system was applying the effluent to a radius of less than 5 feet despite the fact original design plans show an application area approximately 100 feet in diameter. Soil saturation and overloading will continue to occur if the system continues to operate in the failed situation it was in during the various site visits.

Port Perry’s Permit provides:

7. Wastes shall be surface irrigated using a system that shall be operated so as to provide uniform distribution of waste materials over the entire application site.

(Exh. 308, Schedule CWS-2, Appendix 7.12, page 6 of the Permit, paragraph 7).

The Permit also provides:

3. Surface wastewater irrigation of domestic wastewater: (a) shall not result in a surface ponding or runoff of wastewater from wastewater irrigation fields[.]

(Exh. 308, Schedule CWS-2, Appendix 7.12, page 6 of the Permit, paragraph 3 (a));

- The wastewater system also lacks discharge recording and physical protection of the system. (Exh. 4, Thomas Dir., p. 8, ll. 17-22; p. 9-10, ll. 1-4). Port Perry's Permit provides:

Due to the lack of disinfection requirements in this permit, public access to surface wastewater irrigation area must not be allowed by the permittee.

(Exh. 308, Schedule CWS-2, Appendix 7.12, page 6 of the Permit, paragraph 6). The Permit also provides:

3...Access to the...associated wastewater irrigation equipment must be sufficiently restricted or secured to prevent entry by children, livestock, and unauthorized persons.

(Exh. 308, Schedule CWS-2, Appendix 7.12, page 5 of the Permit, paragraph 3.

If MDNR walked onto the Port Perry system site today and observed these issues, MDNR would find the system in violation of its Permit. (Tr. 109, ll.15-18).

Confluence Rivers plans to address the wastewater issues by replacing the defective sprinkler heads, repairing the automated valving for the application area, and repairing fencing as needed. Confluence Rivers would also hire qualified operators that would oversee the system. In addition, the Company would install remote monitoring software that would allow enhanced monitoring and indicate when components are failing. (Exh. 4, Thomas Dir., p. 10, ll. 7-11).

CONFLUENCE RIVERS' PROPOSED REPAIRS AND UPGRADES ARE APPROPRIATE

Staff reviewed the repairs and upgrades proposed by Confluence Rivers in this case. (Exh. 105, Roos Sur., p. 2, ll. 10-19). Staff also reviewed the estimated costs

associated with the repairs and upgrades. (Exh. 105, Roos Sur., p. 2, ll. 19-21; p. 3, ll. 1-14). Staff stated it “considers the proposed repairs and upgrades as general maintenance, or repair/replacement of outdated and worn out equipment with new, more advanced technology. *In Staff’s opinion, the scope and costs of these proposed repairs and upgrades are not unreasonable.*” (Exh. 105, Roos Sur., p. 3, ll. 11-14).

Ms. Kristi Savage-Clarke, Chief of the Water Pollution Compliance and Enforcement Section within MDNR’s Water Protection Program, testified that Confluence Rivers affiliate, Central States Water Resources, Inc. (Central States), has an established history with maintaining its water and wastewater systems in Missouri and investing in operational improvements to ensure their systems stay in compliance with the Missouri Clean Water Law, and MDNR regulations and permits. (Exh. 3, Savage-Clarke Sur., p. 11, ll. 18-21). There is a measure of safety to both human health and the environment, as well as long-term financial benefits, when system upgrades can be made proactively instead of reactively. (Exh. 3, Savage-Clarke Sur., p. 11, ll. 21-22; p. 12, ll. 1-3). Confluence Rivers has a clear plan for remedying the reliability and safety issues identified in both the water and wastewater systems. (Exh. 3, Savage-Clarke Sur., p. 11, ll. 21-22; p. 12, ll. 1-3).

The Commission, of course, is not required to make a determination in this case as to what repairs and upgrades are appropriate for the utility systems. (Exh. 105, Roos Sur., p. 3, ll. 15-19). That decision falls upon Confluence Rivers should the Commission allow the Company to acquire these systems. *Id.* However, the Commission will decide whether Confluence Rivers can recover the costs of the various improvements in a

subsequent rate case. (Exh. 105, Roos Sur., p. 3, ll. 18-21). As Staff witness Roos testified, Staff will evaluate the prudence and costs in a future rate case after Confluence Rivers has completed any improvements. Exh. 105, Roos Sur., p. 3, ll. 18-22; p. 4, ll. 1-17). Mr. Roos explained Staff's evaluation that takes place within a rate case when a utility seeks to recover costs expended on utility improvements:

