



## **Filing Receipt**

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**Control Number - 54546**

**Item Number - 30**

**PUC DOCKET NO. 54546**

<b>APPLICATION OF TEXAS WATER UTILITIES, LP AND WOODLAND OAKS UTILITY LP FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS MONTGOMERY COUNTY</b>	<b>§ § § § § §</b>	<b>PUBLIC UTILITY COMMISSION      OF TEXAS</b>
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**OFFICE OF PUBLIC UTILITY COUNSEL'S STATEMENT OF POSITION ON PHASED-IN RATES**

The Office of Public Utility Counsel (“OPUC”), representing the interests of residential and small commercial consumers in Texas, respectfully submits this Statement of Position pursuant to 16 Texas Administrative Code (“TAC”) § 22.124. OPUC has reviewed the application and discovery responses filed by Texas Water Utilities, LP (“TWU”) and takes the following positions:

TWU’s application requests approval from the Public Utility Commission of Texas (“Commission”) to consummate the transaction proposed by its Asset Purchase Agreement with Woodland Oaks Utility, LP (“WOU”), which would result in the transfer of all of the certificated service area, utility assets, and customers from WOU to TWU.<sup>1</sup> Consistent with Texas Water Code (“TWC”) § 13.3011, TWU proposes to charge customers transferred from WOU the rates in its approved tariffs.<sup>2</sup> TWU’s most recently approved water tariffs as of the application-filing date were approved in Docket No. 53636.<sup>3</sup> The approved tariffs contain a series of phased-in rates, with the initial phase-one effective dates set at June 1, 2021, and each successive phase

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<sup>1</sup> *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* at 17. (“Application”).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.* at 19.

commencing June 1st of the consecutive year. Some systems utilize a seven-year phase-in schedule, whereas others have five-year schedules.<sup>4</sup>

### **1. Rate in Effect as of the Date of Filing of the Application**

In its application, TWU “proposes to charge customers transferred from WOU to TWU the rates that are in TWU’s approved tariffs on the date the application is filed.”<sup>5</sup> TWU’s most recently approved water tariffs as of the application filing date were approved in Docket No. 53636. TWU filed its application on January 4, 2023. The water tariff that was in force when the application was filed is the approved tariffs in Docket No. 53636. However, the phase-2 rates were in effect for different water systems included in the water tariff when the application was filed. *See* OPUC Attachment 1 to this pleading, Water Utility Tariff, Docket No. 53636. The current water tariff for WOU was approved in Docket No. 52257. The base rate for a 5/8” meter size is \$36.28 per month (3/4” is 54.42) with a \$2.58 gallonage charge per 2,000 gallons for 0 to 10,000 gallons and \$3.33 per 10,000 gallons thereafter.<sup>6</sup> TWU has multiple water systems. The phase-2 rates, effective June 1, 2022, were in effect at the time TWU filed its application. Because TWU has multiple water systems under the same tariff, the effective rates are different for each system. For example, for Villas of Willowbrook, the base effective rate on June 1, 2022, for a 5/8” meter was \$19.71, with a gallonage charge of \$1.85 per 1,000 gallons for 0 to 2,000 gallons. TWU is proposing to charge WOU customers a base rate of \$48.37 for 5/8” meter; \$6.48 for the tiered usage rate for the first 0 to 2,000 gallons; \$7.98 for 2,000 to 10,000 gallons; \$9.05 for 10,000 to 20,000 gallons, etc.

In this case, the applicant seeks to impose the \$48.37 rate it claims is in force as opposed to the rate in effect, which is significantly lower for most of its water systems as can be seen from

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<sup>4</sup> *Id.* at 63-128.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> *Id.* at 25.

the illustration above using the Villas of Willowbrook water system. Under the applicable statute an applicant who files a sales, transfer and merger (“STM”) application under TWC § 13.301(a) to purchase or acquire a water or sewer system *may request* that the Commission authorize the applicant to charge initial rates for the service that are *shown in a tariff filed* with the Commission *for another water or sewer system* which is *in force for the other water or sewer system* on the date the application is filed.<sup>7</sup> The Commission “*may not require* a person who makes a request under Subsection (a) *to initiate a new rate proceeding* to establish the initial rates for service the person will provide to the customers of the purchased or acquired system.” Section 13.3011 does not limit the Commission’s authority to direct or require the applicant to either use the existing rate in WOU’s current tariff as outlined above or use the phase-2 effective rates in Villas of Willowbrook water system also referenced above. The language of Section 13.3011 also does not prohibit the Commission from requiring the applicant to initiate a new rate proceeding. The use of the word “may” in TWC § 13.3011 is permissive. Just because the statute says the Commission *may not require* a new rate proceeding in the STM case does not mean the Commission cannot order the applicant to file a new rate proceeding in a subsequent docket within a time certain after the STM application is approved. The Commission thus has several options including, but not limited to:

1. Directing the applicant to use the existing rate in force for the acquired utility (WOU) approved in Docket No. 53636;
2. Directing the applicant to use the phase-2 rates in effect as of June 1, 2022 when the application was filed, as is consistent with the Villas of Willowbrook water system example above; and

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<sup>7</sup> TWC § 13.3011(a).

