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**SOAH DOCKET NO. 473-24-13127  
PUC DOCKET NO. 54617**

**APPLICATION OF TEXAS WATER UTILITIES, L.P. AND SOUTHERN HORIZONS DEVELOPMENT, INC. FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS IN LIBERTY AND MONTGOMERY COUNTIES** § § § § § § § § **BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**TEXAS WATER UTILITIES, L.P.’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

Texas Water Utilities, L.P. (TWU), on behalf of itself and Southern Horizons Development, Inc. (Southern Horizons) files these Exceptions to the Proposal for Decision (PFD).<sup>1</sup> These exceptions are timely filed on or before November 15, 2024.<sup>2</sup>

**I. EXECUTIVE SUMMARY**

The PFD should be rejected and amended<sup>3</sup> pursuant to the following:

- The PFD’s application of 16 TAC § 24.240 is in error, retroactive application of an administrative rule substantially prejudices TWU’s material rights and is against the Texas Code of Construction Act and prior Texas Supreme Court precedent.
- Record evidence of TWU’s planned capital improvements show sufficient certainty to demonstrate that Southern Horizons’ customers will receive a probable improvement in service post-acquisition.
- TWU’s acquisition of Southern Horizons would still lead to a probable improvement of service even though Southern Horizons’ system does not have any TCEQ violations.
- Under Texas Water Code (TWC) § 13.3011(b), the correct inquiry is whether TWU’s rates are designed to recover costs to all systems and customers served by TWU and not whether rates are tailored to specific customers and systems.

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<sup>1</sup> State Office of Administrative Hearings (SOAH) Proposal for Decision with Memorandum (Oct. 22, 2024).

<sup>2</sup> Exceptions and Replies Memorandum (Nov. 1, 2023).

<sup>3</sup> A redline of the Findings of Fact, Conclusions of Law, and Ordering Paragraphs contained in the PFD are attached hereto as Attachment A for the Commission to adopt consistent with TWU’s Exceptions to the PFD.

- If initial rates for Southern Horizons’ customers were set at its current rates, TWU’s other customers would effectively be subsidizing Southern Horizons’ customers, which is contrary to the public interest.
- Southern Horizons current rates do not encourage conservation of usage.
- Southern Horizons’ current rates have not generated revenues sufficient to cover his costs in years when a substantial repair or improvement was needed.
- TWU’s requested initial rates are uniform, systemwide rates that allow TWU to recover its rate of return authorized in Docket No. 50944.
- TWC § 13.3011 is applicable to this proceeding and applies to transactions under TWC § 13.301.
- Enactment of TWC § 13.3011 does not signal a legislative decision that the filed-rate doctrine does not apply to transactions under TWC § 13.301.

## II. EXCEPTIONS TO PROPOSAL FOR DECISION

### A. **The only legal authority applicable to TWU’s request for initial rates is TWC § 13.3011—the corresponding rule, 16 TAC § 24.240, does not apply to this proceeding.**<sup>4</sup>

The PFD’s reliance on 16 TAC § 24.240 constitutes a retroactive application of this rule and should be rejected. The application in this proceeding was filed on February 2, 2023, the application was found administratively complete on April 5, 2023, and notice of the application was found sufficient on June 22, 2023. The Commission adopted the preliminary order for this proceeding on March 7, 2024. The PFD acknowledges each of these facts.<sup>5</sup> The Commission adopted 16 TAC § 24.240 on March 21, 2024,<sup>6</sup> and the rule took effect on April 10, 2024.<sup>7</sup>

Citing to the United States Supreme Court, the Texas Supreme Court has found that “agencies use rules to regulate future conduct and adjudications to determine past and present rights and liabilities” and that “adjudication deals with what the law was; rulemaking deals with

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<sup>4</sup> PFD at 8–10, 16, 52–54 and Conclusion of Law No. 29.

<sup>5</sup> *Id.* at Findings of Fact Nos. 6, 12, 18, and 28.

