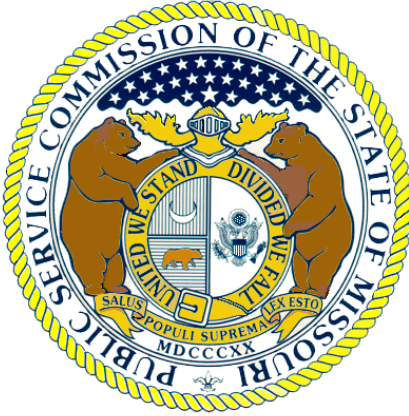


# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



In the Matter of the Application of )  
Confluence Rivers Utility Operating Company, Inc., )  
for Authority to Acquire Certain Water and Sewer )  
Assets and for a Certificate of Convenience and )  
Necessity )

**File No. WA-2019-0299**

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## REPORT AND ORDER

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**Issue Date:** August 26, 2020

**Effective Date:** September 25, 2020

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of )  
Confluence Rivers Utility Operating Company, Inc., ) **File No. WA-2019-0299**  
for Authority to Acquire Certain Water and Sewer )  
Assets and for a Certificate of Convenience and )  
Necessity )

## **APPEARANCES**

**Dean Cooper and Jennifer L. Hernandez**, Brydon, Swearengen & England, P.O. Box 456, Jefferson City, Missouri 65102

Appearing for Confluence Rivers Utility Operating Company, Inc.

**David Linton**, McCarthy, Leonard & Kaemmerer, 825 Maryville Centre Drive, Suite 300, Town and Country, Missouri 63017

Appearing for Lake Perry Lot Owners Association.

**John Clizer**, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102

Appearing for the Office of the Public Counsel.

**Karen Bretz, Travis Pringle, and Mark Johnson**, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102

Appearing for the Staff of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE:** Charles Hatcher

## REPORT AND ORDER

### **I. Procedural History**

On March 29, 2019, Confluence Rivers Utility Operating Company, Inc. (Confluence) filed two applications with the Missouri Public Service Commission (Commission) seeking authority to acquire the water and sewer systems owned by Port Perry Service Company ("Port Perry"), in Perry County, Missouri (Applications).<sup>1</sup> Confluence also seeks Certificates of Convenience and Necessity (CCNs) in conjunction with the transaction.

The Lake Perry Lot Owners' Association (the Lot Owners) represents most of Port Perry's customers. The Lot Owners intervened and objected to the purchase.

Soon after Confluence filed its Applications, the Lot Owners moved to dismiss. The Staff of the Commission (Staff) filed its recommendation to grant the requested authority subject to certain conditions on May 31, 2019. Confluence agreed to Staff's recommended conditions.

On June 4, 2019, the Lot Owners responded in opposition to Staff's recommendation, renewed their motion to dismiss, and requested a hearing. On June 10, 2019, the Office of the Public Counsel (Public Counsel), responded in opposition to Staff's recommendation, opposed granting the requested authority, and requested that Port Perry be made a party. The Commission denied both the motion to dismiss and the request to make Port Perry a party.

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<sup>1</sup> The sewer application, File Number SA-2019-0300, has been consolidated with this case.

A local public hearing was held in Perryville on September 10, 2019.<sup>2</sup> An evidentiary hearing was held October 7-8, 2019, in Jefferson City, Missouri.<sup>3</sup> At the evidentiary hearing, the Commission heard the testimony of twelve witnesses and received twenty-one exhibits into evidence.

Subsequently, the Commission decided that establishing the net book value of Port Perry was a relevant and critical issue to its determination of whether the transaction would be a detriment to the public. The record was reopened, and a limited additional evidentiary hearing was held by telephone and internet conference call on May 19, 2020.<sup>4</sup> At the additional evidentiary hearing, the Commission heard from four witnesses and admitted eight exhibits into evidence.<sup>5</sup> The record was closed on May 27, 2020, with the admittance of a late-filed exhibit. Initial post-hearing briefs were filed on June 2, 2020, and reply briefs were filed on June 9, 2020.

## **II. Findings of Fact**

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. Confluence is a Missouri corporation with its principal place of business in St. Ann, Missouri. It is a “water corporation,” a “sewer corporation,” and a “public utility” as

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<sup>2</sup> The Commission heard from 24 witnesses at the local public hearing, all testified against the acquisition. Transcript, Volume I (hereinafter, “Tr. Vol.”).

<sup>3</sup> Tr. Vol. II and IV.

<sup>4</sup> The hearing was not in-person due to the COVID-19 national emergency.

<sup>5</sup> Tr. Vol. VII.

those terms are defined by statute. Confluence is subject to the jurisdiction and supervision of the Commission as established by statute.<sup>6</sup>

2. Port Perry is a “water corporation”, a “sewer corporation” and a “public utility” as those terms are defined by statute. Port Perry is subject to the jurisdiction and supervision of the Commission as established by statute.<sup>7</sup>

3. Public Counsel is a party to this case pursuant to Section 386.710(2), RSMo (2016),<sup>8</sup> and by Commission rule 20 CSR 4240-2.010(10).

