

**Exhibit No.:**

**Issue(s):** No Net Detriment Standard/EPA's Capacity  
Development Program/The Tartan Criteria

**Witness/Type of Exhibit:** Marke/Surrebuttal

**Sponsoring Party:** Public Counsel

**Case No.:** SM-2025-0067

## **SURREBUTTAL TESTIMONY**

**OF**

**GEOFF MARKE**

Submitted on Behalf of the Office of the Public Counsel

**CONFLUENCE RIVERS UTILITY  
OPERATING COMPANY, INC.  
&  
MISSOURI-AMERICAN WATER COMPANY**

CASE NO. SM-2025-0067

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Denotes Confidential Information that has been redacted.

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May 23, 2025

**PUBLIC**

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**SURREBUTTAL TESTIMONY**

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**CONFLUENCE RIVERS UTILITY OPERATING COMPANY INC. AND  
MISSOURI-AMERICAN WATER COMPANY**

**FILE NO. SM-2025-0067**

**I. INTRODUCTION**

**Q. Please state your name and business address.**

A. Geoff Marke, PhD, Chief Economist, Office of the Public Counsel (OPC or Public Counsel), P.O. Box 2230, Jefferson City, Missouri 65102.

**Q. Are you the same Dr. Marke that filed rebuttal testimony in SM-2025-0067?**

A. I am.

**Q. What is the purpose of your surrebuttal testimony?**

Based on my professional experience, and after reviewing the issue with legal counsel, it is my understanding that the Staff of the Missouri Public Service Commission (“Staff” and “Commission,” respectively) failed to use the correct legal standard in evaluating the Joint Application filed by Missouri American Water Company (“MAWC”) and Confluence Rivers Utility Operating Co, Inc. (“Confluence” and collectively with MAWC, the “Companies”), resulting in its Report not addressing key issues. Specifically, rather than applying the no net detriment standard as required by the Missouri courts and prior Commission decisions,<sup>1</sup> Staff first looked to the Technical, Managerial, and Financial Standard (“TMF”) adopted by the Missouri Department of Natural Resources (“MO DNR”) after guidance from the United States Environmental Protection Agency (“US EPA”). Staff then turned to the Tartan Criteria. It included no analysis directed at the no net detriment standard. I will address each of the three standards below.

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<sup>1</sup> See, e.g., *Osage Util. Operating Co. v. Mo. Pub. Serv. Comm’n*, 637 S.W.3d 78 (Mo. Ct. App. 2021); *In the Matter of the Joint Application of Great Plains Energy Inc., Kan. City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Inc. & for Other Related Relief*, Case No. EM-2007-0374, Report & Order (Mo. PSC July 1, 2008), *clarified in Order Denying Motions for Rehearing, Clarifying Report & Order, & Denying Motion to Stay as Being Moot* (Mo. PSC Aug. 5, 2008).

1 My silence regarding any issue should not be construed as an endorsement of, agreement with,  
2 or consent to any other party's filed position.

3 **Q. Before beginning, are you an attorney?**

4 A. No.

5 **Q. What are your qualifications to speak to the correct legal standard that Staff should**  
6 **utilize in evaluating the Joint Application?**

7 A. I have worked as a member of the Missouri utility regulatory community, including as the  
8 Chief Economist for the OPC for over eleven years and have overseen multiple acquisition  
9 and merger cases during this time. I write this testimony to provide the Commission  
10 background regarding each of the standards addressed in Staff's Report and my understanding  
11 of the proper legal standard that Staff should have applied. I reached the conclusions expressed  
12 in this testimony as a result of my own understanding and do not offer them as legal advice.

13 **Q. What is your recommendation to the Commission?**

14 A. I believe the impacted customers will be worse over time in both cost and quality of service  
15 if the Commission approves this Joint Application. As such, I believe this Joint Application  
16 results in a net detriment for customers and I recommend the Commission reject it.

17 **II. NO NET DETRIMENT STANDARD**

18 **Q. What is the appropriate standard to analyze an acquisition of a utility in Missouri?**

19 A. In *Osage Utilities Operating Company v. Missouri Public Service Commission*, the  
20 Missouri Court of Appeals, Western District said

21 Prior to the sale of certain assets of a regulated utility, the Commission must  
22 approve the transfer. § 393.190.1. "The obvious purpose of this provision is  
23 to ensure the continuation of adequate service to the public served by the  
24 utility." *Fee Fee Trunk Sewer*, 596 S.W.2d at 468. In determining whether  
25 a transfer should be approved, the Commission determines whether the  
26 transfer is **detrimental to the public interest**. *AG Processing, Inc.*, 120  
27 S.W.3d at 735 (citing *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*,  
28 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934)). The Missouri  
29 Supreme Court announced the "not detrimental to the public  
30 interest" standard in a 1934 case. *City of St. Louis*, 73 S.W.2d at 400.

31 637 S.W.3d 78, 92-93 (Mo Ct. App. 2021) (emphasis added). It continued saying

1 In this matter, the Commission indicated that determining whether a sale is  
2 detrimental to the public interest “is a **balancing process**,” which requires the  
3 Commission to perform “a cost benefit analysis in which all of the benefits and  
4 detriments in evidence are considered.” Although no exhaustive list has been  
5 announced of the considerations that may influence whether a sale is detrimental to  
6 the public, Missouri courts have held that the Commission is to consider all relevant  
7 factors in issuing its decisions and orders. *See AG Processing*, 120 S.W.3d at  
8 736 (holding that the Commission erred in failing to consider the reasonableness of  
9 an acquisition premium as part of a cost analysis in evaluating whether a  
10 proposed merger would be detrimental to the public). In the context of the  
11 Commission's approval of a transfer of regulated utility assets, the Commission's  
12 decision will be found to be unreasonable if it “erroneously ignores evidence that  
13 may have substantially impacted the weight of the evidence evaluated to approve”  
14 the transaction. *See State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d  
15 178, 184 (Mo. banc 2011) (internal quotations omitted). *Id.* at 93 (emphasis added).

16 Based on this language, it is my understanding that Missouri operates as a “no net  
17 detriment” merger and acquisition U.S. state where applicants need to demonstrate that  
18 customers are no worse off from the transaction. I do not believe that an explicit standard  
19 is stated in statute, rather it is a standard borne out of case history and recognized by this  
20 Commission and the courts.

21 **Q. Did Staff apply a no net detriment analysis to this Joint Application?**

22 A. I see no such before/after or company-to-company comparative analysis. I also see no  
23 mention of benefits or detriments or a balancing of such factors. In fact, there is only one  
24 reference in the entire Staff Report that could be characterized as at least recognizing that  
25 customers should not be worse off from this transaction. That sole sentence reads as  
26 follows:

27 Staff’s position, based on its review as described herein, is that the transfer of  
28 utility assets is not detrimental to the public interest.<sup>2</sup>

29 **Q. Do you believe that approval of this Joint Application would result in a no net  
30 determinant to customers?**

31 A. No, I maintain my position that I took in rebuttal testimony: If the Commission approves  
32 the relief requested in the Joint Application, customers will suffer a net detriment.

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<sup>2</sup> Case No. SM-2025-0067, Staff Report page 16.

1 To be clear a non-exhaustive list of detriments that were identified in the OPC's rebuttal  
2 testimony include:

- 3 • Customers will go from receiving service from the largest publicly-traded  
4 investor-owned water utility in the United States (and in Missouri), which  
5 comes with access to its own research laboratory and whose business model  
6 is focused on the use of full-time employees, to receiving service from a  
7 much smaller utility whose business model is predicated on finding  
8 distressed systems for sale and operating the systems entirely with  
9 contractual employees.<sup>3,4,5,6</sup>
- 10 • Long-term, impacted customers will pay a premium due to losses of  
11 economies of scale and higher capital costs.

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<sup>3</sup> In defining its "main operational strengths" MAWC references not only its "internal expertise," but also American Water's laboratory, which it characterizes as "one of the premiere water laboratories in the county." (MAWC Response to OPC DR 25, attached as Schedule GM-1). MAWC states in full:

MAWC excels in its ability to operate water and wastewater systems for a variety of reasons including, our internal expertise to deal with challenges in both the water and wastewater services, our operational experience in solving problems in an efficient and cost-effective manner, our buying power with vendors and suppliers, and our relationship with the contractor communities in which we partner. American Water has one of the premiere water laboratories in the country that is available to MAWC to deal with constantly changing emerging contaminants and other water quality issues.