<sup>6</sup> *Water and Sewer Utility Rates After Acquisition*, Project No. 53924, Order Adopting 16 TAC §24.240 (Mar. 21, 2024).

<sup>7</sup> *Id.*, Texas Register Acknowledgment (Mar. 21, 2024); Tex. Gov’t Code § 2001.036(a).

what the law will be.”<sup>8</sup> The Texas Code Construction Act provides that statutes are presumed to operate prospectively unless expressly made retrospective.<sup>9</sup> Under the same principle, a statutory grant of rulemaking authority is not interpreted to bestow the authority to promulgate retroactive rules unless such authority is expressly stated.<sup>10</sup> Because administrative rules have the same force and effect as statutes, courts will construe administrative rules in the same manner as statutes.<sup>11</sup> Therefore, these principles apply to the application of 16 TAC § 24.240.

The Commission is not expressly granted any rulemaking authority in TWC § 13.3011, retroactive or otherwise. While TWU does not challenge the Commission’s authority to adopt a rule to implement this statute, it does challenge the notion that any rule adopted is applicable to a request for initial rates that was filed with the Commission before the rule was effective. Not only does 16 TAC § 24.240 establish criteria to be used to review a request for initial rates that goes beyond the criteria enumerated in TWC § 13.3011(a),<sup>12</sup> it also establishes notice requirements when the statute does not require notice at all.<sup>13</sup> Therefore, the PFD’s reliance on 16 TAC § 24.240 substantially prejudices TWU’s material rights because it retroactively imposes requirements to an application that predates the adoption of the rule.

The preliminary order approved by the Commission in Docket No. 55763 supports the conclusion that the Commission intends 16 TAC § 24.240 to apply prospectively. The application in that proceeding was filed on October 26, 2023, and was found administratively complete on February 6, 2024.<sup>14</sup> Notice was found sufficient on March 19, 2024.<sup>15</sup> The preliminary order for Docket No. 55763 was issued on July 11, 2024—well after 16 TAC § 24.240 was effective—but cites only to TWC § 13.3011 in the “Initial Rates”

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<sup>8</sup> *In re CenterPoint Energy Houston Electric, LLC*, 619 S.W.3d 149, 156 (Tex. 2021) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218–19, 221 (1988)).

<sup>9</sup> Tex. Gov’t Code § 311.022.

<sup>10</sup> *See Bowen*, 488 U.S. at 208; *R.R. Comm’n v. Lone Star Gas Co.*, 656 S.W.2d 421, 425 (Tex. 1983); *All Saints Health Sys. v. Tex. Workers’ Comp. Comm’n*, 125 S.W.3d 96, 104 (Tex. App. Austin—2003, pet. denied) (“Agency rules and rates are set for the future, not for the past.”) abrogated on other grounds by *Tex. Health and Human Servs. Comm’n v. El Paso Cty. Hosp. Dist.*, 351 S.W.3d 460 (Tex. App. Austin—2011, pet. denied).

<sup>11</sup> *Rodriguez v. Serv. Lloyds Ins. Co.*, 991 S.W.2d 248, 254 (Tex. 1999).

<sup>12</sup> *See, e.g.*, 16 TAC § 24.240(d) and (f).

<sup>13</sup> 16 TAC § 24.240(c).

<sup>14</sup> *Application of Texas Water Utilities, L.P. and NextEra Water Texas, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Aransas, Brazoria, Fort Bend, Harris, Jackson, Matagorda, Montgomery, and Waller Counties*, Docket No. 55763, Preliminary Order at 2 (Jul. 11, 2024).

