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**PUC 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  
MOTION FOR CERTIFICATION OF ISSUES  
AND MOTION TO ABATE DISCOVERY**

COMES NOW, MSEC Waste Water, Inc. (MSEC WW) and respectfully files this Motion for Certification of Issues to the Public Utility Commission of Texas (Commission), seeking clarification of the requirements for administrative completeness of a Class D wastewater utility's rate change application, and to determine the appropriate utility classification of MSEC WW. This Motion also requests an abatement of discovery pending such certification. In support hereof, MSEC WW shows the following:

**I. INTRODUCTION**

MSEC WW holds sewer Certificate of Convenience and Necessity (CCN) No. 20984 with a total of ten active connections. Its ownership of the wastewater utility was approved by the Commission in Docket No. 49651. On March 9, 2020, MSEC WW filed its Application for Authority to Change Rates for a Class D Waste Water Utility (Application).<sup>1</sup>

Since MSEC WW filed its Application, it has repeatedly answered questions and provided information supporting its qualifications to file the Application as a Class D utility, but has yet to have its Application declared administratively complete so that the Application can be reviewed, processed, and approved. The road-block to achieving a determination of administrative completeness is Commission Staff's (Staff) position that MSEC WW should have filed as a Class B utility, despite the fact that MSEC WW serves only three customers at 10 connections.

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<sup>1</sup> *Application of MSEC Waste Water, Inc. for Authority to Change Rates* (Mar. 9, 2020).

## II. PROCEDURAL HISTORY

MSEC WW filed its Class D application for a rate adjustment on March 9, 2020. On March 12, 2020, the Administrative Law Judge (ALJ) issued Order No. 1, directing Staff to file comments on the administrative completeness of the application and notice, and, if necessary, to file a recommendation on final disposition including the proposed tariff sheet reflecting the requested rate change, by April 8, 2020.<sup>2</sup> Order No. 1 also directed MSEC WW to file additional information and supporting documentation regarding its legal name, form of business, and parent company and supporting documentation by March 23, 2020.<sup>3</sup> MSEC WW made the required filing on March 19, 2020.

After requesting and obtaining an extension of time to do so, on April 15, 2020, Commission Staff filed its Recommendation on Administrative Completeness of the Application and Notice, finding that MSEC WW's Application was deficient and administratively incomplete.<sup>4</sup> In its filing, Staff stated that MSEC WW "may be considered a Class B utility under the definition in TWC § 13.002(4-b)," because MSEC WW is a wholly-owned subsidiary of Mid-South [Electric Cooperative], which also owns a Class B water utility.<sup>5</sup> Staff stated that it "cannot determine the classification of utility MSEC Waste Water Inc.," and that it needed additional time and information to determine if the Applicant is a Class B or Class D utility.<sup>6</sup> On April 16, 2020, MSEC WW objected to Staff's recommendation, along with Staff's memorandum of the same date, disagreeing that the additional information requested by Staff

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<sup>2</sup> Order No. 1, Requiring Comments on Administrative Completeness and Notice; and Addressing Procedural Matters (Mar. 12, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> Commission Staff's Recommendation on Administrative Completeness of the Application and Notice (Apr. 15, 2020).

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 5.

was required in order to have the application deemed administratively complete, arguing the following:

Staff did not identify any portions of the rate filing that were deficient or not in compliance with the rate filing package developed by the Commission. Instead, Staff took issue with the merits of the Application and recommended that MSEC WW be required to provide [affiliate transaction] information that should more appropriately be requested in the discovery process. As such, Staff is exceeding the scope of a review of administrative completeness and is improperly challenging the merits of the Application itself.<sup>7</sup>

On April 16, 2020, the ALJ issued Order No. 3, finding the Application incomplete and deficient due to the reasons described by Staff in its filing of April 15.<sup>8</sup> The ALJ directed MSEC WW to supplement its application to cure the deficiencies by May 6, 2020, and directed Staff to file a supplemental recommendation regarding administrative completeness by May 27, 2020.<sup>9</sup>

On May 6, MSEC WW provided supplemental information regarding its relationship with its parent company and affiliates, and the support for its filing as a Class D utility.<sup>10</sup> After requesting and obtaining another extension of time in which to do so, on June 10, 2020, Staff filed its supplemental recommendation on the Application, finding the Application incomplete and deficient, based on Staff's interpretation of Commission comments at the Open Meeting on July 18, 2019, regarding Docket No. 47976, *Application of Liberty Utilities (Silverleaf Water) LLC for Authority to Change Water and Sewer Rates*.<sup>11</sup> Staff recommended that the

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<sup>7</sup> MSEC Waste Water, Inc.'s Objection to Commission Staff's Recommendation on Administrative Completeness at 1 (Apr. 16, 2020).

