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**DOCKET NO. 50927**

**PETITION OF THE CITY OF MESQUITE §  
AND TALTY SPECIAL UTILITY §  
DISTRICT FOR APPROVAL §  
OF A SERVICE AREA CONTRACT §  
UNDER TEXAS WATER CODE §  
§ 13.248 AND TO AMEND §  
CERTIFICATES OF CONVENIENCE §  
AND NECESSITY IN KAUFMAN §  
COUNTY §**

**PUBLIC UTILITY COMMISSION  
OF TEXAS**

**COMMISSION STAFF'S RESPONSE TO ORDER NO. 2**

**COMES NOW** the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Response to Order No. 2. In support thereof, Staff shows the following:

**I. BACKGROUND**

On June 15, 2020, the City of Mesquite (Mesquite) and Talty Special Utility District (Talty SUD) (collectively, Applicants) filed an application for approval of a service area contract under Texas Water Code (TWC) § 13.248 and to amend water Certificates of Convenience and Necessity (CCNs) in Kaufman County. The requested area totals approximately 6,180 feet in Kaufman County (2,700 feet along FM 741, 670 feet along Dozier Circle, and 2,810 feet along High Country Lane) and contains connections to 23 customers.

On July 15, 2020, in response to Order No. 1, Staff filed its Recommendation on Administrative Completeness, Notice, and Proposed Procedural Schedule. Staff recommended that Applicants be ordered to file a Sale Transfer Merger (STM) application on the basis that the service area agreement executed by Applicants includes the transfer of assets and/or facilities, namely the transfer of portions of water lines located along FM 741, Dozier Circle, and High Country Lane from Talty SUD to Mesquite.

On July 17, 2020, Mesquite filed its Response to Commission Staff's Recommendation on Administrative Completeness, Notice, and Proposed Procedural Schedule (Response).

On August 5, 2020, the Administrative Law Judge (ALJ) issued Order No. 2 requiring Staff to file a reply to the legal arguments raised in Mesquite's July 17, 2020 response by August 21, 2020. Therefore, this pleading is timely filed.

## II. STAFF'S RESPONSE

Applicants filed their June 15, 2020 application with the Commission under TWC § 13.248 for approval of the transfer of designated service areas, customers to be served, and portions of water lines, among other assets, between the parties. At issue is the transfer of a quantity of six-inch water line, and all taps, meters, and valves along that water line (Facilities). Staff asserts that the contemplated transfer of these Facilities runs counter to the stated requirements of TWC § 13.248. In order to allow the Commission to perform a thorough and complete evaluation of the terms of the agreement, Staff believes it to be in the public interest to require the Applicants to file an application for an STM under TWC § 13.301.

TWC § 13.248 provides that “[c]ontracts between retail public utilities *designating areas to be served and customers to be served*...are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.”<sup>1</sup> Notably absent from this section is mention of the transfer of assets and facilities. The Commission’s rule addressing service area contracts reiterates the sole inclusion of service areas and customers served.<sup>2</sup> Not only does the rule omit the transfer of facilities, it goes on to clarify that the requirements of TWC § 13.301 to document the transfer of assets and facilities between retail public utilities are still in force.<sup>3</sup>

In its Response, Mesquite argues that the Commission does not have authority to regulate the transfer of facilities between political subdivisions, and as such, does not have authority to require Applicants to submit an STM application in order to transfer the Facilities.<sup>4</sup> Mesquite further asserts that neither party is required to have a certificate of convenience and necessity under TWC § 13.242.<sup>5</sup>

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<sup>1</sup> TWC § 13.248 (emphasis added).

<sup>2</sup> 16 TAC § 24.253(a) (providing that “contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities are valid and enforceable and are incorporated into the corresponding certificates of convenience and necessity (CCNs).”).

<sup>3</sup> *Id.* (“Nothing in this provision negates the requirements of TWC § 13.301 to obtain a new CCN and document the transfer of assets and facilities between retail public utilities.”).

<sup>4</sup> The City of Mesquite’s Response to the Commission Staff’s Recommendation on Administrative Completeness, and Proposed Procedural Schedule at 1-2 (Jul. 27, 2020).

<sup>5</sup> *Id.* at 2.

Staff agrees that Mesquite and Talty SUD are political subdivisions, and therefore, fall under the definition of retail public utility<sup>6</sup> and not public utility.<sup>7</sup> Staff also agrees that the plain language of TWC § 13.301 does not explicitly require Applicants to submit an STM application because they are retail public utilities and neither is a water supply corporation. However, Staff does not agree that these facts lead to the conclusion that a transfer of facilities may be effected through an application for a service area contract submitted under TWC § 13.248.

Further, 16 TAC § 24.239, the Commission rule that corresponds to TWC § 13.301, expressly allows for a retail public utility that possesses a CCN to file an STM application.<sup>8</sup> Both Mesquite and Talty SUD hold water CCNs. Accordingly, there is nothing preventing Applicants from seeking approval for their proposed transfer of service area, customers, and facilities via an STM application. The fact that Applicants hold CCNs also renders Mesquite's arguments that Applicants are not required to hold CCNs moot. While Applicants are not *per se* required to file an STM application because they are not entities "required by law to possess a certificate of convenience and necessity..."<sup>9</sup> it would be in the public's best interest to have the additional oversight of the transaction to occur between two certificated entities.

An application under TWC § 13.301 entails a more robust review than an application filed under TWC § 13.248. Specifically, TWC § 13.301(b) provides that the Commission "may require that the person purchasing or acquiring the water...system demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person."<sup>10</sup> These requirements are meant to ensure the transaction will meet the public interest.<sup>11</sup> Because the plain language of TWC § 13.248 does not authorize approval of a service area contract that includes the transfer facilities, Staff recommends that Applicants seek approval of this transaction under TWC § 13.301.

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<sup>6</sup> 16 TAC § 24.3(31) (including political subdivisions).

<sup>7</sup> 16 TAC § 24.3(39) (excluding political subdivisions).

<sup>8</sup> 16 TAC § 24.239(a).

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

<sup>10</sup> TWC § 13.301(b).

<sup>11</sup> TWC § 13.301(d).

### **III. CONCLUSION**

On the aforementioned basis, Staff respectfully requests that the application be found administratively incomplete at this time, and that Applicants be ordered to file an STM application.

Dated: August 21, 2020

Respectfully Submitted,

#### **PUBLIC UTILITY COMMISSION OF TEXAS LEGAL DIVISION**

Rachelle N. Robles  
Division Director

Eleanor D'Ambrosio  
Managing Attorney

/s/ Justin C. Adkins  
Justin C. Adkins  
State Bar No. 24101070  
1701 N. Congress Avenue  
P.O. Box 13326  
Austin, Texas 78711-3326  
(512) 936-7289  
(512) 936-7268 (facsimile)  
Justin.Adkins@puc.texas.gov

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#### **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 August 21, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Justin C. Adkins  
Justin C. Adkins