<sup>15</sup> *Id.*, Preliminary Order at 2.

subsection.<sup>16</sup> In contrast, the rest of the preliminary order contains citations to both the statute and the corresponding rule when appropriate.<sup>17</sup>

In addition to the foregoing, the record in this proceeding does not support the application of 16 TAC § 24.240. No party filed direct testimony citing to this rule. No party cited to this rule in initial or reply briefs. Until the PFD, the only time 16 TAC § 24.240 was referenced was in OPUC's statement of position and its proposed conclusions of law, neither of which were admitted into evidence.<sup>18</sup> Had any party filed testimony citing to 16 TAC § 24.240, TWU would have objected and addressed the application of the rule on rebuttal. Had any party filed an initial brief citing to 16 TAC § 24.240, TWU would have objected and raised arguments in opposition in its reply brief. Had any party filed a reply brief citing to 16 TAC § 24.240, TWU would have objected and requested time to respond. TWU did not have the opportunity to do any of those things because no party cited to 16 TAC § 24.240 as support for their position on TWU's requested initial rates. Applying this rule in the absence of any record evidence citing to the rule further prejudices TWU's rights in this proceeding. It is the equivalent of applying a different set of rules to a game after the game has ended, which is de facto prejudicial.

Based on the foregoing, TWU excepts to the PFD's conclusion of law 29, and other improper determinations contained in the PFD supporting the same.

**B. The PFD sets an unrealistic standard regarding the certainty of post-acquisition capital improvements.<sup>19</sup>**

The PFD's analysis under 16 TAC § 24.239(h)(5)(H) does not give appropriate weight to the [REDACTED] of post-acquisition capital improvements included in the application.<sup>20</sup> One of those improvements is a [REDACTED] which is a major project.<sup>21</sup> A required component of the STM application is an affidavit from the transferee attesting that all statements and matters set forth in the application are true and correct.<sup>22</sup> Labeling these planned capital improvements as anything other than estimates would put TWU in a position of swearing under

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<sup>16</sup> *Id.*, Preliminary Order at 7–8 and fn. 40–43.

<sup>17</sup> *Id.*, Preliminary Order at fn. 7–20, 22–25, 27, 29–30, 32–33, 44–46, and 48–50.

<sup>18</sup> *See* Tr. at 9:1–6 (showing that no exhibits offered by OPUC were admitted).

<sup>19</sup> PFD at 50–51 and Finding of Fact Nos. 76–78.

<sup>20</sup> Confidential Direct Testimony of Brian D. Bahr, Ex. TWU-2, Attachment BDB-2a at 95.

<sup>21</sup> *Id.*

<sup>22</sup> Redacted Direct Testimony of Brian D. Bahr, Ex. TWU-1, Attachment BDB-2 at 16.

oath that it will make the improvements listed in the application and according to the timeline provided before it actually owns and has had the opportunity to operate the facilities to be acquired. Yet this is exactly what the PFD requires, stating:

Improvements like those proposed by TWU in the Application could meet the threshold if there was some certainty as to what exact projects were to be initiated and if they would occur shortly after the acquisition is complete. Here, however this is not such certainty. . .<sup>23</sup>

The application presents the best information TWU was able to provide without actually owning and operating the facilities, and no party challenged this information. Asking the transferee in an STM to make a firm and final commitment regarding capital improvement projects before it has even acquired the facilities to which the improvements will be made is impractical. Accordingly, the record contains evidence of planned capital improvements sufficient to support a finding that there will be a probable improvement of service for the Southern Horizons customers post-acquisition.<sup>24</sup>

Based on the foregoing TWU excepts to the PFD's findings of fact 76 through 78 and other improper determinations contained in the PFD supporting the same.

**C. The absence of unresolved TCEQ violations for the facilities to be transferred does not preclude a finding that there will be a probable improvement of service.<sup>25</sup>**

If the PFD is adopted, it could establish a precedent whereby the Commission will only grant a request for initial rates if there are outstanding TCEQ violations for the systems to be acquired.<sup>26</sup> This policy is too narrow and does not encourage acquisitions. Under 16 TAC § 24.205, a utility must “plan, furnish, operate, and maintain production, treatment, storage, transmission, and distribution facilities of sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses.” The rule goes on to state that the water system and quantity requirements of the TCEQ shall be the minimum standard for determining the sufficiency of the facilities and the safety of the water supplied.<sup>27</sup>

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<sup>23</sup> PFD at 50.

