



## **Filing Receipt**

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## 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 MARION COUNTY</b>	§ § § § § §	<b>PUBLIC UTILITY COMMISSION      OF TEXAS</b>
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**TEXAS WATER UTILITIES, L.P.'S  
MOTION FOR RECONSIDERATION OF ORDER NO. 20**

Texas Water Utilities, L.P. (TWU) files this Motion for Reconsideration of Order No. 20 filed by the administrative law judge (ALJ) on May 18, 2023. The Order references a Commissioner memorandum filed in Docket No. 51646,<sup>1</sup> which is an application for a sale, transfer, or merger (STM) plus an additional request for a certificate of convenience and necessity (CCN) amendment for 4,815 uncertificated acres.<sup>2</sup> For the reasons discussed in detail below, TWU respectfully requests the reconsideration of Order No. 20 in light of the fact that the transaction proposed in the instant case is an STM for the transfer of certificated service area only, with no additional request to amend the transferor's CCN area with uncertificated area (sometimes referred to as a "straight" STM). A transaction of this type is governed by the notice provisions in 16 Texas Administrative Code (TAC) § 24.239(e), which are more narrowly tailored to a CCN amendment effected through an STM than the provisions of 16 TAC § 24.235, which apply to a CCN amendment for uncertificated service area.

**I. APPLICABLE LAW**

An STM is a specific type of CCN amendment under Texas Water Code (TWC) § 13.301 and 16 TAC § 24.239. Public notice must be provided at least 120 days before the effective date of the STM.<sup>3</sup> The statute refers generally to "public notice of the action,"<sup>4</sup> in TWC § 13.301(a)(2), while the rule requires the provision of notice to "affected customers and to

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<sup>1</sup> *Application of Waters of Vista Ranch Water Supply Corporation and Aqua Water Supply Corporation for Sale, Transfer, or Merger of Facilities and Certificate Rights in Fayette County*, Docket No. 51646, Commissioner Memorandum (May 10, 2023).

<sup>2</sup> *Id.*, Order No. 14 Approving Sale and Transfer to Proceed at Finding of Fact No. 10 (Nov. 18, 2021).

<sup>3</sup> 16 TAC § 24.239(a).

<sup>4</sup> TWC § 13.301(a)(2).

other affected parties as required by the Commission on the form prescribed by the Commission.”<sup>5</sup> Notice to cities and neighboring retail public utilities providing the same utility service that are located within two miles from the outer boundary of the area subject to the transaction is also required.<sup>6</sup> Notice by publication may be required at the discretion of the Public Utility Commission of Texas (Commission), may be allowed in lieu of individual notice, and may be waived “if the requested area does not include unserved area.”<sup>7</sup>

An application to obtain a CCN in an uncertificated area or to amend a CCN with uncertificated area is reviewed under TWC § 13.246 and 16 TAC § 24.227. Because 16 TAC § 24.227 is silent as to notice, 16 TAC § 24.235 provides the corresponding notice requirements, which mandate notice by publication.<sup>8</sup> It further provides that individual notice must be mailed to: (1) affected parties;<sup>9</sup> (2) each county and groundwater conservation district that is wholly or partly included in the area proposed to be certified;<sup>10</sup> and (3) cities, districts, and neighboring retail public utilities that are providing the same utility service and are located within two miles of the boundary of the requested area.<sup>11</sup> In addition, TWC § 13.246(a-1) expressly requires notice to owners of a tract of land that is at least 25 acres and partially or wholly located in the area proposed to be certified. Once notified, these landowners may make a filing to opt out of the area proposed for certification.<sup>12</sup>

Neither TWC § 13.246 nor TWC § 13.301 address whether the opportunity to opt out is applicable when certificated area is transferred as the result of a transaction between two utilities. And, the only provision of TWC § 13.246 specifically referenced in TWC § 13.301 is subsection (c).<sup>13</sup> Accordingly, the standalone notice provision in 16 TAC § 24.239(e) becomes

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<sup>5</sup> 16 TAC § 24.239(e)(1); *see also* TWC § 13.301(a)(2) (requiring public notice unless it is waived for good cause shown).

<sup>6</sup> 16 TAC § 24.239(c)(2).

<sup>7</sup> 16 TAC § 24.239(e)(3)–(4).

<sup>8</sup> 16 TAC § 24.235(c).

<sup>9</sup> TWC § 13.246(a).

<sup>10</sup> *Id.*; 16 TAC § 24.235(b)(1)(B)–(C).

<sup>11</sup> 16 TAC § 24.235(b)(1)(A).

<sup>12</sup> TWC § 13.246(h); 16 TAC § 24.227(i).

<sup>13</sup> TWC § 13.301(c)(5).

increasingly important when contemplating whether notice to landowners with tracts of 25 acres or more is required in this proceeding.

## II. MOTION FOR RECONSIDERATION

TWU requests the reconsideration of Order No. 20 for four reasons.

First, the discussion of notice under TWC § 13.246(a-1) and 16 TAC § 24.235 provided in the memorandum in Docket No. 51646 does not appear intended to apply to a straight STM. In the paragraph discussing notice, the memorandum makes three separate references to “the area proposed to be certified,”<sup>14</sup> which directly tracks the language in TWC § 13.246(a-1). It is reasonable to read the memorandum to indicate that the conclusions about the lack of evidence regarding notice to landowners of tracts that are 25 acres or more are specific to the landowners located in the 4,815 acres of uncertificated area. This is the only area subject to the application that is “proposed to be certified” because the 681 acres subject to the actual STM are already certificated, and therefore, are best characterized as the area “proposed to be transferred.” Moreover, there is nothing to suggest that the analysis was intended to cover landowners in the area currently certificated to the transferor.