4. Staff is a party to all Commission investigations, contested cases, and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.<sup>9</sup> Staff participated in this proceeding.

5. Port Perry has signed an Agreement for Sale of Utility System (Asset Purchase Agreement).<sup>10</sup>

6. Confluence’s ultimate parent company is CSWR, LLC (CSWR), with Central States Water Resources, Inc. (Central States) being the managing affiliate for CSWR.<sup>11</sup> The Asset Purchase Agreement is between Central States and Port Perry. Upon closing of the sale, Central States will transfer its rights, title, and interest in Port Perry’s assets to Confluence.<sup>12</sup>

7. Josiah Cox is the president of Confluence. Mr. Cox is also the president of Central States. Mr. Cox is also the president of four additional affiliate utility systems. The

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<sup>6</sup> Ex. 1, Cox Direct, p. 1, and 4.

<sup>7</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, p. 2.

<sup>8</sup> Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in the year 2016.

<sup>9</sup> 20 CSR 4240-2.010(10) and (21) and 2.040(1).

<sup>10</sup> Ex. 1, Cox Direct, Schedule JC-5C.

<sup>11</sup> Ex. 1, Cox Direct, p. 4.

<sup>12</sup> Ex. 1, Cox Direct, p. 12, Ins. 6-10; and Schedule JC-5C.

four affiliates collectively operate three water and six sewer systems. The four affiliates are also owned by the parent corporation, CSWR.<sup>13</sup>

8. CSWR owns 172 water and wastewater systems across four states.<sup>14</sup> CSWR provides sewer service to approximately 2,800 customers.<sup>15</sup> CSWR provides water service to approximately 2,900 customers.<sup>16</sup>

9. Port Perry currently holds CCNs from the Commission to operate water and sewer utilities in Perry County, Missouri, and has held them since 1973. Port Perry provides water service to approximately 370 customers and sewer service to 248 customers.<sup>17</sup> Port Perry's last rate increase was approximately eighteen years ago, in 2002.<sup>18</sup>

10. Port Perry's water and sewer system is compliant with Missouri Department of Natural Resources requirements.<sup>19</sup>

11. Port Perry's water and sewer system will need maintenance and improvements to continue good operational standards and preserve the normal life of utility assets.<sup>20</sup>

12. There is an existing and future need of Port Perry customers for water and sewer services.<sup>21</sup> Having a water and sewer system in the Port Perry service area promotes the public interest.<sup>22</sup>

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<sup>13</sup> Ex 300, Cox Direct, p. 4, Ins. 19-22.

<sup>14</sup> Tr. Vol. VII, p. 396, Ins. 4-9.

<sup>15</sup> Ex. 1, Cox Direct, p. 5.

<sup>16</sup> Ex. 1, Cox Direct, p. 6.

<sup>17</sup> Ex. 1, Cox Direct, p. 11, Ins. 8-13.

<sup>18</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, p. 2.

<sup>19</sup> Tr. Vol. II, p. 197, Ins. 22-23.

<sup>20</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, p. 3.

<sup>21</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, p. 5.

<sup>22</sup> Tr. Vol IV, p. 283, Ins. 8-11.

13. Confluence's standard business practice is to use its own database of water and sewer systems in Missouri, cross-referenced with enforcement lists, age of infrastructure, and existing technology to choose utilities that may be agreeable to a purchase. Confluence then approaches those utilities that have infrastructure issues such that they need significant reinvestment.<sup>23</sup>

14. Port Perry is not typical of many other of the utilities acquired by Confluence because it is not a troubled utility that will necessarily require the same magnitude of improvements that other systems have needed.<sup>24</sup>

15. Confluence has historically used local contractors, and has a local operations and maintenance group within forty-five miles of the Port Perry systems.<sup>25</sup>

16. Confluence bids all construction projects, including operations and maintenance. Projects are then awarded to the lowest bidder.<sup>26</sup> Confluence's affiliates do not bid on those projects.<sup>27</sup>

17. Confluence is not seeking financing authority. The entire purchase of Port Perry will be funded with equity.<sup>28</sup> Confluence has not yet determined whether improvements will be funded by equity, debt, or a combination. The terms of any debt financing would be subject to the approval of the Commission.<sup>29</sup>

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<sup>23</sup> Tr. Vol. II, pp. 61-62, Ins. 19-5.

<sup>24</sup> Ex. 102, Bolin Surrebuttal, p. 4, Ins. 6-7.

<sup>25</sup> Tr. Vol. II, p. 39, Ins. 11-16.

<sup>26</sup> Tr. Vol. II, pp. 37-38, Ins. 22-12.

<sup>27</sup> Tr. Vol. II, p. 67, Ins. 13-15.

<sup>28</sup> Tr. Vol. II, p. 44, Ins. 1-5.

<sup>29</sup> Ex. 1, Cox Direct, p. 10.

18. Confluence is equipped with sufficient technical, managerial, and financial capacity to complete the pending transaction and operate the Port Perry utility systems safely.<sup>30</sup>

19. Confluence is not proposing to change rates in this case.<sup>31</sup>

20. Staff did not review or determine possible future rates to be charged to Port Perry customers. Staff will audit historical financial data, invoices and all relevant factors in recommending customer rate levels at the time of Port Perry's next general rate case filed by the utility.<sup>32</sup>

21. Confluence and Staff initially proposed different Port Perry water and sewer system net book value amounts.<sup>33</sup>

22. All parties agree after Staff's further analysis that the net book value of Port Perry water and sewer systems as of December 31, 2019, is \$77,936: \$20,070 for the water assets and \$57,866 for the sewer assets.<sup>34</sup> Net book value does not change due to ownership of a utility.<sup>35</sup> The net book value set by the Commission in this case will be the Port Perry starting net book value amounts in a subsequent rate case filed by Confluence.<sup>36</sup>

23. It is not uncommon that purchases of utilities are above net book value.<sup>37</sup>

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<sup>30</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, pp. 4-5; Ex. 1, Cox Direct, pp. 8-9.

<sup>31</sup> Ex. 102, Bolin Surrebuttal, p. 2, ln.13.

<sup>32</sup> Ex. 102, Bolin Surrebuttal, p. 2, Ins. 13-16.

<sup>33</sup> Ex. Dietrich Direct, Schedule ND-d2, p. 7; Ex. 1, Cox Direct, pp. 15-16, Ins. 14-8.

<sup>34</sup> Ex. 800, Bolin Direct, p. 4, Ins. 15-16; Ex. 600, Cox Direct, pp.2-3, Ins. 22-5; Ex. 701, DeWilde Rebuttal, pp. 2-3, Ins. 12-2; see also Stipulation and Agreement as to Net Book Value, filed April 9, 2020, para. 3. Note that Exhibit 600 is marked as direct testimony in Transcript Volume VII, but was prefiled as rebuttal testimony. Citations in this Order will be consistent with the transcript.

<sup>35</sup> Tr. Vol. VII, p. 405, Ins. 18-22.

<sup>36</sup> Ex. 600, Cox Direct, p. 2, Ins. 6-9.

<sup>37</sup> Tr. Vol IV, pp. 274-275, Ins. 23-1.



24. An acquisition premium is the amount paid for a system above its net book value.<sup>38</sup> The size or existence of an acquisition premium does not affect ratemaking as net book value is the starting point for ratemaking purposes.<sup>39</sup>

25. There is an acquisition premium being paid in this case; however, Confluence is not seeking rate recovery of the acquisition premium.<sup>40</sup>

26. Purchase price per customer is a standard metric used for utility purchases.<sup>41</sup>

27. Confluence typically uses an iterative process in determining future repairs and maintenance projects on systems it is purchasing, refining projects as information develops.<sup>42</sup> This process involves multiple preliminary estimates and may involve third-party engineer preliminary estimates.<sup>43</sup> These estimates evolve over time.<sup>44</sup> Confluence's first estimate of Port Perry future repairs and maintenance projects was approximately \$693,000.<sup>45</sup> Its most recent repair and maintenance plan for Port Perry's water and sewer system has estimated costs of \$229,075, as of April 2019.<sup>46</sup> Confluence's estimates come from licensed engineers.<sup>47</sup>

28. The Lot Owners have opposed the Application of Confluence to purchase Port Perry since they were first aware of it.<sup>48</sup> The Lot Owners have stated their intent to

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<sup>38</sup> Ex. 800, Bolin Direct, p. 5, Ins. 16-19.

<sup>39</sup> Tr. Vol. VII, p. 406, Ins. 18-22.

<sup>40</sup> Tr. Vol. II, p. 40, Ins. 12-15; p. 62, In. 15; p. 150, Ins. 10-16; p. 151, Ins. 10-12; see also *Waiver Concerning Acquisition Premium*, filed by Confluence on March 4, 2020.

<sup>41</sup> Tr. Vol. VII, pp. 388-389, In. 16-4.

<sup>42</sup> Tr. Vol. II, p. 57, Ins. 6-13.

<sup>43</sup> Tr. Vol. II, p. 147, Ins. 4-6.

<sup>44</sup> Tr. Vol. II, pp. 147-148, Ins. 10-14.

<sup>45</sup> Tr. Vol. II, p. 57, Ins. 4-6.

<sup>46</sup> Ex. 307, Justis Rebuttal, Schedule GJ-03, data request 0012, requested April 24, 2019.

<sup>47</sup> Tr. Vol. II, p. 147, Ins. 4-6.