<sup>24</sup> *See supra* at fn. 19–20.

<sup>25</sup> PFD at Findings of Fact 76 and 78.

<sup>26</sup> *See* PFD at 49, 51 and Findings of Fact Nos. 76–78.

<sup>27</sup> 16 TAC § 24.205(1).

Using the minimum standard a utility must meet to demonstrate it is providing continuous and adequate service as the benchmark for whether there will be a probable improvement of service sets a very low bar. Moreover, it creates a perverse incentive where an acquisition is most attractive when the transferor is struggling to provide continuous and adequate service to its customers. The Commission should encourage a proactive rather than a reactive approach to acquisitions such that systems are sold and transferred to a utility with superior access to the capital needed to perform all necessary repairs, upgrades, or replacements *before* customers suffer any negative impacts to service. Approaching consolidation in this manner will provide an overall benefit to both the customers and the utilities that serve them.

Linking a finding that there will be a probable improvement of service to the presence of unresolved TCEQ violations is also contrary to Commission precedent. For example, in Docket No. 54171, the Commission found that the transferor did not have any unresolved violations listed in the TCEQ database and also found that the transaction would result in a probable improvement of service.<sup>28</sup> The Commission also approved initial rates that are the same initial rates TWU is requesting in this proceeding.<sup>29</sup> A finding of a probable improvement of service even in the absence of TCEQ violations is common in STM proceedings.<sup>30</sup> In light of this, it appears that the PFD's conclusion is more accurately stated as follows: "there will not be a large enough improvement of service to support approval of the requested initial rates." This is not the standard enumerated in TWC § 13.246(c)(8) or 16 TAC § 24.239(h)(5)(H). Therefore, the PFD should be amended to include a finding that there will be a probable improvement of service.

**D. The question of whether the requested initial rates are tailored to the Southern Horizons systems is improper under TWC § 13.3011(b) and contrary to the concept of systemwide rates.<sup>31</sup>**

The PFD's public interest analysis concludes that "the Requested rates are not tailored to the [Southern Horizons] Systems or based on the cost of service needed to serve the Systems'

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<sup>28</sup> *Application of Texas Water Utilities, L.P. and CS Water Corporation for Sale, Transfer, or Merger of Facilities and Certificate Rights in Bosque County*, Docket No. 54171, Order at Findings of Fact Nos. 42 and 79 (Aug. 15, 2024).

<sup>29</sup> *Id.*, Order at Finding of Fact No. 80.

<sup>30</sup> See, e.g. *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, Order (Feb. 15, 2024); Docket No. 54171, Order (Aug. 15, 2024); *Application of SJWTX, Inc. and KT Water Development, Ltd. For Sale, Transfer, or Merger of Facilities and Certificate Rights in Comal County*, Docket No. 54530, Order (Mar. 7, 2024).

<sup>31</sup> PFD at 52.

customers.”<sup>32</sup> This fact is not an appropriate consideration in this case because the only time a cost of service review occurs is in a rate general case,<sup>33</sup> and TWC § 13.3011(b) expressly prohibits the Commission from requiring a new rate proceeding to establish initial rates.<sup>34</sup> Assessing the public interest of the requested rates on this standard would set a test **no utility could meet**, rendering TWC § 13.3011 useless. The Commission recognized this in 16 TAC § 24.240(f)(2)(A), which makes it clear that TWU is not required to establish the cost of serving the Southern Horizons’ systems and customers.<sup>35</sup> Therefore, the PFD’s reliance on this fact is improper.

