



## Filing Receipt

**Received - 2023-02-17 11:54:14 AM**

**Control Number - 53920**

**ItemNumber - 33**

**DOCKET NO. 53920**

<b>APPLICATION OF TEXAS WATER UTILITIES, L.P. AND CREEK WATER UTILITY LLC FOR SALE, TRANSFER OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS IN MARIONCOUNTY</b>	§ § § § § §	<b>PUBLIC UTILITY COMMISSION  OF TEXAS</b>
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**OBJECTIONS OF TEXAS WATER UTILITIES, L.P. TO COMMISSION STAFF’S THIRD REQUEST FOR INFORMATION**

Texas Water Utilities, L.P. (TWU) objects to Request for Information (RFI) No. Staff 3-1 because it seeks information that is not relevant to this proceeding and not required under applicable Commission rules.<sup>1</sup> TWU has negotiated diligently and in good faith with Public Utility Commission of Texas (Commission) Staff as required by 16 Texas Administrative Code (TAC) § 22.144(d), but negotiations have been unsuccessful. This discovery request was received on February 14, 2023. Therefore, this objection is timely filed on or before February 24, 2023, under 16 TAC § 22.144(d).

**I. APPLICABLE LAW**

**A. Relevance**

The Commission’s procedural rules permit parties to obtain discovery regarding any matter that is relevant to the subject matter of a proceeding and is not privileged or exempted under the rules of evidence or civil procedure.<sup>2</sup> Under Texas Rule of Evidence 401, “evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” As detailed below, the question of whether the transferee in a sale, transfer, merger application under Texas Water Code (TWC) § 13.301 meets the operations test is only of consequence in approving the application *after* the Commission finds that the transferee cannot demonstrate adequate financial capability and directs the transferee to provide financial assurance.<sup>3</sup> As a result, discovery requests for information that make it more or less probable that the transferee can satisfy the

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<sup>1</sup> 16 TAC § 22.144(a); Tex. R. Evid. § 401.

<sup>2</sup> 16 TAC § 22.141(a).

<sup>3</sup> See 16 TAC § 24.239(f).

operations test are not yet relevant in this proceeding because no finding has been made regarding TWU's financial capability.

### **B. 16 TAC § 24.239—Financial Capability**

TWU objects to RFI No. Staff 3-1, which seeks information related to TWU's ability to satisfy the operations test. The application that is the subject of this proceeding was filed under TWC § 13.301. The Commission rule corresponding to this statute is 16 TAC § 24.239. Under 16 TAC § 24.239(e), the transferee in a proposed transaction "must demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and the transferee's certificated service area as required by § 24.227(a) . . . ." The Commission may hold a hearing on the application if the transferee cannot demonstrate adequate financial, managerial, and technical capability to provide continuous and adequate service,<sup>4</sup> or the financial ability to provide the necessary capital investment.<sup>5</sup> The Commission may also hold a hearing if, there are concerns that the transaction does not meet the public interest after a weighing of factors that include "the financial stability of the transferee, including, if applicable, the adequacy of the debt-equity ratio of the transferee if the transaction is approved,"<sup>6</sup> If the transferee cannot demonstrate adequate financial capability, the Commission may require the transferee to provide "financial assurance" to ensure continuous and adequate service in an amount set by the Commission and in a form that meets the requirements of 16 TAC § 24.11.<sup>7</sup>

### **C. 16 TAC § 24.11—Financial Assurance**

By its own terms, 16 TAC § 24.11 states that it is applicable to "new and existing owners or operators of retail public utilities *that are required to provide* financial assurance under this chapter."<sup>8</sup> The types of financial assurance the Commission may require are: (1) an irrevocable standby letter of credit;<sup>9</sup> or (2) documentation sufficient to determine that the transferee meets

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<sup>4</sup> 16 TAC § 24.239(h)(2).

<sup>5</sup> 16 TAC § 24.239(h)(4).

<sup>6</sup> 16 TAC § 24.239(h)(5)(F).

<sup>7</sup> 16 TAC § 24.239(f).

<sup>8</sup> 16 TAC § 24.11(b) (emphasis added).

