



Control Number: 50569



Item Number: 16

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DOCKET NO. 50569

**APPLICATION OF MSEC WASTE
WATER, INC. FOR AUTHORITY TO
CHANGE RATES**

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**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

MSEC WASTE WATER, INC.'S RESPONSE TO ORDER NO. 5

COMES NOW, MSEC Waste Water, Inc. (MSEC Waste Water or Applicant) and files this Response to Order No. 5.¹ This Response is timely filed.

On June 10, 2020, the Staff of the Public Utility Commission (Staff) filed its Supplemental Recommendation on Administrative Completeness of the Application and Notice, which includes Staff's Memorandum of the same date.² In its Supplemental Recommendation, Staff recommended that Applicant's application and notice be found deficient and administratively incomplete. Staff's recommendation is founded on its conclusion that Applicant is a Class B utility, in spite of only having three customers. Staff recommended that Applicant either provide all of the information required for a Class B utility, or provide responses to questions posed by the Commission in Docket No. 47976, presumably to address Staff's concerns about the entity filing the application.

Order No. 5 directed the Applicant to amend its application to file information required of a Class B utility, or answer the questions posed by Staff in the Supplemental Recommendation. Because Applicant is a Class D utility, it is opting to provide responses to the questions identified by Staff.³

¹ Order No. 5 Finding Application Incomplete and Establishing Opportunity to Cure; and Suspending Effective Date (Jun. 11, 2020).

² Commission Staff's Supplemental Recommendation on Administrative Completeness of the Application and Notice (Jun. 10, 2020) (Staff's Supplemental Recommendation).

³ Applicant has already provided an organizational chart, a written description of the services provided by affiliates, an explanation (with spreadsheets) of how costs are allocated amongst affiliates, and arguments and citations to the Commission's rules and the Texas Water Code supporting its classification as a Class D utility. See, MSEC Waste Water Inc.'s Response to Order No. 3 and Supplement to Application (May 6, 2020).

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I. RESPONSES TO STAFF QUESTIONS

1. What entity or combination of entities constitutes the utility in this docket under Texas Water Code (TWC) § 13.002(23)?

RESPONSE: MSEC Waste Water is the utility that provides sewer utility services to customers as defined by TWC § 13.002(23), not its parent and not any of its affiliates.⁴ MSEC Waste Water “owns [and] operates” the “equipment [and] facilities” used for the provision of sewer utility services provided to customers by MSEC Waste Water, and MSEC Waste Water receives compensation through its retail rates for providing those services.⁵

MSEC Waste Water is a wholly owned subsidiary of Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy, a Texas electric cooperative association (Mid-South). Another separate legal entity, MSEC Enterprises, Inc. (MSEC Enterprises) is also a wholly-owned subsidiary of Mid-South. The Commission has previously recognized, and expressly found, that MSEC Enterprises and MSEC Waste Water are two separate retail public utilities.⁶

Neither Mid-South nor MSEC Enterprises is responsible for providing retail sewer utility service “directly or indirectly to the public” because neither holds the sewer certificate of convenience and necessity (CCN) for the service areas that are the subject of this rate proceeding. Neither this Commission nor prior regulatory authorities have ever required Mid-South to obtain

⁴ “Water and sewer utility,” “public utility,” or “utility” means any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment of facilities owned and operated for either purpose by a municipality of other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees of tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by other. Texas Water Code § 13.002(23) (TWC).

⁵ *Id.*

⁶ See *Application of MSEC Enterprises, Inc. and MSEC Waste Water, Inc. for Sale, Transfer, or Merger of Facilities and Certificate Rights in Montgomery County*, Docket No. 49615, Conclusion of Law No. 2: “MSEC Enterprises and MSEC Waste Water are retail public utilities as defined by TWC § 13.002(19) and 16 Texas Administrative Code (TAC) § 24.3(59).” (Feb. 28, 2020).

a sewer CCN for MSEC Waste Water to carry out its sewer service functions, nor has Mid-South ever been required to obtain a water CCN for MSEC Enterprises to carry out its water service functions. The Commission has expressly transferred the sewer CCN from MSEC Enterprises to MSEC Waste Water, recognizing their distinct identities.⁷