Focusing on whether the initial rates are tailored to the cost of serving the Southern Horizons’ systems and customers is also problematic because it is contrary to the concept of consolidated, systemwide rates. The requested initial rates are the systemwide rates the Commission approved for TWU in its last general rate case, Docket No. 50944.<sup>36</sup> Rates are not tailored to individual systems and customers—they are tailored to recover the annual cost the utility incurs to serve **all its systems and customers**. Transferring the Southern Horizons’ systems and customers to TWU will generate both additional revenues and additional costs. The amount of the additional revenues will be dictated by the initial rates approved by the Commission, and the amount of the additional costs will be dictated by what it costs TWU to provide service to its customers.

The requested initial rates are the systemwide rates the Commission has set to recover a revenue requirement that reflects TWU’s cost of service.<sup>37</sup> This is the level of service the Southern Horizons customers will receive once the transaction is complete. Similar to TWU’s existing customers, the Southern Horizons customers will benefit from having a water service provider with greater access to capital, which means lower capital costs, and will have less variability in rates because they be served by a larger utility.<sup>38</sup> To discount these facts is

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<sup>32</sup> *Id.*

<sup>33</sup> Even if TWU filed a system improvement charge (SIC), the SIC remains a monthly charge separate and apart from base rates until the underlying costs and capital investment are reviewed for prudence in a general rate case. 16 TAC § 24.76(h)–(i).

<sup>34</sup> TWC § 13.3011(b).

<sup>35</sup> TWU continues to assert that 16 TAC § 24.240 does not apply to this case but raises this issue since the PFD purports to adhere to this rule.

<sup>36</sup> TWU Ex. 1 at 15:3–4.

<sup>37</sup> Ex. TWU-1, Attachment BDB-7 at 2–4.

<sup>38</sup> Ex. TWU-1 at 22:1–15.



tantamount to a decision that TWU's current customers should subsidize the Southern Horizons' customers. Such a decision would constitute approval of an unreasonably preferential rate, and therefore, should be rejected.<sup>39</sup>

**E. Customer bills impacts alone are not sufficient to justify approving the existing Southern Horizons rates.<sup>40</sup>**

Two of the four facts cited in the PFD's public interest analysis speak to the impact the requested initial rates will have on customer bills.<sup>41</sup> In a general rate case, the magnitude of the impact on customer bills does not typically serve as grounds for the Commission to deny any change in rates whatsoever. At most, it factors in to whether the Commission approves some sort of mitigation like phased-in rates. Here, the PFD has concluded that the size of the bill impact supports no change in rates<sup>42</sup> even though both Commission Staff and OPUC opined that phased-in rates schedule applicable to the Villas of Willowbrook would be a reasonable alternative to TWU's requested initial rates.<sup>43</sup> Leaving the rates for the Southern Horizons customers as-is would not be the outcome if TWU filed a rate case, and it should not be the outcome here.

The PFD's comments on cost also do not appear to consider where the bulk of the increase is coming from. The current Southern Horizons rates include 2,000 gallons of usage in the monthly minimum charge and a flat, rather than a tiered, volumetric rate.<sup>44</sup> This is not a rate structure that encourages conservation.<sup>45</sup> It also means that for a customer using 5,000 gallons per month, 63% of the increase in customer bills is attributable to the difference in Southern Horizons' and TWU's volumetric rates.<sup>46</sup> The portion of a customer's bill that is based on usage is the portion over which the customer has control.<sup>47</sup> When combined with the facts discussed in Section II.1., the record does not support approving Southern Horizons' existing rates.

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<sup>39</sup> TWC § 13.182(b).

<sup>40</sup> PFD at 52.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Direct Testimony of James Harville, Staff Ex. 2 at 12:2–12; Office of Public Utility Counsel's Initial Brief at 6 (Aug. 23, 2023).

<sup>44</sup> Redacted Rebuttal Testimony of Brian D. Bahr, Ex. TWU-5 at 7:1–7.

<sup>45</sup> Ex. TWU-5 at Attachment BDB-R-5.