<sup>48</sup> Ex. 309, DeWilde Rebuttal, p. 4, Ins. 10-19.

pursue, if possible, the purchase of Port Perry.<sup>49</sup> On April 4, 2019, the Lot Owners made a purchase offer to Port Perry, priced below that offered by Confluence.<sup>50</sup> The Lot Owners received no reply.<sup>51</sup>

29. The Lot Owners put forth six aspects that make the proposed purchase by Confluence potentially detrimental to the public interest: loss of local control;<sup>52</sup> multiple engineer reports for estimates of repairs;<sup>53</sup> lack of financing information;<sup>54</sup> potential indirect recovery of the acquisition premium;<sup>55</sup> higher anticipated rates under Confluence as opposed to the Lot Owners' ownership business plan;<sup>56</sup> and public sentiment of the customers.<sup>57</sup>

30. Staff recommended the Commission approve the sale, subject to the following eleven conditions,<sup>58</sup> to which Confluence agreed, set out as follows:<sup>59</sup>

- a. Authorize Port Perry to sell and transfer utility assets to Confluence, and transfer the CCNs currently held by Port Perry to Confluence effective upon closing on the assets;
- b. Require Confluence to file adoption notice tariff sheets for each tariff, water and sewer, currently in effect for Port Perry, as 30-day filings, within ten (10) days after closing on the assets;

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<sup>49</sup> Ex. 309, DeWilde Rebuttal, pp. 4-10.

<sup>50</sup> Ex. 309, DeWilde Rebuttal, pp. 9-10, Ins. 22-14.

<sup>51</sup> Ex. 309, DeWilde Rebuttal, p. 10, Ins. 15-16.

<sup>52</sup> Ex. 307, Justis Rebuttal, p. 4, Ins. 9-10.

<sup>53</sup> Ex. 307, Justis Rebuttal, pp. 15-17, Ins. 22-11.

<sup>54</sup> Ex. 307, Justis Rebuttal, p. 4, Ins. 13-14.

<sup>55</sup> Ex. 700, Justis Rebuttal, pp. 3-4, Ins. 21-14.

<sup>56</sup> Ex. 307, Justis Rebuttal, p. 4, Ins. 12-13.

<sup>57</sup> Ex. 307, Justis Rebuttal, p. 4, In. 9.

<sup>58</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, pp. 8-9.

<sup>59</sup> Ex. 1, Cox Direct, p. 15.

- c. Upon closing on the water and sewer systems, authorize Port Perry to cease providing service, and authorize Confluence to begin providing service by applying, on an interim basis, the existing rates, rules and regulations as outlined in Port Perry's water and sewer tariffs, until the effective date of respective adoption notice tariff sheets, as recommended above;
- d. Approve depreciation schedules for Confluence, as shown on Attachments A and B, and order Confluence to depreciate its plant accounts for the appropriate systems as specified by the depreciation schedules;
- e. Require Confluence to ensure adherence to Commission Rule 20 CSR-13 with respect to Port Perry's customers;
- f. Require Confluence to provide an example of its actual communication with Port Perry's customers regarding its acquisition and operations of the system assets, and how customers may reach Confluence regarding water and sewer matters, within ten (10) days after closing on the assets;
- g. Prior to its first billing, require Confluence to distribute to Port Perry customers an informational brochure detailing the rights and responsibilities of the utility and customers regarding its water and sewer service, consistent with the requirements of Commission rule 20 CSR 4240-13.040(3)(A-L) within ten (10) days after closing on the assets;

- h. Require Confluence to provide to Staff's Customer Experience Department a sample of ten (10) billing statements of bills issued to the Port Perry customers within thirty (30) days of such billing;
- i. Require Confluence to provide adequate training for the correct application of rates and rules to all customer service representatives, including those employed by contractors, prior to the customers receiving their first bill from Confluence;
- j. Require Confluence to file notice in this case once Staff recommendations regarding customer communications and billing, listed above, have been completed; and
- k. Make no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the transfers of assets or the CCNs to Confluence, including past expenditures or future expenditures related to providing service in the applicable service area, in any later proceeding.

31. The Lot Owners and Public Counsel recommended the Commission impose four additional conditions on Confluence, set forth as follows:

- a. Limit starting rate base to Staff's recommendation;
- b. Require Confluence to develop a clear capital investment plan for Lake Perry that is endorsed by both the Lot Owners and Public Counsel;
- c. Require Confluence to establish a customer advisory board and associated governance processes, satisfactory to both the Lot

Owners and Public Counsel, that allows meaningful customer input into future capital investments before they are incurred; and

- d. Require Confluence to undergo a biannual independent audit, using an auditor and audit plan acceptable to both the Lot Owners and Public Counsel, to review the reasonableness of operating costs and to confirm that all goods and services are being procured appropriately.<sup>60</sup>

32. The second condition proposed by the Lot Owners and Public Counsel to require the capital investment plan be endorsed by the Lot Owners and Public Counsel is not appropriate.<sup>61</sup> The appropriate time to oppose any investment made under the plan is when Confluence attempts to recover costs in rates, and the prudence of those management decisions is ultimately determined by the Commission.<sup>62</sup>

33. The third condition proposed by the Lot Owners and Public Counsel, allowing meaningful customer input into future capital investments before they are incurred, could inappropriately result in the customers micro-managing the decisions of Confluence.<sup>63</sup> Any interested party to a subsequent rate case can propose the disallowance of any capital investment it believes was unnecessary.<sup>64</sup>

34. The fourth condition proposed by the Lot Owners and Public Counsel, requiring a biannual independent audit, is unnecessary as customers already have the ability to file formal or informal complaints with the Commission to address any issues, Staff

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<sup>60</sup> Ex. 307, Justis Rebuttal, pp. 21-22, Ins. 19-7.