A multi-disciplinary team of Staff engineers, economists, and accountants will be assigned to review the actual repair that was made and the actual cost of the repair. In evaluating prudence, Staff reviews whether a reasonable person making the same decision at that time would find both the information the decision-maker relied on and the process the decision-maker employed were reasonable based on the circumstances at the time the decision was made; *i.e.*, without the benefit of hindsight. The decision actually made is disregarded and the review is instead an evaluation of the reasonableness of the information the decision-maker relied on and the decision-making process the decision-maker employed. If either the information relied upon or the decision-making process employed was imprudent, then Staff examines whether the imprudent decision caused any harm to ratepayers. Only if an imprudent decision resulted in harm to ratepayers, will Staff recommend a partial adjustment or a total disallowance of the cost.

Exh. 105, Roos Sur., p. 4, ll. 1-17).

MDNR REGULATIONS AND EXPERIENCE IDENTIFY CONFLUENCE RIVERS AS THE PREFERRED OPERATING AUTHORITY FOR PORT PERRY'S WATER AND WASTEWATER SYSTEMS

Ms. Kristi Savage-Clarke, of the Missouri Department of Natural Resources (MDNR), testified on behalf of Confluence Rivers. (Exh. 3, Savage-Clarke Sur., p. 1, ll. 11-13). Ms. Savage-Clarke described both the regulatory framework and MDNR experience that indicates Confluence Rivers is a preferred purchaser of the Port Perry assets. Moreover, MDNR's specific experience with Confluence Rivers and its affiliates indicate that they recognize the importance of environmental compliance and proactive

efforts to comply with Missouri's environmental laws to improve protection of Missouri citizens and natural resources.

MDNR is a state agency created by Section 640.010, RSMo to administer the programs relating to environmental control for protecting human health and the state's natural resources. (Exh. 3, Savage-Clarke Sur., p. 1, ll. 6-10). Ms. Savage-Clarke has been employed with MDNR since April 1, 2011, and has been involved in approximately 700 cases during her tenure. (Exh. 3, Savage-Clarke Sur., p. 1, ll. 14-18). As part of Ms. Savage-Clarke's position, she is responsible for understanding and interpreting Missouri's environmental laws and regulations, as well as the specific permits that relate to each case she manages. (Exh. 3, Savage-Clarke Sur., p. 3, ll. 1-7). She supervises the work of the Compliance and Enforcement Section, including proposed actions regulated utilities can take for compliance. (Exh. 3, Savage-Clarke Sur., p. 3, ll. 1-7).

MDNR's permitting regulations for drinking water systems, as well as wastewater systems, set forth in preferential order the types of operating authorities to which MDNR will issue permits. (Exh. 3, Savage-Clarke Sur., p. 4, ll. 6-8). For drinking water, 10 CSR 60-3.020 (6)(A) sets forth the preferential order for issuing permits to dispense:

1. Municipality, public water supply district, and water system regulated by the Missouri Public Service Commission (PSC).
2. Any person showing complete control over and responsibility for the public water system and all property served by it.
3. Any incorporated association of property owners served by a public water system....

(Exh. 3, Savage-Clarke Sur., p. 4, ll. 8-15). In this instance, there is a preference by MDNR to issue a permit to dispense water: first, to Confluence Rivers, as a water system regulated by the Commission; second, to Lake Perry Service Company

“LPSC”); and third, Lake Perry Lot Owners Association (“LPLOA”). (Exh. 3, Savage-Clarke Sur., p. 4, ll. 16-19).

As to wastewater systems, 10 CSR 20-6.010 (2)(B) also sets forth a preferential order for issuing operating permits for wastewater treatment facilities:

3. **Level 3 Authority.** A municipality, public sewer district, or sewer company regulated by the Public Service Commission (PSC) other than one which qualifies under paragraph (2)(B)1. or 2. of this rule or a public water supply district...; 4. **Level 4 Authority.** Any person, industry, or group of persons contractually obligated to collectively act as a wastewater collection and treatment service, or nonprofit company organized under section 393.825, RSMo, with complete control of, and responsibility for the water contaminant source, point source, or wastewater treatment system. 5. **Level 5 Authority.** An association of property owners served by the wastewater treatment facility....