<sup>4</sup> MAWC itself recognizes the benefits that attend its use of full-time employees in its response to the OPC's Data Request No. 54. (attached as Schedule GM-2). In that response, MAWC states:

MAWC has established an operational model that does not utilize third-party contractors to operate and maintain our systems. The size and complexity of most of MAWC's systems require consistent operation and maintenance year after year. Utilizing full-time operational staff that have a diverse knowledge base of MAWC's systems allows for efficient decision making that considers historical changes to the systems and future planning efforts to improve the systems. All operational personnel have access to the entire knowledge base of American Water and that is not true of a third-party contractor.

<sup>5</sup> In response to OPC's Data Request Numbers 17 and 18, Confluence noted that although it intends to do so if the Commission approves this transaction, it has not yet entered in an agreement with a contractor to operate these systems. (Confluence Resp. to DR 17, 18, attached as Schedule GM-3).

<sup>6</sup> The Companies rely on Confluence's use of third-party contractors to support that no net detriment exists in this case. However, when the OPC asked MAWC why it was not proposing to sell all of its small wastewater systems to Confluence, it stated only that "[t]he systems included in this transaction were an arm's length negotiation between both parties. These systems were ones that MAWC was willing to sell, and Confluence Rivers was willing to purchase." (MAWC Resp. to DR 15, attached as Schedule GM-4).

- Short-term, MAWC's remaining customers will continue to pay costs as if these systems were still in operation.<sup>7</sup>
- All things being equal, there is a **\*\*\_\_\_\_\_\*\*** acquisition premium that may be requested from customers to finalize this transaction.
- 18 of the 19 wastewater systems are closer to existing MAWC systems than Confluence systems.

**Q. Can you elaborate on your final detriment?**

A. Yes. In support of their Joint Application, the Companies assert that "Confluence Rivers already has several small wastewater systems in the vicinity of these systems." (Silas Direct Test. 9; Kadyk Direct Test. 7). However, this ignores the fact that MAWC has many other water and wastewater systems in Jefferson City and the surrounding areas, which is just a short drive to 18 of the 19 systems at issue in this transaction.

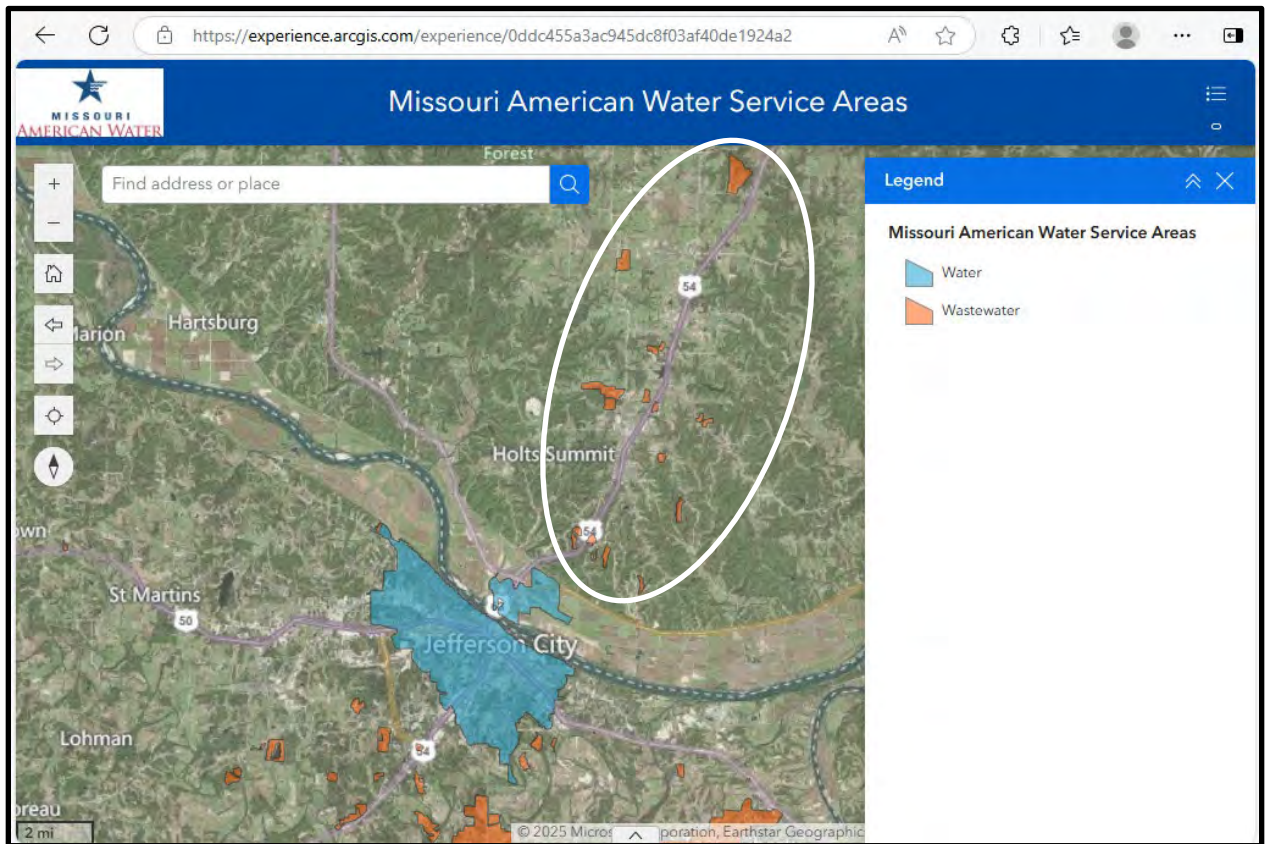
Figure 1 below is a screenshot of the map available on MAWC's website which shows the location of 18 of the 19 systems (those circled in white). As the Commission can see from this screenshot (and from the larger map overall<sup>8</sup>), MAWC has many other systems, including the large water system in Jefferson City and the larger wastewater systems in Taos and Wardsville, very near to 18 of the 19 systems at issue here.