<sup>8</sup> Order No. 3 Finding Application Incomplete and Deficient, Establishing Opportunity to Cure; And Suspending Effective Date at 1 (Apr. 16, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> MSEC Waste Water, Inc.'s Response to Order No. 3 and Supplement to Application (May 6, 2020).

<sup>11</sup> Commission Staff's Supplemental Recommendation on Administrative Completeness of the Application and Notice (Jun. 10, 2020).

Commission either dismiss MSEC WW's Application or require it to provide all information required for a Class B utility base rate case.<sup>12</sup>

On June 11, 2020, the ALJ issued Order No. 5, finding the Application incomplete and deficient, and requiring MSEC WW to either amend its application to provide all information required for a Class B utility, or answer all of Staff's questions from its supplemental recommendation.<sup>13</sup> Because it is a Class D utility, MSEC WW chose to answer Staff's questions rather than amending its Application, and on June 29, 2020, filed extensive responses.

On July 17, 2020, Commission Staff filed its First Request for Information (RFI) to MSEC WW, continuing to inquire about MSEC's ownership and its parent company's other utilities.<sup>14</sup> On August 3, 2020, MSEC WW objected to Staff's First RFI on the grounds that information about its parent company and affiliates is not relevant to the administrative completeness of MSEC WW's Application.<sup>15</sup>

On August 10, 2020, Commission Staff filed a Motion to Compel,<sup>16</sup> and MSEC WW filed its Response to the Motion to Compel on August 17, 2020. On September 25, 2020, the ALJ issued Order No. 8, granting Staff's Motion to Compel, requiring MSEC WW to respond to Staff's First RFI by October 9, 2020, and directing Staff to file its recommendation on the administrative sufficiency of the Application by October 23, 2020.<sup>17</sup>

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<sup>12</sup> *Id.* at 2.

<sup>13</sup> Order No. 5 Finding Application Incomplete and Establishing Opportunity to Cure; and Suspending Effective Date (Jun. 11, 2020).

<sup>14</sup> Commission Staff's First Request for Information (Jul. 17, 2020).

<sup>15</sup> MSEC Waste Water, Inc.'s Objections to Commission Staff's First Request for Information (Aug. 3, 2020).

<sup>16</sup> Commission Staff's Motion to Compel (Aug. 10, 2020).

<sup>17</sup> Order No. 8 Granting Motion to Compel and Extending Deadline (Sep. 25, 2020).

### **III. AUTHORITY FOR CERTIFICATION OF ISSUE TO COMMISSION**

Under 16 Tex. Admin Code (TAC) § 22.127(a), the ALJ “may certify to the commission an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law.”

There are three types of issues that are appropriate for certification: (1) the Commission’s interpretation of its rules and applicable statutes; (2) which rules or statutes are applicable to a proceeding; and (3) whether Commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.<sup>18</sup>

The issue at hand involves the interpretation of the rules and statutes relating to the classification of a wastewater utility with three customers and 10 connections, and the applicability of those rules and statutes to MSEC WW. The Commission’s guidance would help establish and clarify the substantive issue of the proper classification of utilities, which in turn would determine whether MSEC WW’s Application is administratively complete.

Under the procedure set forth 16 TAC § 22.127(c), once the issue is certified to the Commission, parties will have the opportunity to provide briefs to the Commission.

### **IV. CERTIFICATION OF ISSUES RELATED TO CLASSIFICATION OF UTILITY**

The Texas Water Code defines a Class D utility as “a public utility that provides retail water or sewer utility service through fewer than 500 taps or connections.”<sup>19</sup> The Commission’s rules define a Class D utility as “[a] public utility that provides retail water or sewer utility service to fewer than 500 taps or active connections. If a public utility provides both water and

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<sup>18</sup> 16 Tex. Admin. Code (TAC) § 22.127(b).

<sup>19</sup> Texas Water Code (TWC) § 13.002(4-d).

sewer utility service, the number of active water connections determines how the utility is classified.”<sup>20</sup>

16 TAC § 24.8 provides the rule for Staff’s determination of administrative completeness, and specifies “[i]f the commission determines that any deficiencies exist in an application, statement of intent, or other requests for commission action addressed by this chapter, the application or filing may be rejected and the effective date suspended, as applicable, until the deficiencies are corrected.”

