

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held by telephone
and internet audio conference
on the 30th day of September,
2020.

In the Matter of the Application of	)	
Confluence Rivers Utility Operating	)	
Company, Inc., to Acquire Certain	)	<u>File No. WM-2020-0403</u> ¹
Water and Sewer Assets of Terre Du	)	
Lac Utilities Corporation	)	

ORDER DENYING MOTION TO COMPEL DISCOVERY

Issue Date: September 30, 2020

Effective Date: September 30, 2020

On June 12, 2020,² Confluence Rivers Utility Operating Company, Inc. (Confluence) filed an Application and Motion for Waiver seeking leave to purchase substantially all the water and/or sewer assets of Terre Du Lac Utilities Corporation (TDL). On September 2, the Office of Public Counsel (OPC) filed a Motion to Compel responses to data requests (DR) OPC had propounded upon Confluence.³

OPC's DRs were as follows:

DR 3116. Please provide non-redacted copies of all parties' pre-filed testimony filed in Docket No. 19-00062 before the Tennessee Public Utility Commission.⁴

DR 3117. Please provide the Aqua Utilities Appraisal Report provided in response to the Tennessee Consumer Advocate's data requests 1-26 in Docket No. 19-00062 before the Tennessee Public Utility Commission.

¹ WM-2020-0403 and SM-2020-0404 were consolidated by order of July 6, 2020.

² All date citations will be to 2020 unless otherwise indicated.

³ OPC has satisfied Commission Rule 20 CSR 4240-20.090(8).

⁴ The parties have narrowed their arguments about this broad request to data related to the financial health of Confluence's corporate parent, CSWR and related to the TDL acquisition premium..

OPC explains its DRs seek responses concerning the testimony of Alex Bradley and David Dittmore in a Tennessee Public Utility Commission proceeding where Limestone Utility Operating Company, LLC's (Limestone) proposes to acquire Aqua Utilities, Inc., (Aqua) assets.⁵ Per OPC, the redacted portions concern an acquisition premium and the financial condition of CSWR, LLC (CSWR). OPC states CSWR is the parent company of both Confluence and Limestone and so CSWR's financial health may illuminate Confluence's financial health (DR 3116). OPC explains who appraised Aqua Utilities' systems and how they were appraised may relate to TDL's appraisal methodology credibility in the instant case (DR-3117).⁶ Specifically, OPC states a comparison of the Tennessee Aqua and Missouri TDL appraisals may illuminate whether Confluence will be able to acquire the TDL systems without an acquisition premium or other incentive.

Confluence objects that the DRs call for information that is not relevant and is protected by a Tennessee Public Utility Commission (PUC) protective order. Per Confluence, the appraisal is not relevant because the Tennessee Aqua and Missouri TDL systems are materially dissimilar. Confluence says that the Aqua system serves far fewer customers and that TDL has, in contrast to Aqua, been cited for numerous violations of federal and state environmental laws. Confluence argues that for this reason and because Limestone specifically disclaimed seeking an acquisition premium or any such adjustment, the Aqua appraisal is irrelevant to the TDL valuation.

⁵ *In re: Joint Application of Aqua Utilities Company, Inc., and Limestone Water Utility Operating Company, LLC, for Authority to Sell or Transfer Title to the Assets, Property and Real Estate of a Public Utility and for a Certificate of Public Convenience and Necessity*, Docket No. 19-00062. Tennessee Public Utility Commission. Bradley and Dittmore testified on behalf of the Tennessee Attorney General, Public Counsel states that the Tennessee Attorney General has refused to give it the un-redacted testimony.

⁶ Confluence indicated it would disclose the identity of the appraiser in response to another OPC DR.

Concerning CSWR's financial condition, Confluence argues, "[i]t is not apparent from the testimony that CSWR's financial condition is a subject of the redacted testimony," Confluence states that in any event "the financial statements of CSWR would provide the best evidence regarding the financial condition and strength of that entity."

Commission Rule 20 CSR 4240.090 provides that: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Missouri Supreme Court Rule 56.01 governs the scope of discovery in civil actions in the circuit court, and, generally, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. . . ." ⁷ Relevance, for purposes of discovery, is broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence." ⁸ The party seeking to obtain discovery has the burden of establishing the relevance of the information in order to obtain it. ⁹ Discovery may not be used merely as a "fishing expedition" or on "mere suspicion." ¹⁰ On the other hand, "[i]t is a plain rule of discovery that a party will not be required to make available any compilation of data or research efforts that is equally available to the interrogating party." ¹¹ "Neither party ought to be required simply to facilitate his adversary's preparation of the case against him." ¹² The need for discovery must be balanced against the burden and intrusiveness involved in furnishing this information. ¹³

⁷ Rule 56.01(b)(1); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 - 547 (Mo. App. W.D. 2008).