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<sup>7</sup> In Staff's response to OPC's Data Request No. 42, Staff recognized that "MAWC recently made significant upgrades to" the Ryan's Lake system. (attached as Schedule GM-5). If the Commission allows MAWC to sell these systems, including the Ryan's Lake system, MAWC's remaining customers will continue to pay for these improvements through their rates, at least until MAWC's next rate case.

<sup>8</sup> The map is available on MAWC's website at <https://experience.arcgis.com/experience/0ddc455a3ac945dc8f03af40de1924a2>.

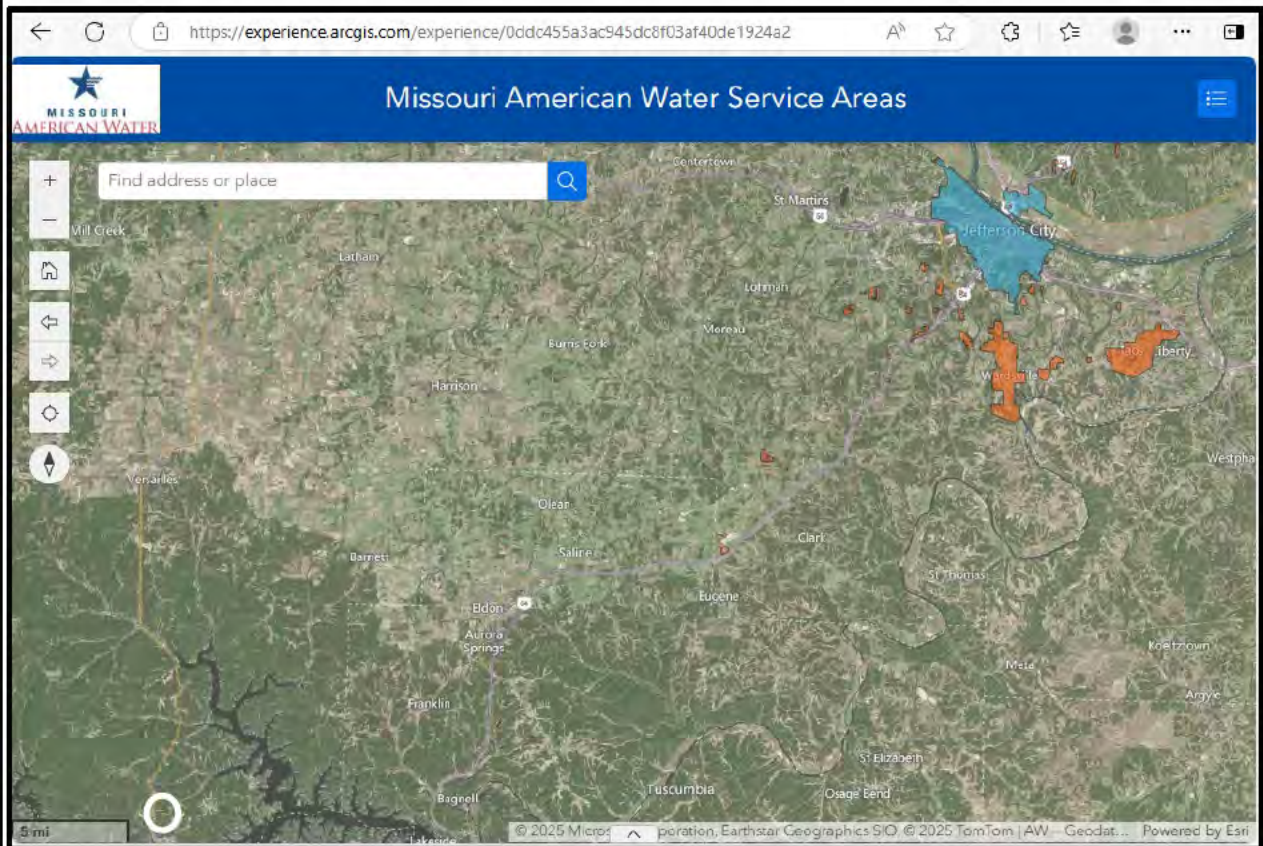
1 Figure 1: Existing MAWC systems and support in close proximity of systems being sold