<sup>61</sup> Ex. 103, Busch Surrebuttal, p. 6, Ins. 10-11.

<sup>62</sup> Ex. 103, Busch Surrebuttal, p. 6, Ins. 11-13.

<sup>63</sup> Ex. 103, Busch Surrebuttal, p. 6, Ins. 14-17.

<sup>64</sup> Ex. 103, Busch Surrebuttal, p. 6, Ins. 17-18.

already conducts a full audit in the course of each rate case, and the Commission also has the ability to direct an investigation of Confluence at any time.<sup>65</sup>

35. Confluence has agreed that the rates for service will remain the same as those existing under Port Perry at the time of the sale until a subsequent rate case. The current water rates for Port Perry are as follows:

Monthly Minimum: (includes 2,000 gallons of water)	
5/8" meter	\$13.32
3/4" meter	\$16.26
1" meter	\$22.33
1 1/2" meter	\$37.49
2" meter	\$55.69
3" meter	\$98.16
4" meter	\$158.83
All usage over 2,000 gallons (per 1,000 gallons)	\$3.58

The current sewer rates for Port Perry are as follows:

Monthly bill	
Full-time residential sites	\$18.94
Part-time residential sites	\$14.21
Part-time residential trailer	
Or camper site with sewer service	\$14.21
Bathhouse and swimming pool complex	\$37.37
Camper dumping station (each)	\$37.37 <sup>66</sup>

36. Staff recommended Confluence adopt the depreciation rate schedules set forth in Attachment A and B of Staff's Official Case File Memorandum.<sup>67</sup> No party put forth evidence that these schedules are incorrect.

### **III. Conclusions of Law**

The Commission has reached the following conclusions of law.

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<sup>65</sup> Ex. 103, Busch Surrebuttal, pp. 6-7, Ins. 19-3.

<sup>66</sup> Ex. 1, Cox Direct, pp. 13-14.

<sup>67</sup> Ex. 100, Dietrich Direct, Schedule ND-d2, pp. 10-11.

A. Confluence is a “water corporation”, “sewer corporation” and a “public utility” as those terms are defined in Section 386.020. Port Perry is a “water corporation”, “sewer corporation” and a “public utility” as those terms are defined in Section 386.020, RSMo. Both Confluence and Port Perry are subject to the Commission’s jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 393, RSMo.

B. Section 393.170, RSMo requires Confluence to have CCNs, which are granted by the Commission, prior to providing water or sewer service in the current Port Perry service area. Section 393.190, RSMo requires Commission approval prior to a transfer of utility assets.

C. Section 393.170.3 RSMo (Supp. 2019), in setting forth the standard for the granting of CCNs, requires that the Commission determine that the services are “necessary or convenient for the public service.” The term “necessity” does not mean “essential” or “absolutely indispensable,” but rather that the proposed project “would be an improvement justifying its cost,” and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.<sup>68</sup> It is within the Commission’s discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.<sup>69</sup>

D. The Commission has previously articulated the specific criteria to be used when evaluating CCN applications: (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

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<sup>68</sup> *State ex rel. Intercon Gas, Inc., v. Public Service Commission of Missouri*, 848 S.W.2d 593, 597 (Mo. App. 1993), citing *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973), citing *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

<sup>69</sup> *State ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

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>70</sup>

E. Pursuant to Section 393.170.3, RSMo, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.

F. Section 393.190, RSMo does not set forth a standard or test for the Commission's approval of the proposed transfer. "The standard governing the Commission's review of an application for sale of assets is set forth in *Fee Fee Trunk Sewer, Inc. v. Litz*: '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.' 596 S.W.2d 466, 468 (Mo.App.1980)." *Environmental Utilities, LLC v. Pub. Serv. Comm'n*, 219 S.W.3d 256, 265 (Mo.App. W.D. 2007). As originally stated by the Missouri Supreme Court in 1934, "A property owner should be allowed to sell his property unless it would be detrimental to the public."<sup>71</sup>

G. The public interest is a matter of policy to be determined by the Commission.<sup>72</sup> It is within the discretion of the Commission to determine when the evidence indicates the public interest would be served.<sup>73</sup> Determining what is in the interest of the

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<sup>70</sup> *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991); *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173, 1994 WL 762882, \*3 (Mo. P.S.C. 1994). These factors are sometimes referred to as the "*Tartan* factors."