Second, reading 16 TAC § 24.235 to apply to every STM regardless of whether the application includes a request for uncertificated service area would render portions of 16 TAC § 24.239(e) meaningless. For example, Staff recommended notice by publication in Docket No. 51646<sup>15</sup> and did not recommend notice by publication in this case.<sup>16</sup> Had Staff been required to rely on 16 TAC § 24.235 for its recommendation in this case, Staff would have had no choice but to recommend published notice thereby disregarding the permissive language in 16 TAC § 24.239(e) altogether. The notice requirements specific to an STM grant the Commission much broader discretion regarding the forms of notice required and the persons to whom notice must be provided than the notice requirements specific to a CCN amendment. To preserve this discretion, 16 TAC §§ 24.235 and 24.239(e) must be applied in a manner that harmonizes these two rules and prevents the former from subsuming the latter.

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<sup>14</sup> Docket No. 51646, Commissioner Memorandum at 2.

<sup>15</sup> *Id.*, Commission Staff’s Second Supplemental Recommendation on Administrative Completeness and Proposed Procedural Schedule, Memorandum of Jolie Mathis at 2 (Jun. 28, 2021).

<sup>16</sup> Commission Staff’s Recommendation on Notice and Proposed Procedural Schedule, Memorandum of Patricia Garcia at 2 (Oct. 21, 2022).

Third, public policy supports a finding that the narrower notice provisions of 16 TAC § 24.239(e) should not be read to include the notice required under 16 TAC § 24.235(b)(2) in an STM proceeding where the proposed transaction does not include any uncertificated area. The requirement to provide notice to landowners of a tract of 25 acres or more that is partially or wholly located in the area for which a CCN is requested is to give these landowners the opportunity to opt out of the regulatory monopoly that will affect their property if the CCN is granted.<sup>17</sup> Permitting a landowner to opt out appropriately recognizes the significance of the regulatory burden that accompanies the *initial* certification of area. In other words, it recognizes that granting a CCN will significantly alter the landowner's circumstances by limiting the landowner's choice of water or sewer utility.

Once an area is certificated, the regulatory burden that accompanies the transfer of the service area from one utility to another is much less significant. If the landowner is a customer, then the effect on the landowner will be the same as the effect on every other customer of the transferor (many of whom do not own tracts large enough to have afforded them the opportunity to opt out). This fact is reflected in the requirement to provide notice to each affected customer.<sup>18</sup> If the landowner is not a customer, then the effect is largely administrative in nature—the number of the CCN in which the landowner's tract is located will change along with the name of the utility that holds the CCN. Nothing in the TWC or Commission rules suggests that once an area is certificated for the first time, a landowner is required to receive an additional opportunity to opt out simply because the certificated area is transferred to a new utility. Accordingly, it is appropriate to exercise the discretion inherent in 16 TAC § 24.239(e) to require the provision of notice in a straight STM in a manner that recognizes the differences in the regulatory effect of certificating an area for the first time compared to transferring an area that is already certificated to a different utility.

Fourth, if the Commissioner memorandum in Docket No. 51646 is construed as a directive to apply TWC § 13.246(a-1) and 16 TAC § 24.235(b)(2) to all straight STM applications, this new precedent should not apply retroactively in this proceeding because the precedent was announced after the 120-day statutory deadline for the Commission to determine

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<sup>17</sup> TWC § 13.246(h); 16 TAC § 24.227(i).

<sup>18</sup> 16 TAC § 24.239(c)(1).

whether a hearing is necessary had passed<sup>19</sup> and an Order Approving the Sale and Transfer to Proceed had been issued.<sup>20</sup> Even with this new precedent, the notice already provided satisfies the requirements of TWC § 13.301(a)(2) and 16 TAC § 24.239(e) because it was mailed to the persons and utilities listed in Staff's recommendation—including affected customers, it was provided using the form recommended by Staff, and it included the information required by 16 TAC § 24.239(e)(1). Consequently, the ALJ's finding that notice was sufficient should remain undisturbed,<sup>21</sup> and the processing of this docket should proceed without the need for additional evidence regarding notice to the owners of tracts of 25 acres or more.

### III. CONCLUSION

TWU respectfully requests the reconsideration and withdrawal of Order No. 20 on the grounds that TWC § 13.246(a-1) and 16 TAC § 25.235(b)(2) are not applicable to this case because the proposed transaction is a straight STM that does not include any uncertificated area. Additionally, TWU requests any further relief to which it has shown itself justly entitled.

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<sup>19</sup> See TWC § 13.301(a) and (f); 16 TAC § 24.239(a) and (i); *and* Order No. 11 Granting Extension and Amending Procedural Schedule at 1 (Feb. 21, 2023).


<sup>20</sup> Order No. 15 Approving Sale and Transfer to Proceed (Mar. 15, 2023).

<sup>21</sup> Order No. 7 Finding Notice Sufficient and Soliciting Procedural Schedule for Continued Processing (Dec. 29, 2022).

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

I hereby 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 May 26, 2023, in accordance with the Order Suspending Rules, issued in Project No. 50664.

  
Eleanor D' Ambrosio  
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