2  
3 Further, the two operators that MAWC has identified for these systems are stationed in  
4 Jefferson City. (MAWC Resp. to DR 16). As shown in Figure 2, the remaining system,  
5 Ozark Meadows (circled in white), is also within driving distance, though is a bit further  
6 away.

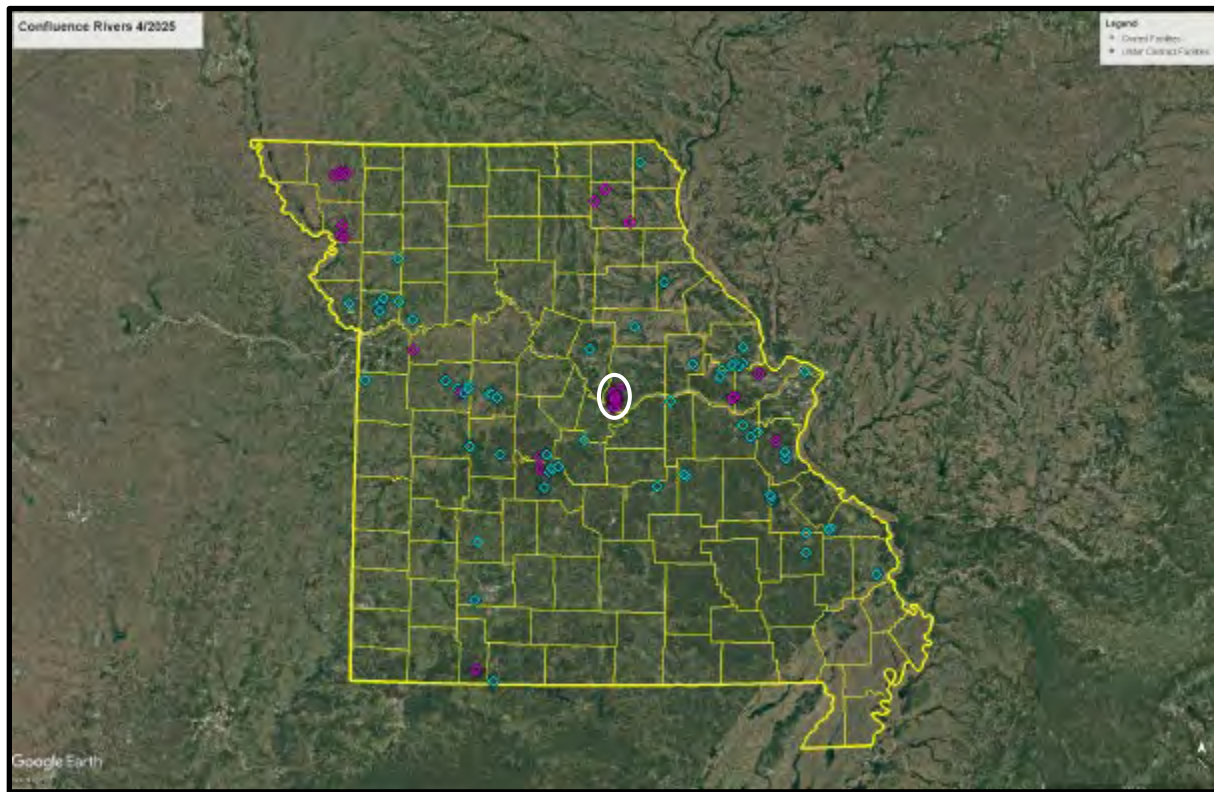


1 Figure 2: Ozark Meadows system in driving distance from Jefferson City Service Center



2 As shown in Figure 3 below, Confluence, on the other hand, has no other systems in  
3 Callaway County, which is where 18 of the 19 systems are located (circled in white in  
4 Figure 3). (Confluence Resp. to DR 40, 43, 46, attached as Schedule GM-6). The closest  
5 systems to these 18 systems are a county away, significantly farther than MAWC's other  
6 systems. (Confluence Resp. to DRs 43, 44, attached as Schedule GM-7).

1 Figure 3: Existing Confluence systems more than one county away from acquisitions



2  
3 **Q. To confirm, did Staff's Report analyze any of the detriments identified by the OPC?**

4 **A. No.**

5 **Q. Based on this information, in your opinion, does this proposed transaction meet the**  
6 **court-authorized no net detriment standard?**

7 **A. No.** The OPC has identified specific detriments that customers will face as a result of this  
8 transaction. When pressed, the Companies cannot produce meaningful benefits to  
9 customers, beyond generic statements that lack support. Moreover, any benefits would be  
10 outweighed by the substantial detriments I have identified.

**III. THE US EPA's CAPACITY DEVELOPMENT PROGRAM**

**Q. Instead of applying the proper no net detriment standard, what is one of the standards that Staff applied in its Report?**

A. It utilized MO DNR's TMF framework in evaluating the Joint Application. In part, the Staff Report states:

In studying most situations involving transfers of assets and CCN's involving existing regulated water and/or sewer systems, Staff utilizes the concepts of technical, managerial, and financial capacity, or "TMF," originally developed by the United States Environmental Protection Agency. Staff has reviewed and stated its position regarding TMF regarding Confluence in previous CCN and transfer of assets cases before the Commission. Staff again reviewed Confluence's TMF capabilities in the context of this application, and takes the position that Confluence continues to demonstrate adequate TMF capability.<sup>9</sup>