⁸ *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. E.D. 1997).

⁹ *State ex rel. Kander v. Green*, 462 S.W.3d 844, 848 (Mo. App. W.D. 2015).

¹⁰ *State ex rel. Boswell v. Curtis*, 334 S.W.2d 757, 760 (Mo. App. Spr. D. 1960).

¹¹ *State ex rel. Albert v. Adams*, 540 S.W.2d 26, 30 (Mo. Banc 1976).

¹² *State ex rel. Schlueter Mfg. Co. v. Beck*, 337 Mo. 839, 855; 85 S.W.2d 1026, 1030 (Mo. Banc 1935).

¹³ *State ex rel. MacDonald v. Franklin*, 149 S.W.3d 595, 597 (Mo. App. S.D. 2004).

DR 3116 – Evaluation of CSWR’s Financial Condition

A review of the redacted testimony of Alex Bradley and David Dittemore, which was attached to OPC’s motion, reveals that Bradley’s testimony, including the redacted portions, concerns only the amount of CIAC (contributions in aid of construction) that should be ascribed to Limestone when its rates are set by the Tennessee Commission. OPC does not assert that the amount of CIAC to be used in setting rates in Tennessee would have any relevance to this Missouri proceeding and the Commission finds that it has none. That leaves the testimony of Mr. Dittemore.

Mr. Dittemore’s testimony does contain information and conclusions by the Tennessee Attorney General’s witness about CSWR’s financial condition and the amount and significance of the acquisition premium resulting from the purchase of the Tennessee utility. Portions of that testimony are redacted in compliance with a protective order issued by the Tennessee commission. Dittemore did not testify on behalf of Confluence or a company affiliated with Confluence, and Confluence has no authority to change the redactions in another party’s testimony. If the Commission were to grant OPC’s motion it would need to order Confluence to violate the Tennessee protective order by turning over an un-redacted copy of Bradley’s testimony that it may have in its possession. This Commission will not burden Confluence with conflicting orders where OPC does not need the documents.

OPC does not need to obtain an un-redacted copy of Dittemore’s testimony to obtain the information it seeks. Dittemore’s testimony is based on the financial statements of CSWR and Limestone provided in the Tennessee case. OPC may seek those financial statements directly from Confluence without obtaining the analysis, opinions and

conclusions of the Tennessee Attorney General's witness about those financial statements. OPC offers no evidence or argument as to how Limestone's financial information is relevant to this proceeding and does not claim CSWR's financial statements are not as available to OPC as they are to Confluence. As far as concerns the analysis, conclusions and opinions of Bradley about CSWR's financial statements, Confluence ought not be required to facilitate OPC's preparation here,¹⁴ particularly in light of the burdens imposed by the Tennessee protective order.

In summary, OPC's request in DR 3116 for an un-redacted copy of Bradley's testimony does not call for information likely to be admissible at trial. OPC's request in DR 3116 for the un-redacted testimony of Dittmore would require Confluence to violate the Tennessee protective order and ultimately seeks information that is available for discovery through other means. Overall, DR 3116 imposes an unnecessary and disproportionate burden on Confluence. The Commission will deny OPC's Motion to Compel Discovery as to DR 3116.

DR 3117 - The Aqua Utilities Appraisal Report

The Commission cannot find based on the current pleadings that OPC has met its burden with respect to the Aqua appraisal. OPC argues the Aqua appraisal might prove useful to undermine or verify the credibility of a TDL appraisal's methodology and the contention that without an acquisition premium Confluence will not be able to acquire TDL. Nothing in aid of this surmise is now known except that CSWR is the "parent" of both Limestone and Confluence, these two corporate "siblings" are both seeking to acquire water and sewer assets, and an acquisition premium may (and this is disputed)

¹⁴ *State ex rel. Schlueter Mfg. Co. v. Beck*, 337 Mo. 839, 855; 85 S.W.2d 1026, 1030 (Mo. Banc 1935).

be at issue in both cases. OPC seems to argue that these connections are enough to throw up a “red flag.” With no other connections between the appraisals, however, it appears that OPC’s request constitutes merely a “fishing expedition” to find more connections where the only fish ultimately to be caught is that the appraisal methodologies (of different assets of different sizes with different problems for different parties) are different. Provided with only this dim light, the Commission simply cannot see the “likelihood” of discovering admissible evidence and finds that OPC has not sustained its burden. The Commission will deny OPC’s Motion to Compel Discovery as to DR 3117.

THE COMMISSION ORDERS THAT:

1. OPC’s Motion to Compel Discovery as to DR 3116 and DR 3117 is overruled.
2. This Order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

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

Graham, 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 30th day of September, 2020.**




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

September 30, 2020

File/Case No. WM-2020-0403

**Missouri Public Service
Commission**

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**Terre Du Lac Utilities
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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**

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