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APPLICATION OF TEXAS WATER UTILITIES, LP AND WOODLAND OAKS UTILITY LP FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE AND RIGHTS AND FOR A NAME CHANGE TO CERTIFICATES OF CONVENIENCE AND NECESSITY IN MONTGOMERY COUNTY	§ § § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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COMMISSION STAFF’S STATEMENT OF POSITION

I. INTRODUCTION

The Staff (Staff) of the Public Utility Commission of Texas (Commission) has reviewed the request for clarification filed by Texas Water Utilities, LP (TWU) and Woodland Oaks Utility, LP (Woodland Oaks) (collectively, the Applicants), as well as the amicus brief filed by CSWR-Texas Utility Operating Company, LLC (CSWR-Texas) in support of the Applicants’ request for clarification.

In short, Staff agrees that Ordering Paragraph No. 5 in Order No. 12 (which requires Woodland Oaks to continue to provide continuous and adequate service in its certificated service areas) should not conflict with Ordering Paragraph No. 1 (which provides approval from the Commission for the transaction to be completed as proposed). Further, TWU should be allowed to provide service to the current customers of Woodland Oaks upon closing of the transaction but prior to the issuance of a final order or notice of approval that will effectuate the transfer of the water and sewer certificates of convenience and necessity (CCN) from Woodland Oaks to TWU.

As detailed more fully below, while Texas Water Code (TWC) § 13.242(a) requires a utility to first obtain a CCN from the Commission before rendering retail water and sewer service to the public or to any area to which service is being lawfully furnished by another retail public utility, there are exceptions in the TWC, as well as case precedent, that would allow TWU to provide service within Woodland Oaks’ CCNs upon closing of the transaction.

II. BACKGROUND

On January 4, 2023, the Applicants filed an application for the sale, transfer, or merger (STM) of facilities and certificate rights in Montgomery County under TWC § 13.301 and 16 Texas Administrative Code (TAC) § 24.239.

On July 19, 2023, the administrative law judge (ALJ) filed Order No. 12, approving the sale and transfer to proceed, which included Ordering Paragraph No. 5, which states:

“This Order does not transfer the water or sewer service areas at issue in this proceeding from Woodland Oaks or authorize Texas Water Utilities to provide service in Woodland Oaks' certificated service areas. Woodland Oaks must provide continuous and adequate service in its certificated service areas until a final order or notice of approval issued by the Commission transfers the requested water and sewer service areas.”¹

On August 21, 2023, the Applicants filed a request for clarification of Order No. 12 to determine if Ordering Paragraph No. 5 allows TWU to provide service to the current customers of Woodland Oaks upon the transaction closing as proposed.² On September 29, 2023, the ALJ filed Order No. 14, establishing a deadline of October 13, 2023 for Staff to file a statement of position on the request for clarification. Therefore, this pleading is timely filed.

III. STATEMENT OF POSITION

Staff agrees that Ordering Paragraph No. 5 should not prevent TWU from operating the water and sewer systems and assets to provide service to the current customers of Woodland Oaks upon the transaction closing but prior to the issuance of a final order or notice of approval transferring the CCNs.

The origin of the change to Ordering Paragraph No. 5 seems to stem from Docket No. 53431 and Commissioner McAdams' memorandum filed in that docket.³ Staff understands Commissioner McAdams' memorandum to emphasize that an acquiring utility is not allowed to provide service to the areas within a selling utility's CCN or within any uncertificated or otherwise

¹ Order No. 12 - Approving Sale and Transfer to Proceed at Ordering Paragraph No. 5 (Jul. 19, 2023).

² Texas Water Utilities, L.P. and Woodland Oaks Utility LP's Request for Clarification of Order No. 12 at 2 (Aug. 21, 2023) (Request for Clarification).

³ *Application of Aqua Texas, Inc. and Forest Grove, Inc. dba Southern Oaks Water Supply for Sale, Transfer, or Merger of Facilities and Certificate Rights in Navarro and Freestone Counties and For Dual Certification with Winkler Water Supply Corporation*, Docket No. 54341, Commission McAdams Memo (Jun. 28, 2023).

certificated area that is not included within the transferred area until the acquiring utility's CCN is amended.⁴ Applying that requirement to this case, TWU's CCNs will not be amended until a final order is issued by the Commission, and TWU therefore cannot provide service within Woodland Oak's certificated service areas until the final order is issued amending TWU's CCNs under TWC § 13.242(a).

