



## **Filing Receipt**

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<b>APPLICATION OF TEXAS WATER UTILITIES, LP AND CS WATER CORPORATION FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS IN BOSQUE COUNTY</b>	<b>§ § § § § §</b>	<b>PUBLIC UTILITY COMMISSION  OF TEXAS</b>
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**COMMISSION STAFF'S BRIEF IN RESPONSE TO ORDER NO. 19**

**I. INTRODUCTION**

The Staff (Staff) of the Public Utility Commission of Texas (Commission) asserts that the financial tests under 16 Texas Administrative Code (TAC) § 24.11(e) are criteria that may be evaluated by the Commission in order to determine whether an applicant in a sale, transfer, or merger (STM) proceeding has demonstrated adequate financial capability for providing continuous and adequate service to the area requested in the proceeding and to any areas currently certificated to the applicant. As such, the financial tests can be applied even if an applicant is not required to provide financial assurance pursuant to Texas Water Code (TWC) § 13.301(c) and 16 TAC § 24.239(f).

Aside from Staff's position on the general applicability of 16 TAC § 24.11(e), which Staff understands to conflict with TWU's position, Staff has conferred with TWU on the interpretation of the financial test under 16 TAC § 24.11(e)(5) and agrees that 16 TAC § 24.11(e)(5) only applies where the applicant either: 1) does not hold a certificate of convenience and necessity (CCN) and is proposing service to a new CCN area to obtain a CCN, or 2) is proposing service to a substantial addition to its current CCN area requiring capital improvements in excess of \$100,000. Staff respectfully recommends that 16 TAC § 24.11(e)(5) should not be found to apply to this proceeding, because: TWU 1) already holds a CCN and is not requesting to obtain a CCN to serve a new CCN area, and 2) is not acquiring a substantial addition to its CCN area requiring capital improvements in excess of \$100,000. Specifically, CS Water Corporation's (CS Water) water system being transferred to TWU does not require capital improvements because the water system already has the infrastructure necessary for TWU to provide continuous and adequate service to the requested area upon acquisition. As such, Staff reiterates its recommendation on July 18, 2023 in response to Order No. 15.

However, even if 16 TAC § 24.11(e)(5) is found to apply, TWU and Staff jointly proposed a finding of fact that states “TWU possesses the funds necessary for the purchase price of CS Water’s public water system and for the construction of TWU’s planned capital improvements.”<sup>1</sup> Alternatively and if necessary, Staff recommends that the Commission grant TWU’s request for a good cause exception to the requirement under 16 TAC § 24.11(e)(5)(A) that it provide loan documentation.<sup>2</sup>

## II. BACKGROUND

On September 30, 2022, TWU and CS Water (collectively, Applicants) filed an application for the STM of facilities and certificate rights in Bosque County, Texas, under TWC § 13.301 and 16 TAC § 24.239.

On October 6, 2023, the administrative law judge (ALJ) filed Order No. 19, establishing a deadline of October 27, 2023 for the parties in this proceeding to file briefs addressing the questions posed by the ALJ related to the interpretation and applicability 16 TAC § 24.11(e)(5). On October 27, 2023, the ALJ granted the parties an extension until November 3, 2023. Therefore, this pleading is timely filed.

## III. QUESTIONS TO BE ADDRESSED

### 1. Does 16 TAC § 24.11 apply to TWU if TWU is not required to provide financial assurance under 16 TAC § 24.11(b)?

Staff contends that the financial tests under 16 TAC § 24.11(e) are criteria that may be evaluated by the Commission in order to determine whether an applicant in a STM proceeding has demonstrated adequate financial capability, notwithstanding the language in 16 TAC § 24.11(b) that states the financial assurance rules apply “to new and existing owners or operators of retail public utilities that are required to provided financial assurance under [Chapter 24].” Specifically, TWC § 13.301(b) states that the “[C]ommission may require that the person purchasing or acquiring the water or sewer system demonstrate adequate financial, managerial, and technical

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<sup>1</sup> Second Supplemental Motion to Admit Evidence and Revised Proposed Order Approving Sale and Transfer to Proceed, Attachment 1 at 6, Finding of Fact No. 48 (Sept. 21, 2023).