(Exh. 3, Savage-Clarke Sur., p. 4, ll. 20-28; p. 5, ll. 1-7). Emphasis added. In this instance, there is a preference by MDNR to issue an operating permit for the wastewater treatment facility: first, to Confluence Rivers as a Level 3 Authority; second, to Lake Perry Service Company as a Level 4 Authority; and third, to Lake Perry Lot Owners Association as a Level 5 Authority. (Exh. 3, Savage-Clarke Sur., p. 5, ll. 7-10).

The hierarchy in both the drinking water and wastewater regulations recognizes that higher ranked continuing authorities are typically more permanent than lower ranked continuing authorities. (Exh. 3, Savage-Clarke Sur., p. 5, ll. 16-18). If permitted by MDNR, continuing authorities must be responsible for the long-term ongoing maintenance and modernization of either a wastewater or drinking water system. (Exh. 3, Savage-Clarke Sur., p. 5, ll. 18-20). Ms. Savage-Clarke testified that in her experience with MDNR, higher ranked continuing authorities typically have a greater technical, managerial and financial capacity than lower ranked continuing authorities.

(Exh. 3, Savage-Clarke Sur., p. 5, ll. 20-22). A continuing authority with greater technical, managerial and financial capability is more likely to provide consistent asset management, which will in turn better protect the interests of human health and the environment. (Exh. 3, Savage-Clarke Sur., p. 5, ll. 22-25). Delaying maintenance and repairs due to financial shortfalls can result in system malfunctions or failure, putting human health, neighboring properties, and the environment at risk, and ultimately costing the system more money. (Exh. 3, Savage-Clarke Sur., p. 5, l. 25; p. 6, ll. 1-3).

MDNR believes Confluence Rivers' application to acquire substantially all the water and wastewater system assets of Port Perry, including its CCNs, is not detrimental to the public interest because Confluence Rivers has the requisite technical, managerial, and financial (TMF) capacity and can provide safe and adequate service to the customers. (Exh. 3, Savage-Clarke Sur., p. 12, ll. 7-11). Systems with sufficient TMF capacity can safely and consistently provide drinking water and wastewater services to their customers and are far less likely to receive notices of violation (NOVs) for non-compliance than systems with insufficient capacity. (Exh. 3, Savage-Clarke Sur., p. 6, ll. 7-10). The TMF capacity considerations developed under the Missouri Clean Water Law, Missouri Safe Drinking Water Law, and the implementing regulations have all of Missouri in mind. (Exh. 3, Savage-Clarke Sur., p. 10, ll. 4-5).

Conversely, systems that are struggling to develop or maintain capacity may be at an increased risk for operational problems such as non-compliance violations. (Exh. 3, Savage-Clarke Sur., p. 6, ll. 10-12). Significant effort is required to properly manage and operate wastewater and drinking water systems. (Exh. 3, Savage-Clarke Sur., p.

11, ll. 11-12). Mismanaged assets can become a liability. (Exh. 3, Savage-Clarke Sur., p. 11, ll. 9-10). The longer a system is allowed to deteriorate, the more expensive upgrades can be in the long run for customers. (Exh. 3, Savage-Clarke Sur., p. 11, ll. 10-11).

MDNR has found that Central States recognizes the importance of environmental compliance. (Exh. 3, Savage-Clarke Sur., p. 8, ll. 5-6). Central States has taken on systems with major compliance issues and brought those systems back into compliance. (Exh. 3, Savage-Clarke Sur., p. 8, ll. 6-8). In correspondence, MDNR has expressed its appreciation for Central States proactive efforts to comply with Missouri's environmental laws and their continued effort to work with MDNR to improve protection of Missouri citizens and natural resources. (Exh. 3, Savage-Clarke Sur., p. 8, ll. 8-11; Schedule KSC-S1; Schedule KSC-S2; and Schedule KSC-S3).

APPLICABLE LEGAL STANDARD

Must Approve If Not Detrimental to the Public Interest

Under applicable law, the Commission must approve those acquisition applications over which it has jurisdiction, unless the transaction is shown to be "detrimental to the public interest," a standard established by the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. 1934) and reaffirmed in *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 735 (Mo. banc 2003).

The statutory basis for this matter arises from the following requirement in Section 393.190.1, RSMo:

No gas corporation, electrical corporation, 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 secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

The Commission's review of these types of matters begins with the constitutional concept of property rights – the owners of property have a constitutional right to determine whether to sell their property or not. “To deny them that right would be to deny them an incident important to ownership of property. A property owner should be allowed to sell his property unless it would be detrimental to the public.” *State ex rel St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. 1934), *citing City of Ottawa v. Public Service Commission*, 288 Pac. (Kan.) 556 (emphasis added).