Although in this docket, the language in Ordering Paragraph No. 5 is clear that Woodland Oaks must continue to provide service until the final order is issued, the Applicants suggest that the Commission can look to Conclusion of Law No. 2 to support an interpretation that Ordering Paragraph No. 5 allows for TWU's operation of the systems and assets once the transaction closes, but prior to the issuance of a final order.⁵

Conclusion of Law No. 2 specifically states that "[a]fter consideration of the factors in TWC § 13.246(c), [TWU] demonstrated that it is capable of rendering continuous and adequate service to every customer within the requested area, as required by TWC § 13.251." TWC § 13.251 states that "a utility [such as Woodland Oaks] may not sell, assign, or lease a [CCN] or any right obtained under a [CCN] unless the [C]ommission has determined that the purchaser, assignee, or lessee [such as TWU] is capable of rendering adequate and continuous service to every consumer within the certified are, after considering the factors under [TWC §] 13.246(c)."

The Applicants argue that Conclusion of Law No. 2, which, when combined with Ordering Paragraph No. 1 (approving the transaction to be completed as proposed), allows the Applicants to move forward with the sale of the relevant portions of Woodland Oaks' CCNs to TWU, as well as the rights obtained under the CCNs.

While Staff agrees that the sale of Woodland Oaks' water and sewer CCNs and any rights obtained thereunder can proceed under this interpretation of Conclusion of Law No. 2 and Ordering Paragraph No. 1, the transaction between the Applicants acknowledges that the transfer of the CCNs will not occur immediately after the transaction is closed, and that the Commission's final approval is needed to the transfer the CCNs.⁶ Even if the Applicants' agreement were to state that the CCNs are sold and effectively transferred to TWU once the transaction has closed, the Commission would still need to issue an order amending the CCNs for TWU to fully comply with

⁴ *Id.* (citing to TWC § 13.242(a)).

⁵ Request for Clarification of Order No. 12 at 4.

⁶ Application, Confidential Attachment 2 - Asset Purchase Agreement at 9 (Jan. 4, 2023).

TWC § 13.242(a), because the action of “obtaining” a CCN under TWC § 13.242(a) is an administrative action requiring Commission approval. Further, Order No. 12 did not authorize TWU to provide service within Woodland Oaks’ certificated service areas pursuant to TWC § 13.242(a).

Staff agrees that TWC § 13.251 should be considered as an exception to the general rule in TWC § 13.242(a) that a utility must first be granted a CCN before being able to provide service in that area, and that, pursuant to TWC § 13.251, TWU will obtain Woodland Oaks’ CCNs and CCN rights, which include the right to provide service under the CCNs that TWU will acquire once the transaction is closed.

Staff also notes that TWC § 13.250(a), (b), and (d) contemplate the provision of service to ratepayers without a CCN. In its amicus brief, CSWR-Texas states that once the STM transaction is closed and TWU owns the facilities used to provide service to Woodland Oaks’ certificated service areas, TWU would be “required under [TWC § 13.250] to continue providing service with those facilities, regardless of its certification status or the willingness of [Woodland Oaks] to continue operations themselves.”⁷ CSWR-Texas argues that Ordering Paragraph No. 5 forces utilities to violate TWC § 13.250.⁸

Staff notes that the requirement to provide continuous and adequate service under TWC § 13.250(a) applies to a retail public utility that either possesses or *is required to possess a CCN*.⁹ Furthermore, TWC § 13.250(b) applies to a person that comes into possession of facilities used to provide service and prohibits such persons from discontinuing, reducing, or impairing service to a certificate service area without Commission approval except in limited circumstances.¹⁰ More specifically, the Legislature intended this language in TWC § 13.250(b) to require such persons who came into possession of service facilities to continue service to everyone within the certificated service area.¹¹ Lastly, TWC § 13.250(d) prohibits a retail public utility *that has not been granted a CCN* from discontinuing, reducing, or impairing service to any ratepayer without

⁷ 54546 CSWR-Texas Amicus Brief in Support of Texas Water Utilities, L.P. and Woodland Oaks Utility LP’s Request for Clarification of Order No. 12 at 2 (Sep. 28, 2023) (citing to TWC § 13.250(a) and (b)).

⁸ *Id.*

⁹ TWC § 13.250(a).

¹⁰ TWC § 13.250(b).

¹¹ See Bill Analysis, H.B. 827, Committee on Natural Resources, available at https://lrl.texas.gov/LASDOCS/72R/HB827/HB827_72R.pdf#page=41 (last accessed Oct. 13, 2023).

Commission approval except in limited circumstances.¹² Staff therefore agrees that TWC § 13.250 allows, and may even require, TWU to provide continuous and adequate service to Woodland Oaks' customers within Woodland Oaks' CCNs once the transaction is closed, regardless of TWU's certification status under TWC § 13.242(a).

This however does not resolve the conflict Ordering Paragraph No. 5 has created by requiring Woodland Oaks to continue to provide service until the issuance of a final order. Just as TWC § 13.250(b) applies to TWU once it closes the transaction and becomes the owner of the facilities, TWC § 13.250(b) conversely applies to Woodland Oaks and allows it to discontinue service without Commission approval under the limited exceptions, despite the language in Ordering Paragraph No. 5 ordering Woodland Oaks to the contrary. Specifically, Staff contends that once Woodland Oaks no longer owns the facilities used to provide service and is no longer liable under the transaction to provide service, such facilities would be subject to TWC § 13.250(b)(3) for nonuse by Woodland Oaks and TWC § 13.250(b)(4) for other similar reasons in the usual course of business.