<sup>71</sup> *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>72</sup> *State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

<sup>73</sup> *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. 1993).



public is a balancing process.<sup>74</sup> Public interest necessarily must include the interests of the investing public.<sup>75</sup>

H. As Confluence brought the Applications, it bears the burden of proof.<sup>76</sup> The burden of proof is the preponderance of the evidence standard.<sup>77</sup> In order to meet this standard, Confluence must convince the Commission it is “more likely than not” that its provision of water and sewer service in the current Port Perry service area is necessary or convenient for public service. Confluence must also convince the Commission it is “more likely than not” that its acquisition of Port Perry will not be detrimental to the public.

I. Commission rule 20 CSR 4240-10.085, on the recovery of acquisition premiums, details a separate application for recovery of the acquisition premium, which demonstrates the system to be acquired is a nonviable utility, and that the acquisition would be unlikely to occur without the probability of obtaining an acquisition incentive. Confluence has not sought to recover an acquisition premium.

#### **IV. Decision**

Confluence requests both a CCN and authority to purchase the assets of Port Perry. A CCN case requires discussion of technical, managerial, and financial capability, along with the Tartan factors of the entity seeking the CCN. The Commission’s decision regarding the authority to purchase a utility is a determination of whether the sale is detrimental to the public interest.

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<sup>74</sup> *State ex rel. Churchill Truck Lines, Inc. v. Public Service Commission*, 555 S.W.2d 328, 334-335 (Mo. App. 1977).

<sup>75</sup> *State ex rel. City of St. Louis v. Public Service Comm’n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>76</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm’n of State of Mo.*, 116 S.W.3d 680, 693 (Mo. App. 2003).

<sup>77</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

The Lot Owners and Public Counsel argued that the sale of Port Perry's systems to Confluence would be detrimental to the public interest, collectively arguing six detriments. Staff and Confluence both recommend the Commission approve the sale, subject to eleven conditions put forth by Staff, as not detrimental to the public interest.

### **CCN**

In order to be granted a CCN to provide water and sewer service in the existing Port Perry service area, Confluence must show that it is qualified to own and operate Port Perry's assets. The Commission traditionally determines if a company is qualified to become a public utility by analyzing the Tartan factors. The Tartan factors contemplate: 1) need for service, 2) the utility's qualifications, 3) the utility's financial ability, 4) the feasibility of the proposal, and 5) promotion of the public interest.

Because a CCN has already been granted to Port Perry and it currently provides service to water and sewer customers under that CCN, there is an obvious need for the service. Confluence has shown that it is qualified to provide the service. Staff agreed and no other party produced evidence that Confluence did not have the technical, managerial, and financial capability to provide safe and adequate service to the Port Perry service area. Confluence has the financial ability to purchase Port Perry, and the financial ability to operate it safely. Promotion of the public interest is served by the continuation of water and sewer service. Additionally, positive findings with respect to the other four Tartan factors support a finding that the Applications will promote the public interest.

The technical, managerial, and financial qualifications having been established, the Commission must look to whether the transfer of Port Perry's assets is "not detrimental to the public interest."

## Authority to Purchase

A prior Commission decision is not established precedent for later Commission decisions. However, consistency between cases, when appropriate, is beneficial and preferred. The Commission has previously stated:

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 [a utility company] 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 [provision of that utility's service] 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.<sup>78</sup>

Thus, the term not detrimental to the public interest means there is no net detriment after considering all of the benefits and all of the detriments.

It is well established that continuation of adequate service to the public served by a utility is not only a benefit, but is the purpose behind Section 393.190, RSMo.<sup>79</sup> The continuation of service benefits the interest of the state in the health and welfare of its citizens and in protecting its waters. The continuation of service benefits the interests of the investors in offering a rate of return on their investment in water and sewer utilities. The continuation of service also benefits the current 370 water and 248 sewer customers, as well as future customers.

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<sup>78</sup> File No. EO- 2004-0108, *In the Matter of the Application of Union Electric Company, Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Report and Order on Rehearing (issued February 10, 2005), p. 48-49.

<sup>79</sup> State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. 1980).

A total of six potential detriments were put forth by the Lot Owners: 1) loss of local control; 2) multiple engineer reports for estimates of repairs; 3) lack of financing information; 4) potential indirect recovery of the acquisition premium; 5) higher anticipated rates under Confluence as opposed to the Lot Owners' ownership business plan; and 6) public sentiment of the customers. Public Counsel joined in the advocacy of the final three detriments.

The first proposed detriment, loss of local control, is not persuasive as there is no statutory requirement of local control for utility services and no credible evidence was presented suggesting a loss of local control would result in any detriment. No evidence was provided that a loss of local control would tend to make the water or sewer service less safe or less adequate, or that it would tend to make rates less just or less reasonable. The Commission finds that the loss of local control in this case does not make the transaction detrimental to the public interest.

The Lot Owners also argued that Confluence's multiple engineering reports and differing estimates of anticipated repairs is detrimental to the public interest. The Lot Owners frame Confluence's repairs and maintenance cost estimate process as the epitome of self-dealing and bad engineering practice. The Commission disagrees. These estimates are not meant to be binding contracts. Confluence stated that its estimates, and list of repairs and maintenance, evolves over time. This is not unusual in an acquisition case as the buyer has not yet operated the system to get a more defined and detailed list of repairs and maintenance. No evidence was offered that multiple engineering reports estimating different lists of repairs would tend to make the water or sewer service less safe or less adequate, or that it would tend to make rates less just or less reasonable. The multiple

estimates do not support a finding of public detriment, because both the actual repairs and maintenance to be performed and their ultimate costs are not only speculative, but are not before the Commission in this proceeding.