This standard was further explained by the Missouri Supreme Court as follows:

To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefited*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'

State ex rel. St. Louis v. Public Service Commission, 73 S.W.2d 393, 400 (Mo. 1934).

The analysis calls for a *netting* of detriments and benefits. The Commission has applied the standard as a no-net-detriment standard in which "all the benefits and detriments in evidence are considered." See, *Re Union Electric Company*, 13

Mo.P.S.C.3d 266, 293 (2005), Case No. EO-2004-0108.

The Commission has described this standard as follows:

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. A detriment, 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. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. 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 interest* where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 454-455 (MoPSC July 1, 2008), quoting *Re Union Electric Company*,), Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005).

Thus, even where detriments may be identified, where they are outweighed by benefits, the transaction is still said to be “not detrimental to the public interest.”

What Is the Public Interest

The Commission has stated as follows as to the “public interest”:

“The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.”

The public interest is a matter of policy to be determined by the Commission. It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served. Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public. The "public interest" necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 458-459 (MoPSC July 1, 2008).

The "public" to be considered by the Commission includes the entirety of Missouri's citizens. (Exh. 3, Savage-Clarke Sur., p. 9, ll. 17-18). Waters of the state are a shared resource and system owners must be good neighbors to others who use the waters of the state. (Exh. 3, Savage-Clarke Sur., p. 9, ll. 6-8). The Missouri Clean Water Law and MDNR's implementing regulations are intended to conserve, protect, maintain, and improve the quality of Missouri's waters for all Missouri citizens and are an expression of the public interest. (Exh. 3, Savage-Clarke Sur., p. 9, ll. 18-20). Delayed repairs or maintenance, or improper system operation, can result in pollution to waters of the state. (Exh. 3, Savage-Clarke Sur., p. 9, ll. 20-21). Pollution to waters of the state can result in the loss of beneficial uses designated to the receiving waters. (Exh. 3, Savage-Clarke Sur., p. 9, ll. 21-22; p. 10, l. 1). This affects all Missourians. (Exh. 3, Savage-Clarke Sur., p. 10, l. 1). Similarly, the Missouri Safe Drinking Water Law, and MDNR's implementing regulations are intended to ensure that Missouri's public water

systems provide safe drinking water to every resident and visitor to Missouri. (Exh. 3, Savage-Clarke Sur., p. 10, ll. 1-4).

LIST OF ISSUES

The Commission should find that Confluence Rivers Utility Operating Company, Inc.'s acquisition of the Port Perry Service Company's water and wastewater assets and certificates of convenience and necessity is not detrimental to the public interest, and approve the transaction.

No Detriment

Confluence Rivers' acquisition of Port Perry's assets will not be detrimental to the public interest.

While there is some disagreement as to what improvements, replacements, and other work needs to be accomplished as to the Port Perry systems, it appears uncontroverted that all of the systems need some amount of work and improved quality of operations.

Once Confluence Rivers takes possession of the Port Perry systems, the Company will operate the acquired systems for a period of time to see if actual experience and improved operations may address difficulties previously thought to require repairs. Additionally, even when repairs are pursued, CSWR will competitively bid the repairs to true third parties (usually local companies) to obtain the lowest price available (CSWR has no affiliated companies that perform construction work). (Exh. 2, Cox Sur., p. 12, ll. 10-15).

Confluence Rivers' acquisition of the identified assets is not only "not detrimental" to the public interest, it is a benefit to the systems, customers, and public interest as

compared to the status quo. As described above, Confluence Rivers brings proven experience in the rehabilitation, operation, management, and investment in small water and sewer facilities to the Port Perry systems, systems that have current owners without the required utility experience or financial ability to make the investments necessary for upgrades.

After closing of the proposed transaction, Confluence Rivers seeks to provide service under the same water and sewer tariffs currently applicable to the Port Perry service area and charge the same rates currently applicable to that service area. Neither the rates nor the tariff provisions may be changed without approval of the Commission. Both OPC and the Lake Perry Lot Owners Association have expressed concern over the potential for “gold-plating” of the systems and unreasonable rates for service if Confluence Rivers is allowed to acquire the systems. However—the only way this could occur would be for the Commission to blatantly refuse to carry out its statutory obligation—that is, fix a rate for service that necessarily results in safe and adequate service at just and reasonable rates.