<sup>2</sup> See also Commission Staff’s Response to Order No. 15 at 2; Attached Memorandum of Fred Bednarski (Jul. 18, 2023).

capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.”<sup>3</sup> 16 TAC § 24.239(h)(2), consistent with TWC § 13.301(e)(2), requires consideration of the financial capability of the applicant to provide “continuous and adequate service to the requested area and any area already being served under the transferee’s existing CCN.”<sup>4</sup> 16 TAC § 24.239(h)(5)(F), consistent with TWC §§ 13.246(c)(6) and 13.301(e)(5), requires the consideration of “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>5</sup> And TWC §§ 13.246(c)(6) and 13.301(e)(5) also further require the consideration of “the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service. . . .”<sup>6</sup> As such, it is clear that the Commission requires an applicant in an STM proceeding to demonstrate adequate financial capability to provide continuous and adequate service to the requested area and any areas currently certificated to the applicant.

The Commission has previously determined that, for an applicant to demonstrate financial capability, the information required to evaluate the financial tests under 16 TAC § 24.11(e) is the type of information that can be evaluated to determine financial capability. Specifically, in the order approving the standard STM application form, the Commission concluded that 16 TAC § 24.11 provides the details for the methods by which an applicant can demonstrate financial capability.<sup>7</sup> In that order, the Commission stated that 16 TAC § 24.11 “specifically provides criteria to demonstrate that an owner or operator of a retail public utility has the financial resources to operate and manage the utility and to provide continuous and adequate service to the current and proposed utility service area.”<sup>8</sup> The Commission further stated that the STM application

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<sup>3</sup> TWC § 13.301(b).

<sup>4</sup> 16 TAC § 24.239(h)(2).

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

<sup>6</sup> TWC § 13.246(c)(6).

<sup>7</sup> *Sale/Transfer/Merger Form - Water and Sewer Utilities*, Project No. 45118. Order Adopting Revisions to the Sale, Transfer, Merger Application for Water and Sewer Utilities as Approved at the March 29, 2018 Open Meeting at 12-13 (Apr. 2, 2018) (discussing the requirement to demonstrate financial capability under former Commission rule 16 TAC § 24.109(g), which is same requirement now under 16 TAC § 24.239(f)).

<sup>8</sup> *Id.* at 12; *see also* 16 TAC § 24.11(a).

form's "Appendices A and B are not arbitrary; rather they are based on the financial test provisions in [16 TAC] § 24.11(e)."<sup>9</sup>

In addition to the Commission's interpretation that the financial information required in the standard STM application form is based on the financial tests under 16 TAC § 24.11(e), the form itself also includes language that permits Staff to request information, presumably to the extent that the information provided with the application does not fully allow Staff to evaluate each of the financial tests under 16 TAC § 24.11(e). Specifically, the form states that "projected financial information is only required if the Applicant proposes new service connections and new investment in plant, *or if requested by Staff*."<sup>10</sup> Further, to be consistent with the Commission's interpretation of the general applicability of the financial tests under 16 TAC § 24.11(e) to determine financial capability, TWC § 13.301(c) and 16 TAC § 24.239(f) should correspondingly be interpreted to not require a specific finding by a Commission order that an applicant cannot demonstrate adequate financial capability before Staff can request an applicant to provide information to evaluate the financial tests under 16 TAC § 24.11(e).

If the Commission changes its interpretation for when 16 TAC § 24.11(e) can apply and interprets that the Commission is first required under TWC § 13.301(c) and 16 TAC § 24.239(f) to make an explicit finding by a Commission order that an applicant cannot demonstrate financial capability, such an explicit finding can be made in an order finding an application deficient or an order compelling discovery responses, based on the fact that the standard STM application form permits Staff to request information to determine an applicant's financial capability. In this proceeding, since TWU provided all information necessary for Staff to evaluate the financial tests under 16 TAC § 24.11(e), a finding by a Commission order that TWU cannot demonstrate adequate financial capability is not necessary before the Commission can include findings related to TWU's satisfaction of the financial tests demonstrating TWU's financial capability in the interim order approving the sale and transfer to proceed.