**Q. Where does the TMF standard originate?**

A. The TMF standard was first referenced in 1996 under the federal Safe Drinking Water Act ("SDWA"). It includes the Capacity Development Strategy that consists of three major components. According to the US EPA these include:

**1. Section 1420(a) New Systems**

Under penalty of Drinking Water State Revolving Fund (DWSRF) withholding, States must have a program established to:  
*"ensure that all new community water systems and nontransient, noncommunity water systems commencing operations after October 1, 1999 demonstrate technical, managerial, and financial capacity with respect to each national primary drinking water regulation in effect, or likely to be in effect, on the date of commencement of operations."*

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<sup>9</sup> Case No. SM-2025-0067 Staff Report p. 14.

**2. Section 1420(c) State Capacity Development Strategies**

Under penalty of DWSRF withholding, the State must develop and implement a:  
*"strategy to assist public water systems in acquiring and maintaining technical, managerial, and financial capacity." (emphasis added)*

**3. Section 1452(a)(3) Assessment of Capacity**

*States may not provide DWSRF loan assistance to systems*

- which lack the technical, managerial, and financial capability to ensure compliance; or
- if the system is in significant noncompliance with any drinking water standard or variance.

*However, States may provide assistance if:*

- the use of such assistance will ensure compliance; and
- the system has agreed to make the necessary changes in operation to ensure that it has the technical, managerial, and financial capacity to comply over the long term.<sup>10</sup>

**Q. Has the MO DNR adopted a TMF capacity framework?**

A. Yes. MO DNR adopted rules in 10 CSR 60-3.030 to enable TMF Capacity requirements for community and nontransient noncommunity water systems commencing operation after October 1, 1999.