<sup>9</sup> 16 TAC § 24.11(d).

both a leverage test and an operations test.<sup>10</sup> The leverage test requires a showing that the transferee possesses one or more financial attributes ranging from a debt-to-equity ratio of less than one to an investment-grade credit rating from one of the three major credit rating agencies.<sup>11</sup> The operations test requires a showing that “sufficient cash is available to cover any projected operations and maintenance shortages in the first five years of operations.”<sup>12</sup>

The transferee may rely on an affiliate to satisfy the operations test, if the affiliate provides a written guarantee that it will cover temporary cash shortages.<sup>13</sup> The transferee must also demonstrate that the affiliate is capable, available, and willing to cover temporary cash shortages and that the affiliate satisfies one of the leverage tests under 16 TAC § 24.11(e)(2)(A)-(D).<sup>14</sup> The types of documents that may be relied on to show compliance with the leverage and operations tests are described in 16 TAC § 24.11(e)(4)(B).

## II. OBJECTIONS

TWU objects to Staff RFI No. 3-1 in its entirety, which reads as follows:

Because 16 TAC § 24.11(e)(3) requires the applicant to demonstrate that “sufficient cash is available to cover any projected operations and maintenance shortages in the first five years of operations,” operating revenue intrinsically cannot be negative and therefore cannot be considered in lieu of operating profit. Accordingly, please file five projected years of operating profit (also known as gross profit, net revenues, or EBITDA) for the Creek Water system being acquired in your application.

The reference to 16 TAC § 24.11(e)(3) clearly indicates that Staff is seeking information it believes is related to the operations test.

### A. The Commission has not required TWU to provide financial assurance

Discovery seeking information related to the operations test is unwarranted. Under 16 TAC § 24.239(f):

*If the transferee cannot demonstrate adequate financial capability, the commission may require that the transferee provide financial*

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<sup>10</sup> 16 TAC § 24.11(e)(1).

<sup>11</sup> 16 TAC 24.11(e)(2)(A)-(D).

<sup>12</sup> 16 TAC § 24.11(e)(3).

<sup>13</sup> *Id.*

<sup>14</sup> 16 TAC § 24.11(e)(2)(E).

*assurance* to ensure continuous and adequate retail water or sewer utility service is provided to both the requested area and any area already being served under the transferee's existing CCN. The commission will set the amount of financial assurance. The form of the financial assurance must meet the requirements of §24.11 of this title relating to Financial Assurance. The obligation to obtain financial assurance under this title does not relieve an applicant from any requirements to obtain financial assurance to satisfy another state agency's rules.<sup>15</sup>

In other words, the financial assurance contemplated by 16 TAC § 24.11 is only required *only if* the transferee's financial capability cannot be demonstrated. Also, note that 16 TAC § 24.239 provides that the decision to require that the transferee provide financial assurance is discretionary rather than mandatory. In summary, the financial assurance described in 16 TAC § 24.11 must be provided only if: (1) the transferee cannot demonstrate adequate financial capability; and (2) the Commission determines this additional financial requirement is necessary.

In contrast, 16 TAC § 24.227(f) reads in relevant part:

The commission may require an applicant seeking to obtain a new CCN or a CCN amendment to provide a bond or other form of financial assurance to ensure that continuous and adequate retail water or sewer utility service is provided. The commission will set the amount of financial assurance. The form of the financial assurance will be as specified in §24.11 of this title (relating to Financial Assurance).

Accordingly, a finding that the applicant has failed to demonstrate adequate financial capability is not a prerequisite to the Commission requiring an applicant to provide financial assurance in an application to obtain or amend a certificate of convenience and necessity (CCN).

**B. TWU has demonstrated adequate financial capability.**

Requiring TWU to fulfill the requirements of 16 TAC § 24.11(e) is unnecessary because TWU has provided the information needed to satisfy 16 TAC § 24.239(f). TWU is a well-established Class A utility that has operated in Texas for many years and TWU's shareholder has an investment grade credit rating with excellent access to capital markets. The Commission completed a full review of TWU's finances in its most recent general rate case, Docket

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<sup>15</sup> 16 TAC § 24.239(f) (emphasis added).