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<sup>9</sup> Project No. 45118, Order Adopting Revisions to the Sale, Transfer, Merger Application for Water and Sewer Utilities as Approved at the March 29, 2018 Open Meeting at 12.

<sup>10</sup> *Id.* at bates page 000037, Application, Part C: Transferee Information, Question 10; *see also* Application for Sale, Transfer, or Merger of a Retail Public Utility, *Public Utility Commission of Texas*, at [https://www.puc.texas.gov/industry/water/forms/stm\\_form.pdf](https://www.puc.texas.gov/industry/water/forms/stm_form.pdf) (last accessed Nov. 3, 2023).

Notably, consistent with Commission precedent in TWU's recent STM proceedings,<sup>11</sup> TWU and Staff jointly proposed findings of fact related to TWU's satisfaction of the financial tests to demonstrate that TWU has "the financial capability and stability to provide continuous and adequate water service,"<sup>12</sup> as well as a separate finding of fact related to financial assurance that follows the language in TWC § 13.301(c) stating that "there is no need to require TWU to provide a bond or other financial assurance to ensure continuous and adequate service."<sup>13</sup> And to further support Staff's position, because these findings of fact have consistently been included in interim STM proceedings in this general manner, it is clear that the Commission has been consistent in the application of its interpretation discussed above,<sup>14</sup> to apply the financial tests as criteria for considering whether an applicant can demonstrate financial capability.

Additionally, while considering the financial tests under 16 TAC § 24.11(e) to determine financial capability, the Commission has consistently and separately concluded that, if the evaluation of the financial tests helps an applicant demonstrate financial capability, there is no need for an applicant to provide a bond or other financial assurance to ensure continuous and adequate service, such that TWC § 13.301(c) and 16 TAC § 24.239(f) are not even implicated.

Therefore, based on the Commission's own interpretations of its rules and STM application form and the application of its interpretations in formal STM proceedings, the criteria in 16 TAC § 24.11(e) can be used to evaluate financial capability, such that 16 TAC 24.11(e) applies to TWU even if TWU is not required to generally provide financial assurance under 16 TAC § 24.11(b).

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<sup>11</sup> *Application of Texas Water Utilities, LP and Creek Water Utility LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights Marion County*, Docket No. 53920, Order No. 15 Approving Sale and Transfer to Proceed at Finding of Fact Nos. 43-47 (Mar. 15, 2023); *Application of Texas Water Utilities, LP and Woodland Oaks Utility LP for Sale, Transfer, or Merger of Facilities and Certificate Rights and for a Name Change to Certificates of Convenience and Necessity in Montgomery County*, Docket No. 54546, Order No. 12 Approving Sale and Transfer to Proceed at Finding of Fact Nos. 52-56 (Jul. 19, 2023); *Application of Texas Water Utilities, LP and 4-D Water Company, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Comal County*, Docket No. 54790, Order No. 8 Approving Sale and Transfer to Proceed at Finding of Fact Nos. 44-48 (Aug. 16, 2023).

<sup>12</sup> Second Supplemental Motion to Admit Evidence and Revised Proposed Order Approving Sale and Transfer to Proceed, Attachment 1 at 6, Finding of Fact Nos. 46-49.

<sup>13</sup> *Id.* at 7, Finding of Fact No. 50.

<sup>14</sup> *Supra* notes 7-9.

## 2. Questions Numbers 2 through 6.

Staff has conferred with TWU and agrees with TWU's responses regarding the interpretation of 16 TAC § 24.11(e)(5). Specifically, a "new CCN area" under 16 TAC § 24.11(e)(5) is only an area that has not been previously certificated to any CCN holder. Further, the applicant must not currently have a CCN, such that the applicant is seeking to obtain a CCN for the first time. This interpretation is bolstered by the fact that the latter part of 16 TAC § 24.11(e)(5) is related to applicants that already have a CCN. Importantly, a substantial addition to an applicant's current CCN area within the context of an STM proceeding can only be interpreted to include additional certificated service area, such that a "new CCN area" can only be interpreted to apply to an applicant that does not have any currently certificated service area. Further, there is no Commission rule or precedent on any threshold amount of acreage or customers that are needed for the application to be considered a substantial addition to an applicant's current CCN area. However, an established threshold may not even be appropriate for all cases, such that the substantialness determination may need to be done on case-by-case basis, depending on the applicant and the financial information already provided in a given STM proceeding.

Next, the interpretation for what constitutes "capital improvements" requires consideration of the language in 16 TAC § 24.11(e)(5), as well as the use of the term in the TWC. 16 TAC § 24.11(e)(5)(A) indicates that the improvements are something "necessary to provide continuous and adequate service..."<sup>15</sup> Further, TWC § 13.183(b) indicates that capital improvements are "necessary to provide facilities capable of providing adequate and continuous utility service..."<sup>16</sup> And TWC § 13.244(d)(3) describes a "capital improvements plan...[as being] for construction of all facilities necessary to provide full service to the entire proposed service area."<sup>17</sup> Consistent throughout, capital improvements are something required or necessary for the system to provide continuous and adequate service. Furthermore, regarding compliance with the standards required by the Texas Commission on Environmental Quality (TCEQ), the Commission has also previously

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<sup>15</sup> 16 TAC § 24.11(e)(5)(A).

<sup>16</sup> TWC § 13.183(b).

<sup>17</sup> TWC § 13.244(d)(3).

stated that “the [C]ommission standard that must be met for continuous and adequate service includes meeting those TCEQ standards.”<sup>18</sup>

Whether or not the phrase “capital improvements in excess of \$100,000” only modifies the phrase “substantial addition to its current CCN area” or also modifies “a new CCN area,” Staff notes that the Commission has considered that the phrase modifies both types of proceedings.<sup>19</sup> However, because a “new CCN area” is interpreted to apply to an applicant that does not have a CCN and is seeking to obtain a CCN for the first time, applying the phrase “capital improvement in excess of \$100,000” to an applicant that proposes to serve “a new CCN area” would inextricably prevent the Commission from fully evaluating an applicant that is new to the industry and not known to the Commission who is either: 1) seeking, in an STM proceeding, to acquire a system that does not require “capital improvements” for the applicant to provide continuous and adequate service upon acquisition, or 2) seeking to obtain a new CCN, in a CCN proceeding, to provide service with a system that it already has and that does not require “capital improvements” to provide continuous and adequate service. As such, to maintain flexibility, the phrase “capital improvements in excess of \$100,000” should only be interpreted to modify the phrase “substantial addition to its current CCN area.” Lastly, the phrases “substantial addition” and “capital improvement in excess of \$100,000” impose separate requirements based on the interpretation of each phrase discussed above.

#### IV. CONCLUSION

For the reasons stated above, Staff respectfully requests that its brief in response to the questions posed by the ALJ be considered for purposes of the pending interim order approving the sale and transfer to proceed.

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<sup>18</sup> Project No. 45118, Order Adopting Revisions to the Sale, Transfer, Merger Application for Water and Sewer Utilities as Approved at the March 29, 2018 Open Meeting at 26-27 and bates page 000041. Application, Part F: TCEQ Public Water System or Sewer (Wastewater) Information. Question 24.

<sup>19</sup> *Application of Liberty County Utilities, LLC for Water and Sewer Certificates of Convenience and Necessity in Liberty County*, Docket No. 52391, Order Remanding Proceeding to Docket Management at 1 (Oct. 20, 2022) (stating that “the owner or operator of a retail public utility that requests to serve a new CCN area or new subdivision must provide additional financial assurance if more than \$100,000 in capital improvements are necessary to provide service.”).



Date: November 3, 2023

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
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**DOCKET NO. 54171**

**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 November 3, 2023 in accordance with the Second Order Suspending Rules, filed in Project No. 50664.

/s/ Scott Miles  
Scott Miles