**Q. How would you characterize the relevance of this framework to the Joint Application?**

A. The TMF framework is a minimum competency threshold for public drinking water systems that are activated after 1999. Importantly, as confirmed by a representative from the MO DNR, it does not apply to private water systems or public or private wastewater systems.<sup>11</sup>

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<sup>10</sup> US EPA (2025) Learn about Capacity Development. <https://www.epa.gov/dwcapacity/learn-about-capacity-development#:~:text=History%20of%20the%20Capacity%20Development,States%20may%20provide%20assistance%20if:>

<sup>11</sup> See email correspondence with the Missouri Department of Natural Resources in GM-8.



1 **Q. Does this framework assist the Commission in determining whether this sewer**  
2 **acquisition between two Commission-regulated public utilities results in a net**  
3 **detriment to customers?**

4 A. No. This standard does not apply to sewer systems.

5 Even if it did, it appears that both MAWC and Confluence likely have the capability to  
6 operate and maintain these systems. Therefore, this framework provides no guidance on  
7 whether the acquisition results in detriments to customers.

8 **Q. Putting aside those facts, based on your reading of the TMF requirements in 10 CSR**  
9 **60-3.030, would this application be in compliance with the State's TMF requirements**  
10 **if it did apply to private wastewater systems?**

11 A. Based on my reading of the requirements, at a minimum, the application would fall short  
12 of 10 CSR 60-3.030(3)(A)<sup>4</sup>'s requirement that:

13 All public water systems subject to this rule shall have and maintain an updated  
14 distribution system map showing, at a minimum, the size and location of all  
15 waterlines, valves, hydrants, storage facilities, pumping facilities, treatment  
16 facilities, and water sources and shall make the map available to the department on  
17 request.<sup>12</sup>

18 **Q. What should the Commission note from this?**

19 A. That the first of two standards Staff applied to this Joint Application are premised on  
20 applying a public drinking water standard for systems coming online after 1999 to an  
21 acquisition of a private wastewater system by another private entity. Furthermore, if that  
22 criteria actually applied in this case, it is my understanding the application would fall short.

### 23 **III. THE TARTAN CRITERIA**

24 **Q. Did Staff apply any other standard in its Report?**

25 A. Yes. Rather than conducting a comparative analysis to determine whether customers will  
26 face a net detriment, Staff also looked to the Tartan factors.  
27

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<sup>12</sup> See GM-9.

**Q. What is the Tartan Criteria?**

A. Referenced originally in the Commission's Report and Order in Case No. GA-94-127 as follows:

Although there is a dearth of statutory guidance, the Commission has articulated requirements for certificates in Commission Rule 2 CSR 240-2.060(2), the criteria to be used in evaluating such applications in *Re Intercon Gas, Inc.*, 30 MO P.S.C. (N.S.) 554, 561 (1991). The Intercon case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.<sup>13</sup>

The Tartan Criteria has traditionally been used by the Missouri Public Service Commission to determine whether a Certificate of Convenience and Necessity ("CCN") is needed for a public utility project.

**Q. Did MAWC and Confluence seek Commission approval of this transaction through the Commission's CCN process?**

A. No.

**Q. If the parties had sought Commission approval of this sale through the CCN process would the filed application be in compliance with the Commission's CCN rule for sewer utilities in place at the time the Joint Application was filed?**

A. No. It would not. 20 CSR 4240-3.305, which is entitled Filing Requirements for Sewer Utility Applications for Certificates of Convenience and Necessity, includes a laundry list of requirements some of which are entirely absent from this Joint Application.<sup>14</sup>

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<sup>13</sup> Case No. GA-94-127 Report and Order p. 6.

Astute readers will note that it would be more accurate to describe the Commission's CCN threshold as the "Intercon Criteria" as the Tartan Report and Order references the Intercon Criteria as the first instance where the criteria are articulated.

<sup>14</sup> See GM-10.

1 **Q. Did the Staff apply the Commission's CCN standard (Tartan Criteria) to a non-CCN**  
2 **docketed case?**

3 A. Yes. Staff's entire Tartan criteria analysis is as follows:

4 1. **Need for Service**

- 5 a. There is both a current and future need for water and sewer service, as the  
6 existing sewer customer base has both a desire and need for service.

