

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of )  
Confluence Rivers Utility Operating )  
Company, Inc., and Missouri-American )  
Water Company for Authority for )  
Confluence Rivers Utility Operating )  
Company, Inc. to Acquire Certain Sewer )  
Assets of Missouri-American Water )  
Company in Callaway and Morgan Counties, )  
Missouri )

Case No. SM-2025-0067

**RESPONSE TO STAFF RECOMMENDATION**

**COMES NOW** the Office of the Public Counsel (the “OPC”) and in response to the Staff of the Public Service Commission of the State of Missouri’s (“Staff” and the “Commission,” respectively) Report and Recommendation (the “Recommendation,” Doc. 11) respectfully states:

The OPC is concerned that Staff has failed to consider the future rate impacts that will occur when Confluence Rivers Utility Operating Company, Inc. (“Confluence”) acquires the assets of the nineteen (19) systems identified in Confluence and Missouri-American Water Company’s (“MAWC,” and together with Confluence, the “Joint Applicants”) Joint Application and Motion for Waiver (the “Joint Application,” Doc. 1). Though Confluence “proposes to utilize the existing customer rates for the nineteen (19) wastewater systems,” no party, including Staff, addresses what will likely happen in Confluence’s next rate case when these systems will be incorporated into Confluence’s rate base and customers’ rates calculated using Confluence’s historically higher rate of return and a higher rate base. (J.Appl. 6, *see generally* Recommendation). These higher rates, caused solely by the change in ownership of the systems, are surely “detrimental to the public.” *See State ex rel. St. Louis v. Pub. Serv. Comm’n*, 73 S.W.2d 393, 400 (Mo. banc 1934). To ensure that this acquisition is not detrimental to the public interest, the OPC proposes four conditions in addition to those proposed by Staff in its Recommendation.

## **I. Background**

On August 27, 2024, Confluence and MAWC filed the Joint Application seeking Commission authority for MAWC to sell and Confluence to acquire nineteen small wastewater systems throughout Callaway and Morgan counties. (*See* Joint Application 1, 4, Doc. 1). Collectively these systems account for approximately 606 connections. (*Id.* 4). Confluence and MAWC assert that this sale “will allow each company to focus on their core competencies and ensure their customers consistently have access to safe, reliable, and environmentally responsible resources, through improved efficiency, better resource allocation, and enhanced service for the customers of both the facilities managed by MAWC and the systems to be acquired by Confluence.” (*Id.* 1).

As a part of the transaction, “Confluence Rivers proposes to utilize the existing customer rates for the nineteen (19) wastewater systems (\$65.36/month).” (*Id.* 6).

In addressing the public interest, MAWC asserts that “[b]y divesting these smaller wastewater facilities, that do not overlap with its water service areas, [it] . . . can concentrate more effectively on its main operational strengths and large-scale facilities.” (*Id.* 6). As to Confluence, the Joint Applicants assert it “specializes in running and rehabilitating small systems.” (*Id.*). The Joint Application further states that Confluence’s “focus on small, geographically dispersed systems gives [it] . . . an advantage in managing the unique challenges that come with these types of operations.” (*Id.*). Finally, the Joint Applicants state that Confluence “has several small wastewater systems in the vicinity of these systems.” (*Id.*).

On August 29, 2024, the Commission directed notice of the Joint Application and set a deadline for intervention. (Order Directing Notice and Setting a Deadline for Intervention Requests

2, Doc. 2). After receiving no requests to intervene, the Commission subsequently ordered its Staff to file a Recommendation. (Order Directing Filing of Staff Recommendation 1, Doc. 3).

Following two extensions and a supplement to the Joint Application,<sup>1</sup> Staff filed its Recommendation on December 30, 2024. In the memorandum attached to its Recommendation, Staff asserted that it was “Staff’s position, based on its review as described herein, . . . that the transfer of utility assets is not detrimental to the public interest.” (Recommendation Mem. 16). Therefore, Staff recommended that the Commission grant the relief requested in the Joint Application, subject to twelve (12) identified conditions. (*Id.* 16-17).

