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June 15, 2023

VIA E-FILING

Public Utility Commission of Texas
ATTN: Central Records
1701 N. Congress Ave., Room 8-100
Austin, TX 78701

Re: E-Filing Mistake—Item No. 61; Docket No. 53920; *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*

Dear Central Records:

We are submitting a corrected version of Item No. 61 in Docket No. 53920— Texas Water Utilities, L.P.'s Appeal of Interim Order No. 21, which was file stamped on today's date at 2:40 p.m. The previous version contained the incorrect date in the certificate of service. Please void Item No. 61 and replace with this filing.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

/s/ Hanna Campbell

Hanna Campbell
Paralegal

DOCKET NO. 53920

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	§ § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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TEXAS WATER UTILITIES, L.P.'S APPEAL OF INTERIM ORDER NO. 21

Texas Water Utilities, L.P. (TWU) files this Appeal of Interim Order No. 21 denying reconsideration of Order No. 20, which directed TWU to provide an affidavit that notice was mailed to “each owner of a tract of land that is at least 25 acres and is wholly or partially included in the *area proposed to be certified*” and evidence showing which tracts are least 25 acres and the owners of those tracts.¹ Pursuant to 16 Texas Administrative Code (TAC) § 22.123(a)(2), this appeal is timely filed.

I. EXECUTIVE SUMMARY

TWU respectfully appeals Order No. 21 because it upholds Order No. 20, which incorrectly applies the Commissioner memorandum filed in Docket No. 51646² to the instant case. The application under consideration in Docket No. 51646 was 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.³ In contrast, the application under consideration 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 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.

¹ Order No. 20 Requiring Clarification on Notice and Supplemental Recommendation at 1-2 (May 18, 2023) (emphasis added).

² Order No. 10 at 1 (citing to *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)).

³ *Id.*, Order No. 14 Approving Sale and Transfer to Proceed at Finding of Fact No. 10 (Nov. 18, 2021).

II. 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.⁴ The statute refers generally to “public notice of the action,”⁵ in TWC § 13.301(a)(2), while the rule requires the provision of notice to “affected customers and to other affected parties as required by the Commission on the form prescribed by the Commission.”⁶ 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.⁷ 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.”⁸

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.⁹ It further provides that individual notice must be mailed to: (1) affected parties;¹⁰ (2) each county and groundwater conservation district that is wholly or partly included in the area proposed to be certified;¹¹ 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.¹² In addition, TWC § 13.246(a-1) expressly requires notice to each owner of a tract of land that is at least 25 acres and wholly or partially located in

⁴ 16 TAC § 24.239(a).

⁵ TWC § 13.301(a)(2).

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

⁷ 16 TAC § 24.239(e)(2).

⁸ 16 TAC § 24.239(c)(3)–(4).

⁹ 16 TAC § 24.235(c).

¹⁰ TWC § 13.246(a).

¹¹ *Id.*; 16 TAC § 24.235(b)(1)(B)–(C).

¹² 16 TAC § 24.235(b)(1)(A).

the area proposed to be certified. Once notified, these landowners may make a filing to opt out of the area proposed for certification.¹³

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).¹⁴ Accordingly, the standalone notice provision in 16 TAC § 24.239(e) becomes increasingly important when contemplating whether notice to landowners with tracts of 25 acres or more is required in this proceeding.

III. ARGUMENT ON APPEAL

Order No. 21, and by extension Order No. 20, have the potential to immediately prejudice TWU's substantial and material right to freely contract for the acquisition of another utility, including the transfer of all the utility's current customers and all the land within its currently certificated service area. While evaluating whether to pursue an acquisition and negotiating the terms of the acquisition, it is necessary to have a complete picture of the existing need for service as well as the potential need for additional service. As such, the issue at the center of this appeal is a need for clarity on the purpose of requiring notice to individuals that are not existing customers of Creek Water Utility, LLC (Creek Water) but own a tract of 25 acres or more that is wholly or partially located in the certificated service area that is to be transferred from Creek Water to TWU.

Under TWC § 13.246(h) and 16 TAC § 24.227(i), this specific category of landowners may elect to opt out of a proposed service area. The logical conclusion stemming from these provisions is that the purpose served by notifying these landowners when they are not customers who will be directly affected by a proposed transaction is to inform them of the opportunity to opt out. However, Commission Staff does not typically recommend the provision of notice to the owners of tracts of 25 acres or more in a straight STM because the area subject to the transaction is already certificated, and therefore, the opportunity to opt out has already passed. Moreover, there is nothing in the TWC or the Commission's rules stating that the opportunity to opt out is applicable when certificated area is transferred as the result of a transaction between

¹³ TWC § 13.246(h); 16 TAC § 24.227(i).

¹⁴ TWC § 13.301(c)(5).

two utilities, and permitting an opt-out in a straight STM proceeding is inconsistent with the streamlined expedited release process established in TWC § 13.2541.

TWU's motion for reconsideration included arguments addressing why the landowner notice requirements in 16 TAC § 24.235(b)(2) should not apply to a straight STM, including arguments regarding the opt-out issue.¹⁵ Neither Order No. 21, nor Order No. 20, directly address whether the supplemental proof of notice to landowners of tracts of 25 acres or more must include the standard opt-out language that is used when a requested CCN amendment includes uncertificated area.¹⁶ They also do not shed any light on the reason for requiring notice to these landowners other than a reference to the memorandum in Docket No. 51646, which was not a proceeding for approval of a straight STM. The ALJ's lone sentence denying the request to reconsider Order No. 20 also does not provide any clarity. Consequently, TWU respectfully requests that the Commission grant its appeal of Interim Order No. 21 and direct the ALJ to rescind Order No. 20 on the grounds that the notice requirements in TWC § 13.246(a-1) and 16 TAC § 25.235(b)(2) are not applicable in this proceeding because landowners of tracts of 25 acres or more are not permitted to opt out in a straight STM.

A. Order No. 21 does not address why the memorandum in Docket No. 51646 is applicable to a straight STM.

The discussion of notice under TWC § 13.246(a-1) and 16 TAC § 24.235(b)(2) provided in the memorandum in Docket No. 51646 does not appear intended to apply to a straight STM, and Order No. 21 does not explain why it does. In the paragraph discussing notice, the memorandum makes three separate references to “the area proposed to be certified,”¹⁷ which directly tracks the language in TWC § 13.246(a-1). Despite these references, the ALJ is reading the memorandum in a manner that applies the conclusions about the lack of evidence regarding notice to landowners of tracts that are 25 acres or more to all tracts of this size, rather than only those tracts wholly or partially located in the 4,815 acres of uncertificated area. Yet, this is the only area subject to the application that is “proposed to be certified” because the 681 acres subject to the actual STM transaction are already certificated. The simple fact that the

¹⁵ Texas Water Utilities, L.P.'s Motion for Reconsideration of Order No. 20 at 4 (May 26, 2023).

¹⁶ *See, e.g.*, Docket No. 51646, Commission Staff's Second Supplemental Recommendation on Administrative Completeness and Proposed Procedural Schedule at 0000007.

¹⁷ Docket No. 51646, Commissioner Memorandum at 2.

memorandum was filed in an STM docket is not enough to lead to the conclusion that the analysis contained therein was intended to cover landowners of tracts located in the area currently certificated to the transferor. Therefore, it is reasonable to conclude that the notice discussion in the memorandum is not applicable in this case because TWU will be adding only certificated area to its CCN, meaning there is no area proposed to be certified and no landowners within that area to be noticed.

B. The ALJ's application of 16 TAC § 24.235 in this proceeding disregards the requirements in 16 TAC § 24.239(e) that are specific to the characteristics of an STM.

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. 51646¹⁸ and did not recommend notice by publication in this case.¹⁹ 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.

C. There is no compelling or other policy reason to provide notice to landowners of tracts of 25 acres or more who are not customers.

Policy considerations support a finding that the opportunity to opt out under TWC § 13.246(h) is no longer available once an area has been certificated regardless of whether the area is later transferred to the CCN of a different utility. As such, the narrow 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 amend the boundaries of the acquired utility to include uncertificated area. Noticing the owners of tracts of

¹⁸ *Id.*, Commission Staff's Second Supplemental Recommendation on Administrative Completeness and Proposed Procedural Schedule, Memorandum of Jolie Mathis at 2 (Jun. 28, 2021).

25 acres or more that are wholly or partially located in the area for which a CCN is requested affords these landowners the opportunity to elect to opt out of the regulatory monopoly that will affect their property if the CCN is granted.²⁰ 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 for the first time 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.²¹ If the landowner is not a customer, the actual effect of the STM 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. In addition, the review of the acquiring utility's financial, managerial, and technical capability to provide continuous and adequate service protects the landowner against the possibility that the acquiring utility is not equipped with the resources to serve them, should they request service in the future.

Policy considerations also support a finding that if the opportunity to opt out is no longer available, there is no compelling reason to provide notice to landowners of tracts of 25 acres or more who are not customers. In an STM, notice to non-customers provides information of nominal value at best—number of customers to be transferred, number of acres of service area to be transferred, the location of the service area to be transferred, etc. Truly meaningful information, such as how to intervene, is immaterial to a landowner who is not also a customer because non-customers do not have standing to intervene. Specifically, non-customers have not been expressly conferred the right to participate in an STM proceeding by statute, rule, order, or

¹⁹ Commission Staff's Recommendation on Notice and Proposed Procedural Schedule, Memorandum of Patricia Garcia at 2 (Oct. 21, 2022).

²⁰ *See* TWC § 13.246(h); 16 TAC § 24.227(i).

²¹ 16 TAC § 24.239(c)(1).

other law,²² and they do not have a justiciable interest that may be adversely affected by the approval of the STM.²³

In light of the foregoing, it is appropriate for the Commission to exercise the discretion inherent in 16 TAC § 24.239(e) and 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 and whether the required notice provides substantive information to the persons noticed. TWC § 13.246(a-1) and 16 TAC § 24.235(b)(2) do not require the provision of notice to landowners of tracts of 25 acres or more that are wholly or partially located in an area that is already certificated and will be transferred via an STM because (1) these landowners have already been afforded an opportunity to opt out of the CCN in which they are located; and (2) providing a notice that is silent regarding the opportunity to opt out amounts to the provision of notice for the sake of notice only.

D. Permitting the owners of tracts of 25 acres or more to elect to opt out in an STM proceeding contravenes TWC § 13.2541.

Allowing a landowner to opt out of a CCN as part of an STM is not consistent with the streamlined expedited release process established by the Legislature. The purpose of this process is to permit a landowner to petition to decertify a tract of land of 25 acres or more from an existing CCN if the tract is not receiving water or sewer service.²⁴ The Legislature has limited the use of the streamlined expedited release process to tracts that are located in counties that meet specific population criteria.²⁵ The area that will be transferred as part of this CCN is in Marion County, which has a population that is less than one million.²⁶ Marion County is

²² If the Commission decides that owners of tracts of 25 acres or more may elect to opt out of a CCN that will be transferred via an STM that still does not confer an express right to participate in the hearing. All that is required to opt out is a filing by the landowner that complies with 16 TAC § 24.227(i). An actual intervention is not necessary.

²³ 16 TAC § 22.103(b); *see also*, Docket No. 51870, Order No. 3 Requiring Recommendation on Notice, Denying Requests to Intervene, and Addressing Request for Referral at 2-3 (Jun. 1, 2021) (concluding that the existing customers of the utility did not have standing to intervene in a proceeding to amend the utility's CCN with uncertificated area because these customers lived outside of the requested area, and therefore, would be unaffected).

²⁴ TWC § 13.2541(a).

²⁵ *Id.*

²⁶ United States Census Bureau QuickFacts, Marion County Texas, <https://www.census.gov/quickfacts/marioncountytexas> (last visited Jun. 15, 2023).

adjacent to Cass, Harrison, Upshur, and Morris Counties, which all have populations less than one million,²⁷ and Caddo Parish, Louisiana, which is also below 1 million people.²⁸ Because Marion County does not satisfy the population bracket in TWC § 13.2541(a), owners of tracts of 25 acres or more that are wholly or partially located within Creek Water's current CCN area cannot petition for streamlined expedited release. Consequently, providing them with notice and an opportunity to opt out is counter to the population limitations approved by the Legislature.

If the Commission approves the landowner's petition for streamlined expedited release, the statute provides an additional process to be used to determine the amount of compensation, if any, that the landowner must provide to the utility.²⁹ Allowing landowners to opt out under TWC § 13.246(h) and 16 TAC § 24.227(i) after a CCN covering their property has been granted impermissibly bypasses the Legislature's recognition of the fact that compensation may be due to a utility as a result of the decertification.

E. Should the Commission determine that the ordered notice is required, the issuance of Order No. 20 and the refusal to reconsider it were in error due to the procedural status of the case at the time.

If the Commission confirms that the portion of the memorandum in Docket No. 51646 addressing notice was intended 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 whether a hearing is necessary had passed³⁰ and an Order Approving the Sale and Transfer to Proceed had been issued.³¹ 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

²⁷ United States Census Bureau QuickFacts, Cass County Texas, <https://www.census.gov/quickfacts/fact/table/casscountytexas/POP060210> (last visited Jun. 15, 2023); United States Census Bureau QuickFacts, Harrison County Texas, <https://www.census.gov/quickfacts/harrisoncountytexas> (last visited Jun. 15, 2023); United States Census Bureau QuickFacts, Upshur County Texas, <https://www.census.gov/quickfacts/upshurcountytexas> (last visited Jun. 15, 2023); United States Census Bureau QuickFacts, Morris County Texas, <https://www.census.gov/quickfacts/morriscountytexas> (last visited Jun. 15, 2023).

²⁸ United States Census Bureau QuickFacts, Caddo Parish Louisiana, <https://www.census.gov/quickfacts/caddoparishlouisiana> (last visited Jun. 15, 2023).

²⁹ TWC § 13.2541(l)-(j).

³⁰ 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).

³¹ Order No. 15 Approving Sale and Transfer to Proceed (Mar. 15, 2023).

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,³² 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.

IV. CONCLUSION

TWU respectfully requests the entry of an Order granting its appeal of Interim Order No. 21 and directing the ALJ to withdraw 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 a request for any uncertificated area. Additionally, TWU requests any further relief to which it has shown itself justly entitled.

³² Order No. 7 Finding Notice Sufficient and Soliciting Procedural Schedule for Continued Processing (Dec. 29, 2022).

Respectfully submitted,

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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 June 15, 2023, in accordance with the Order Suspending Rules, issued in Project No. 50664.



Eleanor D' Ambrosio