Additionally, TWC § 13.254(a)(3) contemplates the provision of service without a CCN. This provision allows for the decertification of a CCN to the extent a CCN holder has agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its certificate.¹³ As an example, Somervell County Water District (Somervell) and Sunset Park Water Corporation (Sunset Park) had an agreement in which Somervell interconnected and provided services within Sunset Park's CCN after Sunset Park's water system experienced mechanical failure.¹⁴ Further, the application to cancel Sunset Park's CCN was filed after a period in which Somervell had already been serving Sunset Park's customers.¹⁵ While the application ultimately did not seek to amend Somervell's CCN,¹⁶ it does present the Commission with an example where, if necessary, a utility can provide service in another utility's CCN without first obtaining a CCN to serve in that same certificated service area.

¹² TWC § 13.250(d).

¹³ TWC § 13.254(a)(3).

¹⁴ *Application of Somervell County Water District to Cancel Sunset Park Water Corporation's Certificate of Convenience and Necessity in Somervell County*, Docket No. 46301, Order (Mar. 30, 2017).

¹⁵ *Id.*

¹⁶ *Id.*

Alternatively, although the STM transaction between the Applicants is meant to be permanent, the period between the close of the transaction and the final order amending the CCNs could be considered an interim period. And TWC §§ 13.242(a) and 13.254(a)(3) are not contemplated during such an interim period, thereby allowing TWU to immediately provide service upon its acquisition of the facilities.

Aside from the foregoing potential statutory exceptions, if the general rule under TWC § 13.242(a) is still applied such that the Applicants must strictly follow Ordering Paragraph No. 5, Woodland Oaks could still satisfy this ordering paragraph through TWU's provision of the service. Specifically, under *Bexar Metro. Water Dist. v. Texas Com'n on Env't Quality*, ownership of the facilities used to provide service is not legally required.¹⁷ This precedent was established when the City of Bulverde (Bulverde) sought to obtain a CCN.¹⁸ However, to satisfy the requirements of TWC § 13.241 for a CCN, Bulverde presented, as the basis for its ability to provide service, its contract with the Guadalupe-Blanco River Authority (GBRA), which provided that GBRA would design, construct, operate, and maintain a water system on Bulverde's behalf.¹⁹

The Commission issued an order granting Bulverde a CCN, which Bexar Metropolitan Water District, who had a competing CCN application for the same area, appealed.²⁰ On appeal, the Austin Court of Appeals ultimately affirmed the Commission's order, holding that Bulverde met the requirements of TWC § 13.241 despite satisfying them through a contractor and that Bulverde was not required to own the facilities that would be used to provide service.²¹ The Court of Appeals also held that the Commission would have regulatory authority to bring an enforcement action against a contractor such as GBRA through TWC § 13.411 in conjunction with TWC § 13.250.²²

Under *Bexar Metro.*, the Applicants could comply with Ordering Paragraph No. 5, even if TWU were to provide service to Woodland Oaks' customers upon the closing of the transaction. Stated similarly, Woodland Oaks, through TWU's ownership and operations of the facilities, could

¹⁷ *Bexar Metro. Water Dist. v. Texas Com'n on Env't Quality*, 185 S.W.3d 546 (Tex. App.—Austin, 2006).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

continue to provide continuous and adequate service to satisfy Ordering Paragraph No. 5, as well as TWC § 13.250(a). The STM transaction agreement between the Applicants would then serve as the basis to hold TWU accountable for providing the service that Woodland Oaks is obligated to provide under its CCNs until the Commission transfers the CCNs in a final order.

Notwithstanding the statutory exceptions and the precedent detailed above, if Ordering Paragraph No. 5 ultimately prohibits TWU from operating the systems and assets to provide service once the transaction is closed, then Staff recommends that Ordering Paragraph No. 1 be amended to delete the words “as proposed.” That way, the Applicants could potentially complete the transaction, as modified, and Woodland Oaks could legally continue to provide service until the issuance of a final order in compliance with Ordering Paragraph No. 5.

IV. CONCLUSION

Staff agrees with the Applicants’ arguments outlined in their Request for Clarification and submits its statement of position for the ALJ’s consideration.

Dated: October 13, 2023

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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CERTIFICATE OF SERVICE

I certify that unless otherwise ordered by the presiding officer, notice of the filing of this document will be provided to all parties of record via electronic mail on October 13, 2023 in accordance with the Second Order Suspending Rules, issued in Project No. 50664.

/s/ Scott Miles
Scott Miles