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Received - 2021-12-08 01:43:23 PM
Control Number - 52172
ItemNumber - 20

DOCKET NO. 52172

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| APPLICATION OF AQUA TEXAS, INC. | § | PUBLIC UTILITY COMMISSION |
| TO AMEND ITS CERTIFICATES OF | § | |
| CONVENIENCE AND NECESSITY IN | § | OF TEXAS |
| COLLIN COUNTY | § | |

ORDER NO. 8
ADMITTING SUPPLEMENTAL EVIDENCE, DENYING MOTION TO TAKE
OFFICIAL NOTICE, AND OVERRULING THE PARTIES' ARGUMENTS
REGARDING FINANCIAL ASSURANCE

I. ADMITTING SUPPLEMENTAL EVIDENCE

By motion filed on December 6, 2021, Aqua Texas, Inc. and Commission Staff moved for the admission of additional evidence. The administrative law judge (ALJ) grants the motion and admits the following supplemental evidence into the record of this proceeding: (a) Aqua Texas's response to Order No. 7 filed on November 23, 2021; and (b) Commission Staff's response to Order No. 7 filed on December 6, 2021.

II. DENYING MOTION TO TAKE OFFICIAL NOTICE

In this matter, Aqua Texas is seeking to prove that it satisfies the financial leverage and operations tests by relying upon the financial health of its affiliate, Essential Utilities, Inc. In Order No. 7 filed on November 10, 2021, the ALJ explained that, before he could find that Aqua Texas satisfies the two tests, additional information was required with respect to Essential Utilities.

On November 23, 2021, Aqua Texas filed its response to Order No. 7. In it, Aqua Texas asserts the following:

The financial health and operating capabilities of both the Applicant, Aqua Texas, Inc., and its affiliate parent company, Essential Utilities, Inc., are both well-known to the Commission and well-documented in the Commission's records. The attached 2020 Annual Report [of Aqua Texas] provides additional evidence in support of the documentation of the financial wherewithal of Aqua Texas to provide continuous and adequate retail water service within the area of the proposed amended CCN in addition to the information included with its original CCN Amendment Application. Accordingly, these are all matters of which the Administrative Law Judge may take official notice in support of a recommendation to grant the requested amendment to CCN 13201 to add the additional unserved 138 acres in Collin County, Texas. 16 TAC § 22.222. Aqua Texas, Inc., requests

the Administrative Law Judge to Officially Notice these matters pursuant to Section 22.222 (16 TAC).¹

The motion to take official notice is denied. Broad concepts like “financial health,” “operating capabilities,” “financial wherewithal,” and the ability “to provide continuous and adequate retail water service” are not appropriate for official notice under 16 Texas Administrative Code (TAC) § 22.222.

III. OVERRULING THE PARTIES’ ARGUMENTS REGARDING FINANCIAL ASSURANCE

A. The Leverage Test

Under 16 TAC § 24.11(e)(2), an applicant, such as Aqua Texas, must pass the leverage test by satisfying at least one of the four criteria found in 16 TAC § 24.11(e)(2)(A), (B), (C), or (D). Alternatively, under 16 TAC § 24.11(e)(2)(E), the applicant may choose to satisfy the leverage test by demonstrating that its affiliated interest “is capable, available, and willing to cover temporary cash shortages” that the applicant may experience. The affiliated interest must also pass the leverage test, by satisfying at least one of the four criteria in 16 TAC § 24.11(e)(2)(A), (B), (C), or (D).

Aqua Texas contends that the evidence in the record of this case “supports the conclusion that its affiliate, Essential Utilities, Inc. has the *capacity and capability*” to cover Aqua Texas’ temporary cash shortages, and that Essential Utilities passes the leverage test.² Commission Staff agrees with Aqua Texas. The ALJ agrees as well.

What is missing from the record, however, is evidence that Essential Utilities is *willing* to cover Aqua Texas’ temporary cash shortages, something that is required by the relevant rule cited above. Commission Staff’s memo that accompanies its final recommendation, filed on October 19, 2021, recommends that Essential Utilities be found willing, but neither party has identified evidence in the record to support such a finding, and the ALJ can find none. In Order No. 7, the ALJ specifically asked the parties to either identify where, in the record, evidence of Essential Utility’s willingness could be found, or to supplement the record with such evidence. The parties did neither, insisting it was unnecessary. Accordingly, based on the record of this case at this time, the ALJ cannot find that Aqua Texas passes the leverage test.

¹ Aqua Texas’ Response to Order No. 7 at 3.

² *Id.* at 4 (emphasis added).

B. The Operations Test

Under 16 TAC § 24.11(e)(3), an applicant must also pass the operations test, as follows:

(3) Operations test. The owner or operator must demonstrate sufficient cash is available to cover any projected operations and maintenance shortages in the first five years of operations. An affiliated interest may provide a written guarantee of coverage of temporary cash shortages. The affiliated interest of the owner or operator must satisfy the leverage test.

In Order No. 7, the ALJ specifically asked the parties to either clarify whether the current record of this case includes a written guarantee from Essential Utilities that it will cover any temporary cash shortages experienced by Aqua Texas and, if not, to supplement the record with such a guarantee. In response, both parties agree that there is no written guarantee in the record, but argue that a written guarantee is not required because of the use of the word “may” in the rule. In other words, under the construction of 16 TAC § 24.11(e)(3) offered by Aqua Texas and Commission Staff, the only thing that must be shown in order for Aqua Texas to pass the operations test is a demonstration that Essential Utilities passes the leverage test.

This construction is unreasonable and runs counter to the text and purpose of the rule as a whole. As stated in 16 TAC § 24.11(a), the purpose of the rule is to establish the criteria by which the Commission can determine whether an applicant “has the financial resources to operate and manage the utility and to provide continuous and adequate service.” Information about the financial strength of an applicant’s affiliate is meaningless *unless* it is paired with a demonstration that the affiliate will use its finances to support the applicant.

Therefore, the ALJ construes 16 TAC § 24.11(e)(3) as follows. Under the rule, an applicant must pass the operations test. The applicant can normally pass the test by demonstrating that it has sufficient cash available to cover any projected operations and maintenance shortages in the first five years of operations. Alternatively, the applicant “may” choose to pass the operations test by relying on the financial strength of its affiliate. If the applicant chooses this option, then the affiliate must pass the leverage test *and* must provide a written guarantee that it will cover any temporary cash shortages that the applicant may experience.

For these reasons, based on the record of this case at this time, the ALJ cannot find that Aqua Texas passes the operations test.

In response to this Order, the parties may, by December 23, 2021, cure the deficiencies in the record identified above, or ask for referral for a hearing on the merits. Additionally, the parties may, if they wish to do so, seek an interim appeal of this Order in accordance with 16 TAC § 22.123.

Signed at Austin, Texas the 8th day of December 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE