



## Filing Receipt

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**PUC DOCKET NO. 54316**

<b>JOINT APPLICATION OF SW</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>MERGER ACQUISITION CORP.,</b>	<b>§</b>	
<b>CORIX INFRASTRUCTURE (US) INC.,</b>	<b>§</b>	<b>OF TEXAS</b>
<b>TEXAS WATER UTILITIES, LP,</b>	<b>§</b>	
<b>CORIX UTILITIES (TEXAS) INC.,</b>	<b>§</b>	
<b>SWWC UTILITIES, INC., AND</b>	<b>§</b>	
<b>MIDWAY WATER UTILITIES, INC.</b>	<b>§</b>	
<b>FOR AN ORDER FINDING THAT</b>	<b>§</b>	
<b>APPROVAL OF A MERGER</b>	<b>§</b>	
<b>TRANSACTION IS NOT REQUIRED</b>	<b>§</b>	
<b>UNDER TEXAS WATER CODE</b>	<b>§</b>	
<b>§ 13.302 OR, ALTERNATIVELY, FOR</b>	<b>§</b>	
<b>APPROVAL OF MERGER</b>	<b>§</b>	
<b>TRANSACTION UNDER TEXAS</b>	<b>§</b>	
<b>WATER CODE § 13.302</b>	<b>§</b>	

**OFFICE OF PUBLIC UTILITY COUNSEL’S INITIAL COMMENTS**

The Office of Public Utility Counsel (“OPUC”), representing the interests of residential and small commercial consumers, files these comments regarding SW Merger Acquisition Corp., Corix Infrastructure (US) Inc., Texas Water Utilities, LP, Corix Utilities (Texas) Inc., SWWC Utilities, Inc., and Midway Water Utilities, Inc.’s (collectively “Applicants”) planned merger of SW Merger Acquisition and Corix Infrastructure (US).<sup>1</sup> Pursuant to Order No. 2, the deadline for intervenor comments on the Applicants’ planned merger is December 9, 2022.<sup>2</sup> Therefore, these comments are timely filed.

**I. INTRODUCTION**

A threshold legal question under consideration by the Public Utility Commission of Texas (“Commission”) in this docket is whether Commission approval of the merger is required. Applicants contend that no voting stock or controlling interest in any of the Texas Utilities is to be

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<sup>1</sup> Joint Application of SW Merger Acquisition Corp., Corix Infrastructure (Us) Inc., Texas Water Utilities, LP, Corix Utilities (Texas) Inc. SWWC Utilities, Inc., and Midway Water Utilities, Inc. for an Order Finding that Approval of a Merger Transaction is Not Required Under Texas Water Code § 13.302 or, Alternatively, for Approval of Merger Transaction Under Texas Water Code § 13.302, Docket No. 54316, Application (Nov. 9, 2022) (Application).

<sup>2</sup> Order No. 2 at 1. (Nov. 30, 2022).

acquired pursuant to the planned business combination, such that the transaction does not require Commission approval under Texas Water Code (“TWC”) §13.302.<sup>3</sup> Alternatively, should the Commission disagree, Applicants request approval under TWC § 13.302,<sup>4</sup> which would require Applicants to “demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated. . . .”<sup>5</sup> Should TWC § 13.302 be found to apply, TWC § 13.302(d) further states the Commission may hold a hearing on the transaction and assess the transaction in light of the criterion outlined in TWC § 13.301(e)<sup>6</sup> so as to determine if the transaction will serve the public interest. It is OPUC’s contention that the Commission does have regulatory authority in this matter and approval of the proposed merger is, in fact, required under TWC § 13.302.

## II. PUBLIC INTEREST ASSESSMENT

Though the public interest assessment triggered by TWC § 13.302(d) differs from its counterpart in Public Utility Regulatory Act (“PURA”) § 39.915(b), whereby the Commission is to consider whether a contemplated transaction will “adversely affect the reliability of service, availability of service, or cost of service for an electric utility or transmission and distribution utility,” OPUC contends the assessment as to “reliability, availability, and cost” is aptly analogous to that of “financial, managerial, and technical capability.”<sup>7</sup> As such, the determination of Applicants’ capabilities would ultimately confirm whether the available service is to be considered

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<sup>3</sup> Application at 1.