As detailed in the memorandum attached to Staff’s Recommendation, Staff conducted an investigation of each of the nineteen systems at issue in this matter, including visiting each of the systems. (*Id.* 3-8). As a part of that investigation, Staff found that “a common theme with many of these systems is that they are properly constructed and have been well maintained, but they are aged.” (*Id.* 3). Staff noted that “the overall cost of purchasing the 19 systems and updating them to reach modern and future [effluent] limits will be substantial.” (*Id.*).

In addressing “[r]ate and [t]ariff matters,” Staff states that “[i]n its Application, Confluence proposes to adopt MAWC’s existing tariffs and rates related specifically to these 19 wastewater systems.” (*Id.* 14). It further recognizes that in response to a data request asking why the transaction was not detrimental to the public interest, Confluence asserted that

If rates currently in effect (which will remain in effect immediately after closing) are not fully compensatory, Confluence Rivers believes it will be able to sustain any short-term negative impacts to net income until the effective date of rates in the initial rate case involving the systems at issue in this docket.

(*Id.* 12 (quoting Confluence Response to Staff Data Request No. 0025)).

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<sup>1</sup> On November 21, 2024, the Joint Applicants supplemented the Joint Application “with the specific maps and legal descriptions associated with the sale and purchase.” (J.Suppl. to Appl. 1, Docs. 7, 8).

In addressing the public interest in its Recommendation, Staff, after addressing the other Tartan factors,<sup>2</sup> stated only that “due to the positive nature of the preceding criteria, coupled with the present and future need for utility service, this proposed acquisition promotes the public interest.” (*Id.* 16).

## **II. Response**

The OPC files this Response because it is concerned that Staff has failed to consider the future rate impacts that will result solely from Confluence acquiring the systems. As explained in the attached verified memorandum from Mr. David Murray, Chartered Financial Analyst, who has extensive experience in utility regulation, customers are likely to see a substantial increase in their rates due to the higher rate of return requested and traditionally awarded to Confluence as opposed to MAWC, and the higher rate base amount Confluence is likely to request. These higher costs will result in higher rates for customers after they are incorporated into Confluence’s system, even if no changes are made to the customers’ sewer systems. Higher rates that result solely because of a change in ownership, tip the scales so that this transaction is detrimental to the public interest.

### **A. Legal Standard: Detrimental to the Public Interest**

Section 393.190.1 of the Revised Statutes of Missouri governs the sale of any portion of a sewer corporation’s system that is “necessary or useful in the performance of its duties to the public” and requires Commission approval prior to the sale. § 393.190.1 RSMo.

The Missouri Supreme Court has recognized that “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” *St. Louis*, 73 S.W.2d at 400. The Commission need not find a public benefit as a result of the transaction, but the transaction cannot

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<sup>2</sup> The Tartan factors are: “1) the need for service; 2) the applicant’s qualifications; 3) the applicant’s financial ability; 4) the economic feasibility of the proposal; and, 5) promotion of the public interest.” (Recommendation Mem. 15).

result in a net detriment to the public. *See Osage Util. Operating Co. v. Mo. Pub. Serv. Comm'n*, 637 S.W.3d 78, 93 (Mo. Ct. App. 2021) (citing *St. Louis*, 73 S.W.2d at 400).

To determine whether a sale is detrimental to the public interest, the Commission must “consider all relevant factors.” *Id.* (citing *State ex. rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003)). Although no exhaustive list of considerations has been identified, courts will find the Commission’s decision unreasonable “if it ‘erroneously ignores evidence that may have substantially impacted the weight of the evidence evaluated to approve’ the transaction.” *Id.* (citing *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. banc 2011)).

Although the “potential for increased rates for ratepayers does not require the Commission to disapprove of a transfer,” it is “‘one factor for the Commission to weigh when deciding whether or not to approve’ a transaction.” *Id.* at 96 n. 15 (citing *AG Processing, Inc.*, 120 S.W.3d at 737).