MSEC Waste Water holds the sewer CCN, having qualified for that certificate in its individual capacity.⁸ The sewer tariff is thus in the name of MSEC Waste Water; MSEC Waste Water provides the sewer utility service and receives payment from its customers for such services. Neither Mid-South nor MSEC Enterprises is entitled to demand compensation from customers for MSEC Waste Water's services to the public.⁹

Therefore, MSEC Waste Water is the utility applying for a rate change in this docket, not Mid-South, and not MSEC Enterprises. As set forth in detail in MSEC Waste Water's Response to Order No. 3 and Supplement to Application, no provisions of the TWC or of the Commission's rules extend the definition of "utility" to capture either the utility's parent or the utility's affiliates. Therefore, nothing in any provision of the TWC supports a conclusion that affiliates or parents, or other third parties with whom MSEC Waste Water transacts business, should also be treated as the "utility."

⁷ *Id.*

⁸ See, Docket No. 49615, Finding of Fact No. 31: "MSEC Waste Water has the managerial and technical capability to provide continuous and adequate service to the requested area"; Finding of Fact No. 34: "MSEC Waste Water has demonstrated the financial capability and stability to provide continuous and adequate water service to the requested area"; and Conclusion of Law No. 7: "After consideration of the factors in TWC § 13.246(c), MSEC Waste Water has demonstrated adequate financial, managerial, and technical capability for providing adequate and continuous service to the requested area, as required by TWC § 13.301(b)."

⁹ See: TWC § 13.242(a) ("a utility may not in any way render retail water or sewer utility service directly or indirectly to the public without first having obtained from the utility commission a [CCN]"; TWC § 13.250(a) (requiring CCN holders to provide continuous and adequate service within their certified areas); TWC § 13.13.002(20) (defining "retail water or sewer utility service" as "potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation"); TWC § 13.002(19) (defining "retail public utility" as "any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.").

- a. **Which entity or entities owns the assets used by MSEC Waste Water in providing utility service?**

RESPONSE: MSEC Waste Water owns the assets used in providing sewer utility services.¹⁰

- b. **Are there employees solely dedicated to MSEC Waste Water’s day-to-day operations?**

RESPONSE: MSEC Waste Water and Mid-South are parties to a Master Service Agreement whereby individuals employed by Mid-South are contracted to provide services required by MSEC Waste Water. Of the approximately 138 total Mid-South employees, four provide direct services to MSEC Waste Water. While these employees are not “solely dedicated” to MSEC Waste Water’s day-to-day operations, the responsibility for such day-to-day operations falls solely on these employees.

- c. **Which entity or entities employ the individuals who perform MSEC Waste Water’s day-to-day operations?**

RESPONSE: The individuals who perform the day-to-day operations of MSEC Waste Water are employed by Mid-South, and operate the sewer utility under the direction and control, and on behalf, of MSEC Waste Water by virtue of the Master Services Agreement between Mid-South and MSEC Waste Water. These individuals are licensed by the Texas Commission on Environmental Quality (TCEQ) as wastewater operators for the purpose of providing day-to-day operations of the wastewater plants owned by MSEC Waste Water.

It should be noted that Staff’s Supplemental Recommendation contains an incorrect statement. In the penultimate paragraph of the Staff memorandum, Staff states that it is “particularly concerned when the operational and billing services for MSEC Waste Water appear to be provided by Mid-South Synergy employees, and MSEC Waste Water’s management, operational, and customer service personnel appear to be MSEC Enterprise’s employees.”¹¹

¹⁰ See, Docket No. 49615, Bill of Sale dated November 7, 2019, attached as Exhibit A to *Notice of Proof that Transaction has been Consummated and Customer Deposits have been Properly Addressed* (Nov. 12, 2019).

¹¹ Staff’s Supplemental Recommendation at 7.

It is a correct statement that Mid-South employees, through the Master Service Agreement and the Customer Service and Billing Service Agreement, provide operational and billing services for MSEC Waste Water. The services are provided for the benefit of MSEC Waste Water and under the supervision of MSEC Waste Water. It is a common practice for both small and large utilities to contract for these services rather than directly employ individuals to perform these functions; the agreements do not thereby make Mid-South the utility.