<sup>4</sup> *Id.*

<sup>5</sup> TWC § 13.302(b).

<sup>6</sup> “The utility commission may hold a hearing if:

- (1) the application filed with the utility commission or the public notice was improper;
- (2) the person purchasing or acquiring the water or sewer system has not demonstrated adequate financial managerial, and technical capability for providing continuous and adequate service to the service area being acquired and to any areas currently certificated to the person;
- (3) the person or an affiliated interest of the person purchasing or acquiring the water or sewer system has a history of:
  - (A) noncompliance with the requirements of the utility commission, the commission, or the Department of State Health Services; or
  - (B) continuing mismanagement or misuse of revenues as a utility service provider;
- (4) the person purchasing or acquiring the water or sewer system cannot demonstrate the financial ability to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water or sewer system; or
- (5) there are concerns that the transaction may not serve the public interest, after the application of the considerations provided by Section 13.246(c) for determining whether to grant a certificate of convenience and necessity.”

<sup>7</sup> See TWC § 13.301(e)(2).

reliable and cost effective. With respect to ratepayer protections relating to reliability and costs, Applicants have proposed a series of Regulatory Commitments in their application.<sup>8</sup> OPUC posits the public interest assessment by the Commission in this matter is warranted, particularly with regard to the sufficiency of Applicants' proposed Regulatory Commitments.

### **III. ADEQUACY OF REGULATORY COMMITMENTS**

Should the Commission hold that approval of the transaction is not required, an outstanding question would remain of how Regulatory Commitments proposed by Applicants could or would be enforced. Commission review in order to codify the Regulatory Commitments specific to this transaction so as to ensure adequate consumer protection would be analogous to a TWC § 13.302 demonstration as to Applicants' "adequate financial, managerial, and technical capability for providing continuous and adequate service." OPUC has specifically requested a review of Applicant's proposed Regulatory Commitments, and advocates for a Commission determination as to whether these Regulatory Commitments should be revised or expanded, in light of the public policy concerns relating to protection for residential and small commercial consumers. Of note, a water and wastewater transaction of this magnitude has not occurred since the Commission gained regulatory authority over water and wastewater utilities in 2013, and the Commission has a history of imposing Regulatory Commitments in similar electric utility transactions to effectively address public policy concerns associated with Transaction Costs, Integration and/or Transition Costs, and Ring-Fencing Commitments.<sup>9</sup>

#### **a. Transaction Costs**

While OPUC is supportive of Applicants proposed Regulatory Commitment to not seek recovery of Transaction Costs from customers,<sup>10</sup> there has been no definition or illuminating clarification from Applicants as to what constitutes Transaction Costs. For example, the

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<sup>8</sup> Application at 16.

<sup>9</sup> *Joint Report and Application of El Paso Electric Company, Sun Jupiter Holdings LLC, and IIF Us Holding 2 LP for Regulatory Approvals Under PURA §§ 14.101, 39.262, and 39.915*, Docket No. 49849 (Jan. 28, 2020); *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 49831 (Aug. 27, 2020); *Application of AEP Texas Inc. for Authority to Change Rates*, Docket No. 49494 (April 6, 2020); *Application of CenterPoint Energy Houston Electric, LLC For Authority to Change Rates*, Docket No. 49421 (Mar. 9, 2022).

<sup>10</sup> Application at 15-17.

Agreement entered into between the applicants was signed on or around August 26, 2022.<sup>11</sup> Costs associated with the Agreement were likely incurred well before this date. Such costs might include, but not be limited to, expenses associated with meetings and negotiations between the Parties, as well as outside legal and consulting fees necessary to establish the proposed transaction and develop the merger agreement. Further, as Applicants execute the agreement, they will undoubtedly incur additional internal and external costs.