7 2. **Applicant's Qualifications**

- 8 a. Confluence is an existing water and sewer corporation and public utility  
9 subject to the jurisdiction of the Commission. Confluence is currently  
10 providing sewer service to approximately 6,000 customers throughout  
11 Missouri, and Confluence is a subsidiary of CSWR.

12 3. **Applicant's Financial Ability**

- 13 a. Confluence, with the assistance of its parent company, CSWR, is financially  
14 capable of the acquisition.

15 4. **Feasibility of the Proposal**

- 16 a. The fourth Tartan Criteria calls for an evaluation of the economic feasibility  
17 of the proposal. Additionally, it is Staff's opinion that the feasibility of the  
18 engineering aspects of the proposal must be addressed as well. As such, both  
19 are addressed here. Staff has evaluated the proposals for upgrading the  
20 systems and finds them to be reasonable. Confluence has demonstrated over  
21 numerous years that it has adequate resources to operate utility systems it  
22 owns. The current rates, which Confluence is adopting, were designed to  
23 support the cost of service. Staff does not have any evidence that CSWR  
24 cannot provide the necessary support for Confluence to purchase, upgrade,  
25 own, operate, maintain, and otherwise control and manage the MAWC  
26 sewer systems.

27 5. **Promotion of the Public Interest**

- 28 a. Staff finds that due to the positive nature of the preceding criteria, coupled  
29 with the present and future need for utility service, this proposed acquisition

promotes the public interest. Staff's conclusion is that all Tartan Energy  
criteria are met for this case.<sup>15</sup>

**Q. Can you summarize Staff's analysis of the Tartan Criteria in your own words?**

A. Sure. Restated, Staff's position is as follows:

1. The customers receiving service will need the same service in the future
2. Confluence provides wastewater service in Missouri
3. Confluence is capable of attracting capital for future investment
4. Engineering estimates for future investment were put forward
5. Because 1-4 are acceptable the joint application has to be in the public interest.

**Q. What should the Commission note from this?**

A. First, that the second of the two standards Staff applied to this Joint Application is premised on criterion commonly applied to CCN applications, not a utility acquisition case such as this.

Second, if the Companies had filed this Joint Application as a request for a CCN the filed case would not meet the minimum requirements.

Third, Staff's analysis assumes the public interest has been met by the mere fact that Confluence is already a regulated utility providing service in Missouri.

**V. CONCLUSION**

**Q. Can you please summarize your position?**

A. I believe Staff has applied the wrong criteria in assessing this acquisition application. First, Staff applied a MO DNR/US EPA public drinking water standard to a private wastewater acquisition case. Then Staff applied the Commission's CCN Tartan criteria (but not the Commission's sewer utility CCN rule) to an acquisition application. Finally, Staff provided no comparative analysis between the two utilities and the acquisition's impact on customers, as would be necessary to determine that customers are not made worse off from this transaction.

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<sup>15</sup> Case No. SM-2025-0067 Staff Report p. 15-16.



1       As such, I maintain my position from rebuttal testimony and recommend that the  
2       Commission reject this application.

3       **Q. Does this conclude your testimony?**

4       A. Yes.

**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           ) Case No. SM-2025-0067  
Company, Inc. to Acquire Certain Sewer           )  
Assets of Missouri-American Water           )  
Company in Callaway and Morgan           )  
Counties, Missouri           )

**AFFIDAVIT OF GEOFF MARKE**

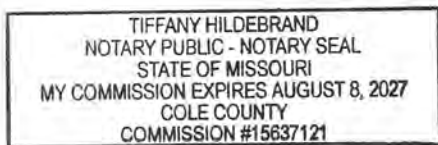
**STATE OF MISSOURI**   )  
  ) **ss**  
**COUNTY OF COLE**       )

Geoff Marke, of lawful age and being first duly sworn, deposes and states:

1. My name is Geoff Marke. I am a Chief Economist for the Office of the Public Counsel.
2. Attached hereto and made a part hereof for all purposes is my surrebuttal testimony.
3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
Geoff Marke  
Chief Economist

Subscribed and sworn to me this 21<sup>st</sup> day of May 2025.



  
\_\_\_\_\_  
Tiffany Hildebrand  
Notary Public

My Commission expires August 8, 2027.