3. Directing the applicant to use the historical rate shown in the tariff, which is also a rate in force in the tariff, if charging the proposed rate would result in a significant rate shock.

OPUC contends that it would be beneficial to accommodate residential and small commercial consumers with the monetarily lowest first phase-in rate authorized in an applicant’s tariff—as opposed to allowing the applicant to impose a higher rate taken from a multi-phased rate regimen that spans a plethora of geographic regions. Implementing a utility’s phased-in rate in effect at the time of filing of the application would develop a standard that: (a) avoids excessive debate regarding which rate to select from a multi-region and multi-phased rate system in a given tariff, and (b) streamlines the application process in order to reduce expenses and, ultimately, the cost of services to consumers—especially given the number of cases where the proposed tariffs have multi-phased rates. The Commission should make this oversight decision on a case-by-case basis until a rule implementing TWC § 13.3011 is adopted.

As has been noted by Staff of the Public Utility Commission (“Staff”),

[E]xamination of Chapter 13 of the Texas Water Code, and Chapter 13’s Subchapter H specifically, does not provide any insight on what the Legislature intended regarding the specific types of rates that can be selected by an acquiring utility under TWC § 13.3011. Thus, the Legislature’s intent on this portion of the statute is ambiguous. In the case of an ambiguous statute, extrinsic aids, such as legislative history, may be used to interpret the statute. Since the specific types of rates an acquiring utility may select under TWC § 13.3011 is ambiguous, the section’s legislative history may be used to help determine the Legislature’s intent. . . . The [H.B. 1484] bill analysis explains that the Legislature intended TWC § 13.3011 to streamline the acquisition of systems . . . that need upgrades, in a manner that benefits both customers and utilities.<sup>8</sup>

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<sup>8</sup> *Application of Conroe Resort Utilities, LLC and Undine Texas, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Montgomery County*, Docket No. 52797, Commission Staff’s Recommendation on Administrative Completeness and Notice and Motion for a Determination of Applicable Rates at 3-4. (Sep. 20, 2022). See also *Application of Conroe Resort Utilities, LLC and Undine Texas, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Montgomery County*, Docket No. 52797, Undine’s Brief Regarding Texas Water Code at § 13.3011 Pursuant to Order No. 11 at 2 (Oct. 7, 2022) (noting, “Staff’s interpretation of TWC § 13.3011 is both supported by the legislative history and, in Undine’s view, provides for the most logically consistent outcome.”).

Regrettably, the Commission has yet to adopt rules implementing TWC § 13.3011. When the Legislature's intent cannot be readily ascertained by examining the plain meaning of the statute's words or phrases, the statutory scheme as a whole should be considered.

OPUC believes that TWC § 13.3011 lends itself to the interpretation that the statutory phrase "in force" applies to all rates within an approved tariff particularly in a phased-in tariff. Where the rates are phased-in as in the proposed TWU's tariff, the phased-in rate in effect as of the date of filing of the application should be given effect as that is the rate that the applicant is currently charging its customers.

Based on the common tenant in statutory construction that gives consistent meaning to identical words and phrases in the same statute, an alternative interpretation that "in force" was meant to be unnecessarily and narrowly construed to be interpreted as a rate that is currently being charged to a few customers in another geographic region within the existing tariff, wholly undermines the legislature's intent.<sup>9</sup> Note: Chapter 13 of the TWC has multiple references to the phrase "in effect," outlining situations where specific rates are going into effect based on a Commission action or to describe rates that are already in effect based on an existing tariff.<sup>10</sup> Conversely, Chapter 13 generally uses the phrase "in force" when referring to the collection of rates and standards established in a tariff or group of tariffs.<sup>11</sup> Therefore, it would follow that the term "in force" within TWC § 13.3011 is referring to any rates that appear in a tariff filed with a regulatory authority, including year one of a multi-year phased in rate. OPUC contends that the controlling statute in this matter, reading its language according to the laws of statutory

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<sup>9</sup> *Beeman v. Livingston*, 468 S.W.3d 534, 539 (Tex. 2015).

<sup>10</sup> TWC §§ 13.043(c), (h), 13.187(l), 13.1871(s), and 13.305(j).