MSEC WW’s Application has yet to be deemed administratively complete, due to Staff’s position that MSEC WW is required to file a Class B application for rate change because MSEC WW’s parent also owns a separate and distinct entity that is a Class B water utility. MSEC WW disagrees with Staff’s position. MSEC WW’s classification as a sewer utility is not determined by the character or size of its parent company or by the number of connections possessed by other affiliates owned by the same parent company. MSEC WW has been forced to provide information that goes well beyond the scope of MSEC WW’s Application for a Class D utility rate change, and over seven months since its filing has yet to have the merits of its Application considered.

The appropriate focus of an inquiry into administrative completeness is whether “any deficiencies exist in an application, statement of intent, or other requests for commission action.”<sup>21</sup> Staff has not identified any deficiencies in the Application, but has continued to seek additional information about the legal status of MSEC WW – a status that has already been reviewed and determined by the Commission.

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<sup>20</sup> 16 TAC § 24.3(8).

<sup>21</sup> 16 TAC § 24.8(b).

MSEC WW's status as a utility has already been determined by the Commission (acting on Staff's favorable recommendation), and is not subject to further review by Staff in this proceeding. In 2019, MSEC WW and MSEC Enterprises, Inc. (MSEC Enterprises) filed an application for approval of a sale, transfer, or merger (STM) whereby sewer utility assets and sewer CCN No. 20984 were to be transferred from MSEC Enterprises to MSEC WW.<sup>22</sup> In that proceeding (Docket No. 49615), the Commission approved the sale of the sewer utility assets and transfer of the CCN to MSEC WW, based upon the following findings of fact:

- "MSEC WW is a new sewer utility..."<sup>23</sup>
- "As a new sewer utility, MSEC Waste Water has no history of noncompliance..."<sup>24</sup>
- "There are three existing customers in the requested area who will continue to need service."<sup>25</sup>
- "MSEC Waste Water has the managerial and technical capability to provide continuous and adequate service to the requested area."<sup>26</sup>
- "MSEC Waste Water has a debt-to-equity ratio of less than one, satisfying the leverage test."<sup>27</sup>
- "MSEC Waste Water has sufficient cash available to cover any projected operations and maintenance shortages..."<sup>28</sup>
- "MSEC Waste Water has demonstrated the financial capability and stability to provide continuous and adequate water service to the requested area."<sup>29</sup>

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<sup>22</sup> *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 (June 7, 2019).

<sup>23</sup> Docket No. 49615, Notice of Approval at Finding of Fact No. 5 (Feb. 28, 2020).

<sup>24</sup> *Id.* At Finding of Fact No. 23.

<sup>25</sup> *Id.* at Finding of Fact No. 26.

<sup>26</sup> *Id.* at Finding of Fact No. 31.

<sup>27</sup> *Id.* at Finding of Fact No. 32.

<sup>28</sup> *Id.* at Finding of Fact No. 33.

<sup>29</sup> *Id.* at Finding of Fact No. 34.



- “MSEC Enterprises has sold and transferred all of its facilities and service area under sewer CCN number 20984 to MSEC Waste Water.”<sup>30</sup>
- “Commission Staff recommended approval of the application.”<sup>31</sup>

Based upon these findings, the Commission concluded the following as a matter of law:

- “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).”<sup>32</sup>
- “... 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).”<sup>33</sup>
- “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).”<sup>34</sup>

The Commission has conclusively established that MSEC WW is a utility, that it has three customers, that it owns the sewer utility facilities, and that it is qualified to hold the sewer CCN. Any further inquiry into board members, executives, employees, service agreements, ownership structures, or signatories to agreements is unnecessary to determine whether the Application is administratively complete.

In addition, Staff’s continued inquiry into MSEC WW’s legal status has resulted in increased rate case expenses to be borne by the utility and ultimately by its three customers. Legal and consultant expenses through the filing of the Application in March 2020 were \$17,458 and \$14,154, respectively. Since the Application was filed, additional legal fees in the amount of

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<sup>30</sup> *Id.* at Finding of Fact No. 45.

<sup>31</sup> *Id.* at Finding of Fact No. 50.

<sup>32</sup> *Id.* at Conclusion of Law No. 2.

<sup>33</sup> *Id.* at Conclusion of Law No. 7.

<sup>34</sup> *Id.* at Conclusion of Law No. 8.

over \$30,000 have been incurred in MSEC WW's efforts to have the Application declared administratively complete. The fees continue to accumulate as this effort continues.