However, it is incorrect to state that any services are provided by MSEC Enterprises to MSEC Waste Water. MSEC Enterprises has no employees. In its Supplemental Recommendation, Staff refers to the application in Docket No. 49615 and the representations made therein by MSEC Enterprises and MSEC Waste Water in their efforts to assure the Commission that the sale and transfer of the wastewater assets and CCN from MSEC Enterprises to MSEC Waste Water was in the public interest. (The Commission found that it was.)¹² Staff misquotes the application from that docket at page 6 of its Supplemental Recommendation, leaving out the italicized portion: “This application is to transfer the assets only; *the operations, maintenance, management, and customer services will continue to be provided by Mid-South Synergy by virtue of an* [the] operating agreement with MSEC Waste Water, which is anticipated to be the same as the existing operating agreement with MSEC Enterprises.”¹³ Perhaps the statement from the application in Docket No. 49615 was misunderstood by Staff as indicating that MSEC Enterprises would be providing the services to MSEC Waste Water. However, MSEC Waste Water has previously provided the Master Services Agreement and the Customer Service and Billing Service Agreement that clearly show the services flowing to MSEC Waste Water from Mid-South.¹⁴

¹² See Docket No. 49615, Conclusion of Law No. 8: “MSEC Enterprises and MSEC Waste Water have demonstrated that the sale of MSEC Enterprises’s sewer system and the transfer of all of the service area under sewer CCN number 20984 to MSEC Waste Water will serve the public interest and is necessary for the service, accommodation, convenience, or safety of the public, as required by TWC §§ 13.246(b), 13.301(d).”

¹³ Docket No. 49615, Application at 7 (Jun. 7, 2019) (emphasis added).

¹⁴ See Attachments 1 and 2 to MSEC Waste Water’s Response to Order No. 3 and Supplement to Application (May 6, 2020).

Nowhere in the Application in Docket No. 49615 do either MSEC Enterprises or MSEC Waste Water make any representations to the Commission that MSEC Waste Water and MSEC Enterprises are one and the same entity, or that any services will be provided by MSEC Enterprises. Throughout that application and the application in this Docket, it has been made very clear that there are three distinct legal entities that will each be providing distinct public utility services--electric, water, and wastewater—each in their own name and under the authority of their own CCN, and charging rates under their own tariff. It has also been clear from the outset that neither MSEC Enterprises nor MSEC Waste Water have employees of their own, but both contract with Mid-South for the provision of services that allow each to provide their own utility service.

Each of MSEC Waste Water, MSEC Enterprises, and Mid-South are governed separately. The day-to-day governance and operations of MSEC Waste Water are directed by the officers of MSEC Waste Water.

d. Which entity or entities direct the employees who perform MSEC Waste Water's day-to-day operations?

RESPONSE: See response to (c) above. The day-to-day operations of MSEC Waste Water are performed by four individuals holding wastewater operators certifications issued by the TCEQ. Their activities are governed primarily by their obligations and responsibilities under those certifications to the public and to the TCEQ. In the event that additional activities are warranted, MSEC Waste Water provides the directions to the operators.

e. Which entity or entities direct the day-to-day operations of MSEC Waste Water?

RESPONSE: See responses to (c) and (d) above. MSEC Waste Water directs its own day-to-day operations.

f. Which entity or entities make decisions for MSEC Waste Water regarding investments, loans, and other business activities?

RESPONSE: MSEC Waste Water makes its own business decisions affecting its business activities, including those involving investments. When making capital infrastructure and other similar business decisions, MSEC Waste Water consults with its officers and its own Board.

g. If a combination of entities constitutes the utility, how should the Commission deal with the entities that are part of the utility but are not included as parties in this docket? Should these entities be joined in this proceeding under 16 Texas Administrative Code (TAC) § 22.104(a) as necessary parties?