Should the Commission enter an Order in this proceeding, OPUC advocates for inclusion of a clear definition of Transaction Costs, with examples provided. In addition, a requirement of reporting of these Transaction Costs should be included within the Annual Reports filed by Applicants and/or the newly combined Company to enable adequate review and monitoring, and to allow for a third-party assessment that no such costs are ultimately being included within revenue requirements developed in Applicants' future rate applications. Of note, Corix Utilities has a pending application for a change in rates before the Commission specific to a test year ended March 31, 2022.<sup>12</sup> Given the date of the Agreement between Applicants, it is possible that transaction costs associated with pertinent discussions between the parties and development of the Transaction Agreement have already been included within this pending rate application. Should the Commission enter an Order relative to this Regulatory Commitment, Corix's application within Docket No. 53815 should be appropriately assessed.

#### **b. Integration and/or Transition Costs**

Just as costs will be incurred specific to the transaction, additional costs will be incurred as the transaction is implemented. These costs are referred to herein as "Integration Costs." Within the application, Applicants acknowledge that costs and benefits will be realized from the transaction, with said costs and benefits assessed as part of future ratemaking proceedings and customers receiving the benefit of these efforts net of overall costs. However, no consumer protections are provided should costs ultimately exceed benefits.

In prior proceedings before the Commission, specifically Docket 49849, a Regulatory Commitment has been codified specific to Integration Costs with a limitation on the costs that can

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<sup>11</sup> Application, Appendix B at Bates page 37.

<sup>12</sup> *Application of Corix Utilities (Texas) Inc. for Authority to Change Rates*, Docket No. 53815 (pending).

ultimately be passed on to customers.<sup>13</sup> A similar Regulatory Commitment made within this proceeding would help provide further protection to customers and serve the public interest. While Integration Costs could be left for assessment in future ratemaking proceedings, preemptively establishing a Regulatory Commitment regarding these expenses could serve to reduce future disputes and minimize rate case expenses attributable to addressing this issue.

### **c. Ring-Fencing Commitments**

In terms of current operations, the Texas Utilities of Corix are currently capitalized via Corix Infrastructure Inc (“CII”) and its upstream entity, British Columbia Investment Management Corporation (“BCI”).<sup>14</sup> The Texas Utilities of Monarch (and its affiliates) are currently capitalized via SW Merger Acquisition Corp (“SWMAC”) and their upstream entities, Bazos CIV, L.P. (“Bazos”) and IIF Subway Investment (“IIF”).<sup>15</sup> OPUC’s understanding is that on closing of the transaction, all Texas Utilities will ultimately roll up under a new entity—Intermediate Newco—which will be owned by Corix US, of which CII and SWMAC Holdco will each own 50% of Corix US.<sup>16</sup> Capitalization for Intermediate Newco is to come in the form of debt and equity contributions from CII and SWMAC and their upstream entities, BCI, Bazos, and IIF, respectively. The effect of the transaction is a combination of the existing entities that provide capital for Texas Utilities, with a number of Regulatory Commitments proposed by Applicants relative to ensuring the financial integrity and protection of Texas Utilities.

In discussions with representatives for Applicants, OPUC has inquired regarding the potential need for further or expanded ring-fencing requirements specific to this application, with the understanding that there is a possibility for additional requirements potentially hampering the adequate capitalization of Texas Utilities or increasing the cost of capital, to the potential detriment of ratepayers. Accordingly, OPUC advocates for a Commission assessment of the proposed ring-fencing commitments, with careful attention made to ensure Regulatory Commitments are

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<sup>13</sup> See *Joint Report and Application of El Paso Electric Company, Sun Jupiter Holdings LLC, and IIF US Holding 2 LP for Regulatory Approvals Under PURA §§ 14.101, 39.262, and 39.915*, Docket No. 49849 Final Order, Finding of Fact 58(f) (Jan. 28, 2020).