No. 50944, which received final approval less than a year ago.<sup>16</sup> In addition, Commission Staff has recommended and/or the Commission has determined TWU has adequate financial capability multiple times within the past year (see Docket Nos. 54171,<sup>17</sup> 53472,<sup>18</sup> 53215,<sup>19</sup> and 52494).<sup>20</sup>

As required in the STM application form, TWU has provided historical financial information through audited financial statements issued within 18 months of the application filing date and projected financial information in the form of a capital improvement plan.<sup>21</sup> In response to Staff's First RFI, TWU provided an affidavit from the Chief Financial Officer for its parent company, Southwest Water Company (Southwest), affirming that Southwest is capable, available, and willing to provide interim funding to TWU along with a copy of Southwest's Centralized Cash Collections & Liquidity Practices Policy and a document showing the amount of cash currently available to Southwest on short (same-day) notice pursuant to its revolving line of credit.<sup>22</sup> Collectively, these facts are more than sufficient to support a finding that TWU has demonstrated adequate financial capability to ensure continuous and adequate retail water or sewer utility service is provided to both the requested area and the service area under its existing CCN. A finding to the contrary would be unfounded, and without such a finding, Commission Staff has no basis for requesting information related to financial assurance at this time.

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<sup>16</sup> *Application of Monarch Utilities I L.P. for Authority to Change Rates*, Docket No. 50944, Order (Feb. 23, 2022).

<sup>17</sup> *Application of Texas Water Utilities, L.P. and CS Water Corporation for Sale, Transfer, or Merger of Facilities and Certificate Rights in Bosque County*, Docket No. 54171, Commission Staff's Recommendation on Approval of the Sale and on the CCN Amendment at 8-11 (Jan. 31, 2023).

<sup>18</sup> *Application of Monarch Utilities I L.P. to Amend Its Certificate of Convenience and Necessity and to Decertify Portions of Johnson County Special Utility District and Mountain Peak Special Utility District in Johnson County*, Docket No. 53472, Notice of Approval at Conclusion of Law No. 6 (Nov. 17, 2022).

<sup>19</sup> *Application of Monarch Utilities I L.P. to Amend Its Certificate of Convenience and Necessity in Harris, Liberty, and Montgomery Counties*, Docket No. 53215, Notice of Approval at Conclusion of Law No. 6 (Oct. 24, 2022).

<sup>20</sup> *Application of R&N Enterprises and Monarch Utilities I L.P. for Sale, Transfer, or Merger of Facilities and Certificate Rights in Cooke County*, Docket No. 52494, Notice of Approval at Conclusion of Law No. 8 (Sept. 1, 2022).

<sup>21</sup> Order No. 4 Finding Application Administratively Complete and Requiring a Recommendation on Notice and a Proposed Procedural Schedule at 3 (Oct. 7, 2022).

<sup>22</sup> Texas Water Utilities, L.P.'s Response to Commission Staff's First Request for Information at Staff 1-2, including confidential Attachments 1-2(1)-(3) (Feb. 3, 2023).

### **III. REQUEST FOR DEADLINE FOR MOTION TO COMPEL AND EXPEDITED RULING**

Under the current procedural schedule, the 120-day statutory deadline in this proceeding is March 20, 2023. TWU is opposed to extending the 120-day statutory deadline. Consequently, TWU is filing, subject to and without waiving this objection, a response to Staff 3-1 contemporaneously with this objection. Under 16 TAC § 22.144(e), a motion to compel must be filed no later than five working days after an objection is received and the absence of a motion to compel is construed as an indication that the parties have resolved their dispute. TWU requests the entry of an order establishing February 24, 2023 as the deadline for Commission Staff to file a motion to compel or for parties to file notice that the discovery dispute has been resolved. In the event a motion to compel is filed, TWU respectfully requests an expedited ruling on the motion.

### **IV. CONCLUSION**

TWU respectfully requests the entry of an Order sustaining its objections to RFI No. Staff 3-1 because it addresses “financial assurance” under 16 TAC § 24.11 even though the Commission has not made a finding that TWU does not possess adequate financial capability, which is a prerequisite for requiring TWU to provide financial assurance. TWU also requests that the Order establish February 24, 2023, as the deadline for Commission Staff to file a motion to compel a response to Staff 3-1 or for the parties to file notice that the discovery dispute has been resolved. Additionally, TWU requests any further relief to which it has shown itself entitled.

Respectfully submitted,

/s/ William A. Faulk, III

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**ATTORNEYS FOR TEXAS WATER  
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**CERTIFICATE OF SERVICE**

I hereby certify that notice of the filing of this document was provided to all parties of record via electronic mail on February 17, 2023 in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ William A. Faulk, III

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