The third detriment put forth by the Lot Owners is the lack of financing information. Confluence will use equity to purchase Port Perry. Confluence testified that it had not yet decided if the repairs and maintenance would be financed by debt, equity, or a combination. Given the facts in this case, Confluence is not required to disclose how it will pay for uncertain, future repairs and maintenance costs. There is, however, a requirement that any financing sought by Confluence must first receive Commission approval. Therefore, in this case where Confluence has demonstrated it has the financial ability to undertake needed repairs, a lack of financing information for future repairs and maintenance costs does not tend to make the water or sewer service less safe or less adequate, and also does not tend to make rates less just or less reasonable. The Commission finds that, given the facts in this case, Confluence's lack of specific financing information for future repairs and maintenance costs does not make the transaction detrimental to the public interest.

Generally, only the net book value of the purchase price of any utility plant would be recoverable in rates from rate-paying customers. Confluence's purchase price for Port Perry is above net book value, therefore an acquisition premium exists. Confluence has not requested recovery of an acquisition premium in this case.

While there is no direct recovery of the acquisition premium by Confluence, the Lot Owners and Public Counsel contend that the temptations for indirect recovery of the acquisition premium are detrimental to the public interest. Gold plating projects; inflated

financing; self-dealing; cutting expenses to unsafe levels; and socializing the acquisition premium across other service areas are examples of how such indirect recovery could occur. No evidence was offered that Confluence is, or plans to, engage in any of these indirect recovery methods. These temptations exist for all regulated utilities, and current utility regulations already address them. In any general rate case where Confluence would seek to recover such amounts through rates, the Commission will review the prudence of Confluence's repairs and maintenance costs. Requests for financing requires Commission authority. Complaints can be made regarding any utility violation of the affiliate transactions rules, or of any unsafe conditions. Rate consolidation likewise cannot happen without review and authorization by the Commission. The Commission finds the risk of a future indirect recovery of some portion of the acquisition premium when balanced against the benefits does not make the transaction detrimental to the public interest in this case.

The fifth detriment is the potentially higher rates under Confluence ownership as opposed to under ownership of the Lot Owners. Only Confluence's Applications are before the Commission, but the Lot Owners were permitted to introduce their business plan in order to show the detriments of the Confluence plan.<sup>80</sup> Stated another way, this is not a bidding situation in which the Commission has authority to choose between the business plans.

Confluence's operation of the Port Perry systems will be as a regulated public utility, Confluence will not be able to charge a rate that the Commission has not found is just and reasonable. In a rate case, Confluence will not be authorized to recover imprudent improvements and financing charges as rate cases include audits and prudence reviews.

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<sup>80</sup> Order Regarding Four Motions to Strike Testimony, Request to Limit Issues, Request for Discovery Sanctions, and Request to Delay Evidentiary Hearing, issued October 2, 2019.

There is likely to be a rate increase no matter who owns Port Perry because maintenance and improvements are needed. The Commission is persuaded that the risk of a higher rate increase under Confluence's ownership than under the hypothetical Lot Owners' ownership does not outweigh the benefits of Confluence's ownership.

The final detriment to the public argued in this case is the sentiment of the customers. The Lot Owners make up the majority of Port Perry's customers. The Lot Owners oppose the purchase by Confluence. However, the interests of the customers are not the totality of the public interest. The state of Missouri has a public interest in protecting the health and safety of its citizens as well as in protecting its waters from effluent. Public interest also includes the investing public. The Commission is not persuaded that the sentiment of the customers is more than a slight detriment. When weighing these competing public interests together, the Commission does not find the proposed transaction to be detrimental to the public interest.

The Commission recognizes the clear desire of the Lot Owners to operate their own water and sewer system. This ownership would have its own benefits, as well as detriments. However, the Commission's powers are not unlimited. The owners of Port Perry have decided to sell their water and sewer system, which already serves the Lot Owners as customers. The Commission cannot deny the owners their right to sell unless the Commission finds the sale would be detrimental to the public interest. If the sale is not detrimental to the public interest, then the Commission has no authority to deny Confluence's purchase.<sup>81</sup>

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<sup>81</sup> State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. 1980).

There must be a balancing of all the benefits and detriments to determine if the transfer as a whole would be detrimental to the public.<sup>82</sup> After weighing the totality of all benefits against all detriments, the Commission finds the evidence shows the granting of Confluence's Applications, subject to Staff's recommended conditions which Confluence agreed to, will not be detrimental to the public interest.