<sup>14</sup> Application at 2.

<sup>15</sup> *Id.*

<sup>16</sup> Application at 220, Direct Testimony of Brian Bahr at 13: Figure 3.

carefully crafted so as not to impact the capitalization, or the cost of capitalization, to Texas Utilities.

#### **IV. ADDITIONAL REGULATORY COMMITMENT CONSIDERATIONS**

Reviewing other similar transactions before the Commission is instructive in determining additional Regulatory Commitments that could potentially be imposed specific to this transaction. OPUC offers additional considerations associated with Regulatory Commitments addressing Applicants' formalizing testimonial commitments, accounting matters, and affiliate transactions.

##### **a. Formalizing Testimonial Commitments**

Within the testimony accompanying the application, a myriad of commitments are made.<sup>17</sup> However, not all of these commitments are formally documented as proposed Regulatory Commitments potentially subject to enforcement by the Commission. For example, the testimony of Jeffrey McIntyre presents a commitment to continued community engagement and continuation of a Monarch Customer Assistance Program.<sup>18</sup> OPUC would urge that if such commitments are going to be enforced, they should be documented as formal Regulatory Commitments within the Order approving the transaction.<sup>19</sup> Further, and specific to Monarch's current Customer Assistance Program, the Regulatory Commitment should not only address the continuation of the program, but also the expansion of the program to cover the Texas Utilities currently owned and operated by Corix.

##### **b. Accounting Matters**

While acquisition premiums, adjustments, or impacts to goodwill are somewhat limited in this matter, OPUC suggests that a better understanding of the transaction's potential impacts may be needed relative to its impact to the assets of the Texas Utilities. The application does present a proposed Regulatory Commitment that no material assets will be transferred to Intermediate Newco from the Texas Utilities, but no information is provided as to how assets may potentially

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<sup>17</sup> See Application at 228, 240, 257, and 270.

<sup>18</sup> Application at 254, Direct Testimony of Jeffrey McIntyre at 10:1 to 10:22.

<sup>19</sup> See Docket No. 49849, Final Order, Finding of Fact 53-73 (Jan. 28, 2020), for the extensive nature of documenting Regulatory Commitments.

flow, if at all, from Intermediate Newco to the Texas Utilities, an attribute that might impact rate base in future rate proceedings. While it is possible that no such transactions or impacts will occur, a definitive answer is unclear at this time based on available information.

**c. Affiliate Transactions**

Undoubtedly, affiliate transactions will continue to occur within the day-to-day operations of the Texas Utilities, just as they do now under separate operations by the individual entities, with such transactions subject to a higher burden of proof in rate proceedings.<sup>20</sup> While said transactions would be considered as part of future rate-making proceedings, the emphasis of these requirements may be strengthened via a Regulatory Commitment in this proceeding, along with potentially enhanced reporting requirements on said affiliated transactions as part of Schedule 615 in Applicants' required annual report to the Commission.

**V. CONCLUSION**

OPUC appreciates the opportunity to file these comments addressing the contemplated merger and looks forward to continued discussions with Applicants on a path forward that ensures a resolution aligning Applicants' shared mission, to "help people enjoy a better life and to help communities thrive,"<sup>21</sup> with OPUC's mission, to ensure costs borne by residential and small commercial consumer ratepayers are reasonable and justified. OPUC requests the Commission grant such relief as may be appropriate and necessary to ensure ratepayers are adequately safeguarded should the proposed transaction be either consummated or rejected.

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<sup>20</sup> See TWC § 13.185(e).


<sup>21</sup> Application at 11.



Date: December 9, 2022

Respectfully submitted,

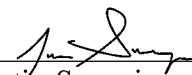
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**CERTIFICATE OF SERVICE**  
PUC DOCKET NO. 54316

I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 9th day of December 2022 by facsimile, electronic mail, and/or first class, U.S. Mail.

  
Justin Swearingen