<sup>11</sup> TWC §§ 13.136(a), (c), 13.139(c), and 13.138 (a).

construction, *confers upon residential and small commercial consumers of an acquired system the same phase-in opportunities as customers of the existing systems.*

## **2. TWC § 13.3011 Should be Interpreted in Harmony with TWC § 13.182**

TWC § 13.182(a) requires that “*every rate* [including rates imposed pursuant to sales, transfer and merger under TWC § 13.3011] made, demanded, or received by any utility . . . be just and reasonable.” [Emphasis added]. TWC § 13.182(b) mandates that “rates may not be unreasonably preferential, prejudicial or discriminatory but shall be sufficient, equitable, and *consistent in application* to each class of consumers.” [Emphasis added]. These tenets of the Water Code should be read in tandem with TWC § 13.3011. Reading the relevant sections of TWC § 13.182 in conjunction with TWC § 13.3011 would require the Commission to honor the phased-in rates in a proposed tariff to be used by an acquiring utility. At the very minimum, if there is a phased-in rate tariff at the time the application was filed, such as exists in this case, the phased-in rate that is active at that time should be used. In the instant application, the phased in rates active as of the date the application was filed are in most cases lower than the rates the applicant is seeking to impose on residential and small commercial customers. Applying a higher rate within the same tariff to the customers of the acquired utility will result in preferential, discriminatory, and inconsistent application of the rates set-forth in the tariff.<sup>12</sup>

## **3. The Commission Need to Provide Clarity as to Which Rates Apply When an Applicant Seeks to Utilize an Existing Tariff That Has Phased-In Rates**

OPUC applauds the effort of the Commission in recently opening a rulemaking project to implement TWC § 13.3011.<sup>13</sup> Between now and when the rule is adopted, the Commission needs to provide clarity as to which rates apply when an applicant seeks to utilize an existing tariff that

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<sup>12</sup> TWC § 13.182(a) and (b).

<sup>13</sup> *Review of Certain Financial and Rate Requirements Related to Water and Sewer Certificates of Convenience and Necessity*, Project No. 54663, Control No. Request Form (Feb. 17, 2023).

has phased-in rates for the acquired utility. TWC § 13.3011 is silent on this issue and there are no rules or guidance in place presently for Commission staff to use in implementing this statute. Under the statutory scheme in TWC § 13.3011, the Commission is not directed or required to impose a rate shown in a tariff for another water or sewer system which is in force for the other water or sewer system on the date the application is filed.<sup>14</sup> The statute simply states that the applicant “*may request* that the regulatory authority with original jurisdiction over the rates for water or sewer service provided by the person to the customers of the system authorize the person to charge initial rates for the service that are: (1) shown in a tariff filed with a regulatory authority by the person for another water or sewer system; and (2) in force for the other water or sewer system on the date the application described by Section 13.301(a) is filed.”<sup>15</sup> [Emphasis added.] The statute then delineates that “[t]he regulatory authority may not require a person who makes a request under Subsection (a) to initiate a new rate proceeding to establish the initial rates for service the person will provide to the customers of the purchased or acquired system.”<sup>16</sup> Under the statute, an applicant may elect to: (a) use the existing tariff for the water system it is acquiring, (b) request to use one of its existing tariff from its other water utility, or (c) file an application for new rates. It is inaccurate to assume that just because the applicant *may request* to use an existing tariff from its other water utility, that the Commission must approve such a request by the applicant. Even if one were to assume that the Commission must approve the request, does the Commission have the discretion or authority to decide which rate shown in the tariff should be given effect? Since this statute does not answer this question, the regulatory authority, in this case the Commission, must provide some guidance while Project No. 54663 is being developed. OPUC would urge the

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<sup>14</sup> TWC § 13.3011.

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

<sup>16</sup> *Id.*



Commission to enable a willing applicant to apply the phase-1 rates in its existing tariff to customers of the acquired utility, especially where using such rates would mitigate the potential rate-shock attendant to the transaction and acquisition. Such is the case in multiple STM dockets currently pending with the Commission.<sup>17</sup> Not allowing the applicant to use the phase-1 rates is delaying the approval of the respective STM cases.

### **CONCLUSION**

For the reasons stated herein, OPUC recommends that the applicant be directed to use the phase-2 rates in effect at the time it filed the instant STM application. The Commission should then determine which of the respective water systems' phase-2 rates may be charged by the applicant to the customers of WOU.

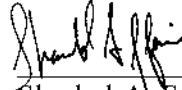
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<sup>17</sup> This is true in Docket No. 52797: *Application of Conroe Resort Utilities, LLC and Undine Texas, LLC, and Undine Environmental, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Montgomery County*; and Docket No. 53765: *Application of Crystal Systems Texas, LLC and Undine Texas, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Smith County*.

Date: April 24, 2023

Respectfully submitted,

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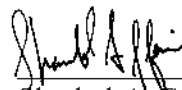
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**CERTIFICATE OF SERVICE**

PUC DOCKET NO. 54546

I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 24th day of April 2023, by facsimile, electronic mail, and/or first class, U.S. Mail.



Sharbel A. Sfeir