The Lot Owners and Public Counsel recommended the Commission impose four additional conditions on Confluence. The first, which would limit Confluence's starting rate base to net book value as identified by Staff, is met as all parties agree to the net book value. The next two, requiring Confluence to develop a capital investment plan endorsed by the Lot Owners and Public Counsel, and to establish a customer advisory board satisfactory to the Lot Owners and Public Counsel, infringe upon Confluence's right to make its own business decisions. The last recommended condition requires a biannual audit. This condition would overlap the audit done during a general rate case. For the above reasons, the four conditions recommended by the Lot Owners and Public Counsel are rejected.

The Commission finds that Confluence has met its burden to show that the grant of a CCN to operate the Port Perry systems is necessary or convenient for the public service subject to the conditions proposed by Staff and agreed to by Confluence. The Commission finds that Confluence has also met its burden to show that granting it the authority to purchase Port Perry would not be detrimental to the public interest.

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions,

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<sup>82</sup> State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State, 120 S.W.3d 732, 737 (Mo. 2003).



the Commission determines that the substantial and competent evidence in the record supports the conclusion that Confluence has met, by a preponderance of the evidence, its burdens of proof. The Commission finds that Confluence has demonstrated that it possesses adequate technical, managerial, and financial capacity to own, operate, manage, and maintain the Port Perry water and sewer systems. The Commission finds that Confluence has met the Tartan factors. Confluence has shown by a preponderance of the evidence that the grant of a CCN to serve the Port Perry service areas, subject to the conditions recommended by Staff, is necessary or convenient for the public service. Confluence has also shown by a preponderance of the evidence that the transfer of Port Perry's assets to Confluence is not detrimental to the public interest.

The Commission finds that Confluence's proposed acquisition of Port Perry is not detrimental to the public interest. Therefore, the Commission will approve the transfer of assets, pursuant to Section 393.190, RSMo. The Commission will grant Confluence the CCNs to provide water and sewer service in the service territories previously served by Port Perry, pursuant to Section 393.170, RSMo, subject to the conditions set forth by Staff.

**THE COMMISSION ORDERS THAT:**

1. Port Perry is authorized to sell and transfer utility assets to Confluence, via Central States, as identified in Confluence's Applications.
2. The net book value of Port Perry, as of December 31, 2019, is \$77,936: \$20,070 for the water assets and \$57,866 for the sewer assets.
3. Upon closing on the Port Perry water and sewer systems, Confluence is granted a CCN to provide water and sewer service in the service areas currently served by Port Perry.

4. Upon closing on each of the water and sewer systems, Confluence shall provide service by applying, on an interim basis, the existing rates, rules and regulations as outlined in Port Perry's water tariff and sewer tariffs, until the effective date of respective adoption notice tariff sheets.

5. Confluence shall file Tariff Adoption Notice tariff sheets for the corresponding water and sewer tariffs of the Port Perry systems within ten days after closing on the assets.

6. Immediately upon closing on the Port Perry water and sewer systems, Port Perry shall cease providing service, and Port Perry's CCN and tariffs are canceled.

7. Confluence shall depreciate its plant accounts for the appropriate systems as specified by the depreciation schedules shown on Attachments A and B of Staff's Memorandum, Exhibit 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, pp.10 and 11 of 11.

8. Confluence shall adhere to Commission rule 20 CSR 4240 Chapter 13 with respect to Port Perry customers.

9. Confluence shall provide an example of its actual communication with Port Perry's customers regarding its acquisition and operations of the system assets, and how customers may reach Confluence regarding water and sewer matters, within ten (10) days after closing on the assets.

10. Prior to its first billing, Confluence shall distribute to Port Perry customers an informational brochure detailing the rights and responsibilities of the utility and customers regarding its water and sewer service, consistent with the requirements of Commission rule 20 CSR 4240-13.040(2)(A-L) within ten (10) days after closing on the assets.

11. Confluence shall provide to Staff's Customer Experience Department a sample of ten (10) billing statements of bills issued to the Port Perry customers within thirty (30) days of such billing.

12. Confluence shall provide adequate training for the correct application of rates and rules to all customer service representatives, including those employed by contractors, prior to the Port Perry customers receiving their first bill from Confluence.

13. Confluence shall file notice in this case once Staff recommendations regarding customer communications and billing have been completed.

14. The Commission makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the transfers of assets or the CCNs to Confluence, including past expenditures or future expenditures related to providing service in the applicable service area, in any later proceeding.

15. This order shall be effective on September 25, 2020.



**BY THE COMMISSION**

A handwritten signature in dark ink, reading "Morris L. Woodruff".

Morris L. Woodruff  
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and  
Holsman CC., concur.

Hatcher, Regulatory Law Judge

**STATE OF MISSOURI**

**OFFICE OF THE PUBLIC SERVICE COMMISSION**

**I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 26<sup>th</sup> day of August, 2020.**



  
**Morris L. Woodruff**  
**Secretary**

**MISSOURI PUBLIC SERVICE COMMISSION**

**August 26, 2020**

**File/Case No. WA-2019-0299**

**Missouri Public Service  
Commission**

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***Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).***

***Sincerely,***



**Morris L. Woodruff  
Secretary**

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Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.