**B. Higher Rates Tip the Scales So That, Without Additional Protections, the Transaction in this Case is Detrimental to the Public Interest,**

Here, as explained in Mr. Murray’s verified memorandum, the customers of these nineteen systems will likely experience higher rates, solely due to the transfer of ownership from MAWC to Confluence, due to Confluence’s requested and traditionally awarded higher rates of return, as well as the higher rate base it may request for the systems. Although Staff notes that these systems may need repairs in the future, its Recommendation specifically recognizes that these systems are “properly constructed and have been well maintained.” (Recommendation 3). In fact, Staff recognizes that these acquisitions are different than the “vast majority” of Confluence’s recent mergers and acquisitions, which focus on “smaller, financially-challenged water and sewer

systems.”<sup>3</sup> (*See id.* 12). Indeed, in addressing the public interest, Staff notes only that because the sale meets the first four Tartan criteria and there is a need for future service, the sale promotes the public interest. (*Id.* 16). It does not appear that Staff considered the future rate impacts in reaching its conclusion. Such a failure to address this important factor of the public interest is unreasonable. *See Osage Util. Operating Co.*, 637 S.W.3d at 93 (recognizing that “[i]n the context of the Commission’s approval of a transfer of regulated utility assets, the Commission’s decision will be found to be unreasonable if it ‘erroneously ignores evidence that may have substantially impacted the weight of the evidence evaluated to approve’ the transaction.” (citation omitted)).

### **C. Proposed Conditions to Ensure Transfer is Not Detrimental to the Public Interest**

The OPC proposes four conditions to ensure that this transaction is not detrimental to the public interest by increasing customers rates due solely to Confluence’s historically higher rate of return and the potential for a higher rate base.

The OPC’s recommended conditions are

1. Confluence commits that for the systems subject to this transaction, it will not request a higher pre-tax rate of return than MAWC would seek if it were still the owner of the systems subject to this transaction. For purposes of enforcing this condition, the parties agree that the maximum pre-tax rate of return Confluence shall request will be determined based on MAWC’s most recently filed general rate case;<sup>4</sup>
2. If the Commission sets MAWC’s authorized pre-tax rate of return in MAWC’s most recent rate case (or the parties agree to a specified pre-tax rate-of-return as part of a settlement), this is the maximum pre-tax rate of return that Confluence

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<sup>3</sup> Indeed there is nothing in either the Joint Application or Staff’s Recommendation that suggests that MAWC cannot or will not provide safe and adequate service to the customers of these nineteen systems should the Commission reject this request. *Contra Env’t. Utils., LLC v. Pub. Serv. Comm’n of Mo.*, 219 S.W.3d 256, 266 (Mo Ct. App. 2007) (concluding that the Commission “could well determine that such a sale was detrimental to the public” where the sale would leave some customers to be served by the distressed utility and the rest of the customers “could conceivably see the cost of sewer service double.”).

<sup>4</sup> In the event that Confluence files a general rate case before MAWC files its next general rate case (the case *after* Case Number WR-2024-0320), these conditions refer to Case Number WR-2024-0320. In the alternative event, these conditions refer to MAWC’s forthcoming rate case.

shall sponsor in its next rate case for purposes of determining the revenue requirement for the systems subject to this transaction;

3. If the income tax rate used to determine MAWC's effective pre-tax authorized rate of return is higher than Confluence's income tax rate, then the maximum pre-tax authorized rate of return that Confluence shall sponsor for use in setting the rates of these particular systems in its next rate case shall be adjusted downward accordingly;
4. Require Confluence to adhere to the acquisition accounting guidance provided in the USOA so that a request for rate recovery can be properly audited in Confluence's next rate case.

The imposition of conditions to ensure that the sale of assets does not negatively affect customers of a regulated utility is not new. For instance, in Laclede Gas Company's (now Spire Missouri) acquisition of the Missouri Gas Energy (now Spire Missouri West) natural gas distribution system from Southern Union, the Commission imposed a condition that stated "Laclede Gas represents that the authorized pre-tax rate of return in Case No. GR-2009-0355 will be equal to or higher than the pre-tax rate of return that Laclede Gas will sponsor in the next rate case filed prior to October 1, 2015, involving the MGE division." (Stipulation and Agreement 17, Commission Case No. GM-2013-0254, Doc. 71). Similarly, in that same case, the parties included in the Stipulation and Agreement, which the Commission approved, language that insulated customers from higher costs of capital due to the transaction. (*See id.* 14). Specifically, the Stipulation stated that "Laclede Gas shall not recommend an increase to the cost of capital for its Laclede or MGE Divisions as a result of this Transaction." (*Id.* 14). The parties also included a provision that recognized that the transaction would have no detrimental impact on customers:

Laclede Gas represents that this transaction shall not have any detrimental effect on Laclede Gas or MGE Division utility customers, including, but not limited to: increased rates or any adverse effect on quality of service, and further agrees that, should such detrimental effects nevertheless occur, nothing in the approval or

implementation of the proposed acquisition shall impair the Commission's ability to protect such customers from such detrimental effects.

(*Id.* 35).

Similarly, the Stipulation and Agreement reached amongst The Empire District Electric Company (“Empire”), Liberty Utilities (Central) Co. (“LU Central”), Liberty Sub Corp., Algonquin Power & Utilities Corp. (“Algonquin”), and Staff (the “Staff Stipulation”) in the case in which the Commission considered Empire’s planned merger with Algonquin, included similar language that sought to insulate customers from higher rates caused by a higher cost of capital as a result of the transaction. (Staff Stipulation 4-5, Commission Case No. EM-2016-0213, Doc. 134). Specifically, that Stipulation and Agreement stated “Empire shall not seek an increase to the cost of capital as a result of this Transaction or Empire’s ongoing affiliation with Algonquin Power & Utilities Corp. and its affiliates other than Empire after the Transaction.” (*Id.* 4). Similarly, in the Stipulation and Agreement in that same case amongst Empire, LU Central, Liberty Sub Corp., Algonquin, and the OPC (the “OPC Stipulation”), the signatories included language that made clear that “[t]he Joint Applicants will ensure that the merger will be rate-neutral for Empire’s customers.” (OPC Stipulation 2, Commission Case No. EM-2016-0213, Doc. 134).

As to the OPC’s fourth proposed condition, this condition mirrors that suggested by Staff in Case Number WA-2023-0450, the case established to consider Confluence’s acquisition of systems owned by three entities. In that case, Staff recognized that acquisition premiums/discounts existed as the calculated rate base differed from the purchase price of the systems. (Recommendation 10-11, Case No. WA-2023-0450, Doc. 10). Staff pointed out that the Uniform System of Accounts (“USAO”) provided an account that held acquisition premiums/discounts, saying:



Plant Instruction No. 5 of the Commission-approved Uniform System of Accounts (“USOA”) provides guidance on how to record the acquisition of utility systems. This instruction describes how the cost of the acquisition should be charged to various rate base accounts as well as accounts that generally do not affect the ratemaking revenue requirement; including Account 114 – Utility Plant Acquisition Adjustments. Conceptually, this account holds the difference between the net book value of assets acquired and the purchase price of those assets. The accounting industry also commonly refers to the amount of purchase price over book value as an acquisition premium (or if the book value exceeds the purchase price, an acquisition discount).

(*Id.* 10). Staff therefore recommended that the Commission include a condition mirroring that which the OPC has recommended here to ensure that “a request for rate recovery can be properly audited in Confluence’s next rate case.” (*Id.* 11, 19).

### **III. Conclusion**

As explained in Mr. Murray’s memorandum, customers of these nineteen systems will likely see significantly higher rates due to the higher rate of return Confluence typically requests, as opposed to MAWC, and the potential for a higher rate base. In a case, such as this, where the systems are in good condition and no concerns exist with the current operator of the systems, such higher rates will likely tip the scales in such a way that the transaction becomes detrimental to the public interest. The imposition of conditions to protect customers from the detrimental effects of the transaction is therefore required. For this reason, the OPC asks that the Commission, in addition to the conditions recommended by Staff, impose the four conditions specified in this Response. Alternatively, if the Commission does not impose the OPC’s recommended decisions, the OPC opposes the transaction as being detrimental to the public interest and requests that the Commission hold a hearing in this matter.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission either impose its proposed conditions in addition to those recommended by Staff or hold a hearing in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 9th day of January 2025.

/s/ Lindsay VanGerpen