Certifying questions to the Commission regarding MSEC WW's proper utility classification would eliminate the single issue identified by Staff for continuing to find MSEC WW's Application incomplete and deficient. For these reasons, MSEC WW respectfully requests the ALJ to certify the following questions to the Commission:

1. Once a utility is: (a) determined by the Commission to be a legal entity qualified to own and operate a utility; and (b) is granted a Certificate of Convenience and Necessity by the Commission, is that utility's legal status subject to review and reexamination by Staff when the utility files a rate change application?
2. If an entity: (a) provides retail wastewater utility services to 10 connections; (b) owns and operates the equipment and facilities to provide the retail wastewater utility services to the 10 connections; (c) has a Commission-approved tariff issued in its name containing the rates it may charge for the wastewater utility services; (d) receives compensation according to a Commission-approved tariff from its three customers through its retail wastewater rates for the provision of such retail wastewater utility services to 10 connections; and (e) holds a CCN granted by the Commission for the provision of such wastewater utility services, is that entity a Class D utility under Tex. Water Code § 13.002(4-d)?
3. If a Class D utility applies for authority to change rates, is it required to disprove to Staff that it is any other class of utility before its Class D application may be deemed administratively complete?
4. Must each affiliated entity join in an application for approval of rates charged by a legally separate entity?
5. Must a utility's parent join in an application for approval of rates charged by the utility?
6. Is MSEC Waste Water, Inc., a separate entity from Mid-South Electric Cooperative Association?
7. Is MSEC Waste Water, Inc., a separate entity from MSEC Enterprises, Inc.?

8. Is MSEC Waste Water, Inc., the only Applicant to submit the Application, and thus there is no need for joinder of any other “necessary party”?
9. Is MSEC Waste Water, Inc., a Class D utility?

#### **IV. MOTION TO ABATE DISCOVERY**

As noted above, Order No. 8 requires MSEC WW to respond to Staff’s discovery requests by October 9, 2020. Because the questions requested for certification will potentially moot the requests, MSEC WW requests that the discovery process be abated for a period of time to allow the ALJ to consider this Motion for Certification. MSEC WW believes the Commission’s input is extremely important in this matter, both to MSEC WW individually and also to clarify the relevant inquiry into rate change applications filed by retail public utilities.

#### **V. CONCLUSION**

WHEREFORE PREMISES CONSIDERED, MSEC WW respectfully requests that the ALJ certify the following questions to the Commission:

1. Once a utility is: (a) determined by the Commission to be a legal entity qualified to own and operate a utility; and (b) is granted a Certificate of Convenience and Necessity by the Commission, is that utility’s legal status subject to review and reexamination by Staff when the utility files a rate change application?
2. If an entity: (a) provides retail wastewater utility services to 10 connections; (b) owns and operates the equipment and facilities to provide the retail wastewater utility services to the 10 connections; (c) has a Commission-approved tariff issued in its name containing the rates it may charge for the wastewater utility services; (d) receives compensation according to a Commission-approved tariff from its three customers through its retail wastewater rates for the provision of such retail wastewater utility services to 10 connections; and (e) holds a CCN granted by the Commission for the provision of such wastewater utility services, is that entity a Class D utility under Tex. Water Code § 13.002(4-d)?
3. If a Class D utility applies for authority to change rates, is it required to disprove to Staff that it is any other class of utility before its Class D application may be deemed administratively complete?

4. Must each affiliated entity join in an application for approval of rates charged by a legally separate entity?
5. Must a utility's parent join in an application for approval of rates charged by the utility?
6. Is MSEC Waste Water, Inc., a separate entity from Mid-South Electric Cooperative Association?
7. Is MSEC Waste Water, Inc., a separate entity from MSEC Enterprises, Inc.?
8. Is MSEC Waste Water, Inc., the only Applicant to submit the Application, and thus there is no need for joinder of any other "necessary party"?
9. Is MSEC Waste Water, Inc., a Class D utility?

MSEC WW also respectfully requests that discovery in this matter be abated pending the ALJ's consideration of the Motion to Certify and the Commission's determination on the questions certified. Additionally, if issues are certified to the Commission, MSEC WW requests the opportunity for parties to provide briefing on the certified questions in accordance with 16 TAC § 22.127.

Respectfully submitted,

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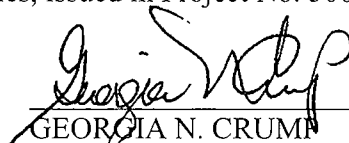
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**ATTORNEY FOR MSEC WASTE WATER,  
INC.**

**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 October 2, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

  
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GEORGIA N. CRUMP