When the benefits are considered, Confluence Rivers’ acquisition of the Port Perry assets is not detrimental to the public interest and should be approved by the Commission subject to the conditions proposed by the Staff.

Lake Perry Service Company Proposal

It should first be noted that the “contingent offer” that has been discussed in this case comes from LPSC, and not the LPLOA. LPSC has no owners, no members, no water and sewer assets, no permits to operate water or sewer systems, and no contract

to buy any water and sewer assets, (Tr. 312, ll. 1-18). There is no guarantee that LPSC will ever have a contract with Port Perry to buy the water and sewer assets.

The “contingent offer” made by LPSC should not be relevant as it does not affect or change Confluence Rivers’ qualifications or the fact that Confluence Rivers’ ownership of the Port Perry assets would not be detrimental to the public interest. However, if the Commission decides to examine LPSC’s proposal, it needs to recognize that there is no evidence that Port Perry considers LPSC’s offer to be reasonable or would be willing to sell its assets for that price. It is unclear whether LPSC could acquire the Port Perry assets in the absence of a Confluence Rivers’ purchase. (Tr. 188, ll. 7-11).

The most glaring deficiency in LPSC’s plan is its inability to obtain stable financing necessary to own and operate the Port Perry systems in a safe and adequate manner. LPSC’s plan is to obtain financing for the proposed purchase and initial capital for the systems by asking current lot owners to consider investing in the utility, and then using the “commitments” to purchase a Certificate of Deposit (“CD”). (Exh. 309, DeWilde Reb., p. 8, ll. 1-6). LPSC’s goal is to reach \$300,000 in lot owner commitments to be able to borrow \$300,000 from a bank using the CD as collateral. (Exh. 309, DeWilde Reb., p. 8, ll. 5-7). Even though LPSC is essentially borrowing its own money back from the bank for three years, LPSC’s proposed financing arrangement results in LPSC having to pay an effective rate of 8.65 percent to lot owners. (Tr. 192, ll. 3-24). After three years of operations, LPSC states it would then attempt to refinance the bank loan, redeem the CD and repay the investors. (Exh. 307,

Justis Reb., p. 10, ll. 14-18). LPSC's plan also assumes, the ability to obtain another loan in five years to finance an additional \$630,000 in system improvements. (Exh. 307, Justis Reb., p. 8, ll. 7-10; Schedule GJ-01, pp. 6-7).

LPSC's financing plan is entirely based on assumptions that LPSC will be able to obtain financing when, and in the amounts, that the plan has set forth. (Exh. 307, Justis Reb., Schedule GJ-01, pp. 6-7). There are no guarantees. There are no stated alternatives. At the evidentiary hearing, Mr. DeWilde testified that lot owners have agreed to commitments totaling \$250,000. (Tr. 296, ll.10-14; 302, ll. 11-13). There have been no additional commitments from lot owners since July 8, 2019. (Tr. 302, ll. 11-25; 303, l. 1). Further, a lot owner's commitment is not binding. (Tr. 304, ll. 17-21). If lot owners decide they no longer want to contribute their "commitment" amount to the purchase, no one plans to enforce the previous commitments. (Tr. 305, ll. 12-25; 306, ll. 1-3). When questioned at the evidentiary hearing, Mr. Justis had no knowledge of any other option available to LPSC if it could not obtain enough lot owner commitments to reach the \$300,000 goal. (Tr. 188, ll. 18-22). If the \$300,000 is not reached, LPSC will not try to buy the system. (Tr. 188, ll. 23-25).

Rates

LPLOA and Office of the Public Counsel (OPC) expressed concern as to rates that may result after the Port Perry systems have underwent any necessary repairs and improvements. Of course, no one knows what rates will be in the future. Staff witness Bolin acknowledged that she has no way to say with certainty what rates will be two years from now if Confluence Rivers acquires the Port Perry systems. (Tr. 163, ll. 25,

164, ll. 1-2). Ms. Bolin also stated she has no way of knowing what rates will be in two years if Confluence Rivers does not acquire the Port Perry systems. (Tr. 164, ll. 7-10). What is known is that Confluence Rivers “will continue to charge the existing rates under [Port Perry’s] current tariff applicable to these properties until it files a subsequent rate case with the Commission.” (Exh. 102, Bolin Sur., p. 4, ll. 8-17). And if the Commission approves Confluence River’s Application and a subsequent rate case is filed, the Commission will ultimately decide what rate Confluence Rivers may charge for service:

During the rate case Staff will audit the books and records of [Confluence Rivers], which includes reviews of all invoices, bids and other available documentation. Also, Staff will review managerial and operational aspects of the Company to ensure the Company is providing safe and adequate service at a just and reasonable rate. *Any decision on future rates will be ultimately a decision of the Commission in a future rate case.*

(Exh. 102, Bolin Sur., p. 4, ll. 8-17) (emphasis added).