RESPONSE: Only one entity—MSEC Waste Water—constitutes the utility. No combination of entities constitutes the utility. No other entities are necessary parties under 16 Tex. Admin. Code (TAC) §22.104(a) because they are not “[a]pplicants, complainants, [or] respondents”; MSEC Waste Water is the sole applicant. The corporate organization of MSEC Waste Water as a wholly-owned subsidiary of Mid-South, and existing alongside other wholly-owned subsidiaries of Mid-South, is a common business model for investor-owned utilities. Neither Mid-South nor MSEC Enterprises is providing sewer utility service to any customers in Texas—MSEC Waste Water is the entity holding the CCN and directly receiving payment for utility services. Nothing in TWC § 13.002(23) suggests that it is necessary to regulate a utility’s parent or affiliates as part of the utility when the utility is the entity actually responsible for providing service and allowed to receive compensation for the services through Commission-approved tariffed rates.

No purpose would be served in making either Mid-South or MSEC Enterprises parties to this proceeding; they do not provide the services, they do not direct how the services are to be provided, they do not hold the CCN, the tariff is not in either of their names, they do not receive compensation for the provision of the services, and the outcome of the rate proceeding will not affect them one iota. The only affected party in this proceeding is the utility that charges and collects rates for the services it performs—MSEC Waste Water.

II. ADDITIONAL RESPONSE

MSEC Waste Water additionally takes this opportunity to respond to statements and arguments made by Staff in its Supplemental Recommendation.

Staff points out that in Docket No. 49615, no notice was given to customers that the applicant in that docket:

intended to change the designation of the utility from a Class B to a Class C (currently Class D). The Notice of Approval did not address a class change. Staff believes that the approval of Docket No. 49615 did not effectively change the classification of a portion of a Class B utility into a Class C utility...¹⁵

The Notice of Approval in Docket No. 49615 approved the sale and transfer of a wastewater utility from one legal entity to another legal entity. The change from a Class B utility to a Class C (now Class D) utility occurred by operation of law—the ownership of the utility passed from an entity with 5,000 water connections and 9 sewer connections to an entity with only 9 sewer connections which, by law, is a Class C (now D) utility.¹⁶

Staff is concerned that the three sewer customers “received no notice that the ‘regulatory burden’ reduction meant that MSEC Waste Water could apply for four Class D increases with no opportunity for protest by customers.”¹⁷ Staff’s issue is with the statute, not with MSEC Waste Water. Indeed, if MSEC Enterprises had instead sold the sewer utility to ABC Sewer Company with 400 existing sewer customers, the same result would hold. The sewer customers would no longer be served by a Class B utility, but by a Class D utility, because that is the way the statute is written. In that instance, there would likewise be no notice given to customers that their “regulatory burden” thereafter includes having to withstand four indexed rate increases without

¹⁵ Staff’s Supplemental Recommendation at 7.

¹⁶ The Commission was well aware of the relationships between Mid-South, MSEC Enterprises, and MSEC Waste Water when it approved the sale of the sewer utility to MSEC Waste Water in Docket No. 49615. See Finding of Fact No. 6 in the Notice of Approval: “Both MSEC Enterprises and MSEC Waste Water are wholly-owned subsidiaries of MidSouth Synergy, a member-owned electric cooperative.” The Commission was also well aware that MSEC Waste Water only had three current customers; see Findings of Fact No. 10 and 26: “The total area to be transferred comprises approximately 373 acres and three current customers” and “There are three existing customers in the requested area who will continue to need service.”

¹⁷ Staff’s Supplemental Recommendation at 7.

opportunity for protest. That's what the statute allows for Class D utilities. If the Commission is concerned with what customers are told regarding the change in classification of a sold utility, then there is certainly an opportunity to insert some such language in the notice provisions for the sale, transfer, or merger process. There is no current requirement.

Staff also notes what it considers to be an "anomaly," namely:

affiliated entities would be charging water as a Class B utility to the same customers receiving sewer from a Class D utility. MISD could protest its water rate increases, however, when MSEC Waste Water, Inc. filed a Class D rate adjustment increase, MISD would be unable to protest.¹⁸

Again, Staff's problem is with the statute that allows a Class D utility to receive indexed rate increases, regardless of what a separate Class B utility has to do. It is neither an anomaly nor uncommon for an individual to receive water service from one utility and sewer service from another. The Commission's rules recognize that this is not an anomaly by providing guidance and regulations for how the two separate utilities can cooperate in their billing and collection activities.¹⁹

Staff has also unilaterally inserted a public interest requirement into the determination of whether a rate application is administratively complete, and essentially seeks to undo what the Commission did in Docket No. 49615 when it expressly found the transfer of the sewer utility to MSEC Waste Water to be in the public interest.²⁰ In conjunction with that insertion, Staff has also, without foundation therefor, offered its interpretation of legislative intent, to-wit:

it is not in the public interest to allow affiliates to form a new corporation for the purpose of changing utility class designations in order to take advantage of reduced reporting requirements, including the Class D annual adjustment. Staff does not

¹⁸ *Id.*

¹⁹ 16 TAC § 24.165(g).

²⁰ See Docket No. 49615, Conclusion of Law No. 8: "MSEC Enterprises and MSEC Waste Water have demonstrated that the sale of MSEC Enterprises's sewer system and the transfer of all of the service area under sewer CCN number 20984 to MSEC Waste Water will serve the public interest and is necessary for the service, accommodation, convenience, or safety of the public, as required by TWC §§ 13.246(b), 13.301(d)."

believe this was the purpose of the legislation that created the Class D rate adjustment increase.²¹

While offering this opinion about what the legislature intended, Staff has, without basis in fact and wrongfully, ascribed ulterior motives to MSEC Waste Water. As representatives of MSEC Waste Water explained in in-person meetings with Staff and with the Commissioners, it makes no sense at all for 3 customers to bear the rate case expenses associated with the preparation of a Class B rate filing. That is the regulatory burden that customers of Class D utilities avoid. Staff assumes that MSEC Waste Water will apply for annual indexed increases, without any basis for doing so. Staff also ignores the fact that a Class D utility can file annually for increases larger than the indexed increases, and the utility's customers can have the opportunity to intervene in those cases.

Staff is also concerned that the school district “may wish to participate in rate proceedings.” However, MSEC Waste Water hand-delivered the rate application to the school district, explained what its purpose was (*i.e.*, to reduce rate case expenses, regulatory burdens, and thereby rates), on March 12, 2020. To-date, the school district has not protested the rate. Staff's presumption about what the school district may or may not wish to do does not justify its proposed strained and very unreasonable interpretation of the TWC or the Commission's rules.

III. CONCLUSION

MSEC Waste Water is a utility in its own right, operating a retail sewer utility under the authority of a CCN granted by the Commission after a consideration of MSEC Waste Water's qualifications. The ownership of the sewer utility facilities in the name of MSEC Waste Water was approved by the Commission after an examination of the public interest in which the Commission affirmatively found that MSEC Waste Water had the managerial, financial, and technical capabilities to provide continuous and adequate service to its customers, and thereby expressly found the transfer to be in the public interest. The rates charged by MSEC Waste Water are according to the tariff held in its name; revenues received from those charges are revenues

²¹ Staff's Supplemental Recommendation at 7.

booked to MSEC Waste Water and are used by MSEC Waste Water to provide the facilities and services required.

MSEC Waste Water is a Class D utility that has filed a rate change application in compliance with the Commission's Order in Docket No. 44740.²² Neither the utility nor its customers should be tasked with the filing and operational requirements applicable to the former owner of the utility simply because the former owner is an affiliate. Such a conclusion is not required by statute or the Commission's rules.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900

Austin, Texas 78701

(512) 322-5800

(512) 472-0532 (Fax)

gcrump@lglawfirm.com



GEORGIA N. CRUMP

State Bar No. 05185500

ATTORNEYS FOR MSEC WASTE WATER,
INC.

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on June 29, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.



GEORGIA N. CRUMP

²² In Docket No. 44740 (a sewer CCN filing by MSEC Enterprises in 2015), the Commission required MSEC Enterprises to file a rate change application to true-up new rates approved in that docket. When the sewer utility was sold and transferred to MSEC Waste Water, MSEC Waste Water assumed that regulatory obligation, and filed the rate application that is the subject of this docket. See *Application of MSEC Enterprises, Inc., to Amend a Certification of Convenience and Necessity in Montgomery County*, PUC Docket No. 44740, Notice of Approval, Ordering Paragraph No. 6 (Sept. 7, 2017).