Local Public Hearing

The question arises as to what consideration the Commission should give the public testimony that has been provided in this case.

First, this testimony is somewhat unique in that it is provided by what is essentially a competitor to purchase the assets of Port Perry. LPLOA purports to represent all of the lot owner’s that have testified in this case and has been very straight forward with its desire to purchase the same Port Perry Service Company assets (although it has no contract to do so and, apparently, no high likelihood of having such a contract).

Second, there is no such thing as a public comment “veto” in a Commission case. The Commission exists by statute for the purpose of giving experienced and measured consideration to these types of questions. The General Assembly recognized years ago that this decision-making function was best served by an experienced, steady and expert decision maker.

What the Commission can do in regard to the public testimony is determine whether the public testimony identifies any potential substantive detriments associated with the proposed purchase of the Port Perry Service Company assets. Even if it should determine that there are potential detriments identified by that testimony, the Commission must move on to weigh those potential detriments against benefits provided by the proposed transaction (the “no net detriments” test) in determining whether the proposed transaction is not detrimental to the public interest.

Here, there are two primary themes that have been repeated by the public testimony – (1) that there is a danger of rate increases associated with Confluence Rivers’ proposed purchase; and (2) that the proposed purchase will result in a loss of “local control.”

As stated above, no one can say with any certainty what rates will be two years from now if Confluence Rivers acquires the Port Perry systems or if Confluence Rivers does not acquire the Port Perry systems. What is known is that the rates will remain subject to the regulation of this Commission and an established process under the Commission exists to review and assess any future request by the Company for any increase in rates.

As to the potential loss of “local control,” it is unclear what that means within the context of this situation. Port Perry system assets have been owned by Port Perry Service Company, LLC since approximately 1973, and Port Perry has been regulated by this Commission over that 46 year period. The LPLOA has not had an ownership interest in those assets over the 46 year period, nor has it, or the public had “control” over Port Perry during that time.

The Commission should condition its approval of Confluence Rivers’ acquisition of Port Perry on those conditions proposed by the Staff.

The Staff has proposed that the Commission impose certain conditions in conjunction with approval of the proposed acquisition of the Port Perry assets. Staff’s Recommendation is acceptable to Confluence Rivers. (Exh. 1, Cox Dir., p. 15, ll. 14-25; p. 16, ll. 1-8).

SUMMARY

Confluence Rivers does not believe there are detriments to its ownership of the Port Perry water and sewer assets. However, should the Commission believe that it should weigh benefits and detriments, the following specific benefits justify a finding of no detriment:

- Confluence Rivers, an experienced and current owner and operator of 9 water and 9 sewer systems, would acquire the systems;
- Confluence Rivers is an owner/operator with a solid track record of rehabilitating, maintaining and operating small water and sewer systems;
- Confluence Rivers’ financial and technical resources are sufficient to provide improved service options for customers; and,

- Confluence Rivers' ownership will result in continued regulation of operations by the Commission to ensure safe and adequate service at just and reasonable rates.

When the benefits are considered, Confluence Rivers' acquisition of the Port Perry utility assets and certificates of convenience and necessity is not detrimental to the public interest and should be approved by the Commission.

WHEREFORE, Confluence Rivers respectfully submits this *Initial Brief* for the Commission's consideration.

Respectfully submitted,

/s/ Jennifer L. Hernandez

Jennifer L. Hernandez, MBE #59814

Dean L. Cooper, MBE #36592

BRYDON, SWEARENGEN & ENGLAND P.C.

312 E. Capitol Avenue

P.O. Box 456

Jefferson City, MO 65012

(573) 635-7166 telephone

(573) 636-7431 facsimile

jhernandez@brydonlaw.com

dcooper@brydonlaw.com

**ATTORNEYS FOR CONFLUENCE RIVERS
UTILITY OPERATING COMPANY, INC.**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served electronically on counsel for the parties of record herein on this 31st day of October, 2019.

/s/ Jennifer L. Hernandez