<sup>46</sup> Ex. TWU-5 at 6:21 – 23 and Attachment BDB-R-3.

<sup>47</sup> Ex. TWU-5 at 7:3–4.

**F. The PFD does not encourage consolidation of small utilities.<sup>48</sup>**

The final fact cited by the PFD in its public interest analysis is a comparison of the amount of revenue generated by the requested initial rates and the amount of TWU's rate base.<sup>49</sup> The fact that the revenues generated by the requested initial rates would be a very small percentage of TWU's "rate base"<sup>50</sup> is purely due to the fact that TWU is a large utility and Southern Horizons is a small utility. If this factor is found to be relevant to the public interest inquiry, then it will count as a negative for any transaction where a Class A utility seeking to acquire a Class D utility. There is no legal requirement to consider this fact, and it is contrary to the goal of encouraging consolidation of small utilities with larger ones. Therefore, the Commission should disregard this element of the PFD's analysis.

**G. The PFD misapplies 16 TAC § 24.240(f)(2)(B).<sup>51</sup>**

Overall, the PFD's just and reasonable analysis should be rejected because it applies 16 TAC § 24.240(f), which, as explained previously, does not apply to this proceeding.<sup>52</sup> If the analysis stands, then it should be rejected because it misapplies 16 TAC § 24.240(f)(2)(B). The PFD cites TWU's decision not to include its water pass-through in its request for initial rates as a reason that the requested initial rates are not just and reasonable.<sup>53</sup> TWU had a number of pass-through rates in effect at the time the application was filed.<sup>54</sup> While there was a \$2.34 pass-through rate applicable to the majority of TWU's systems, the Southern Horizons customers are not currently charged any pass-through rates.<sup>55</sup> Therefore, the PFD is unclear how TWU's decision to exclude a water pass-through rate from its request for initial rates renders the request unjust or unreasonable. To the contrary, 16 TAC § 24.240(f)(2)(B) appears to indicate that a system-specific charge such as a pass-through charge may be unjust or unreasonable if applied to customers acquired through an STM.

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<sup>48</sup> PFD at 52.

<sup>49</sup> *Id.*

<sup>50</sup> Comparing revenues to rate base is not an appropriate comparison. A more apposite comparison would be between the revenues generated at the requested initial rates and TWU's overall water revenues. The PFD appears to draw this incorrect comparison because that is the comparison that was drawn in briefing. Office of Public Utility Counsel's Post-Hearing Initial Brief at 6 (Aug. 9, 2024).

<sup>51</sup> PFD at 53.

<sup>52</sup> *Id.* at 52–53.

<sup>53</sup> *Id.* at 53.

<sup>54</sup> Ex. TWU-1, Attachment BDB-2 at 88–114, 127, and 130.

<sup>55</sup> *Id.* at 25–27.

**H. The PFD’s analysis highlights the contradiction in 16 TAC § 24.240(f)(2)(A) and (B), but does not attempt to resolve it.<sup>56</sup>**

The PFD’s just and reasonable analysis is confusing because it attempts to apply 16 TAC § 24.240(f)(2)(B), which reads as contradictory to 16 TAC § 24.240(f)(2)(A). Specifically, the transferee is not required to establish “substantial similarity between the acquired water or sewer system and the water or sewer system to which the requested rates already apply,”<sup>57</sup> but the Commission is permitted to consider “evidence of whether the requested rates are generally consistent with the rates charged to similar water or sewer systems.”<sup>58</sup> Regardless of the rule, a showing of substantial similarity should not be required because (1) when TWC § 13.145 was in effect, this was a required showing in a rate case, which renders it inapplicable to a request for initial rates under TWC § 13.3011(b); and (2) a showing of substantial similarity is no longer required in a rate case because TWC § 13.145 has been repealed.<sup>59</sup>

Further, the repeal of TWC § 13.145 means that substantial similarity is no longer a defined standard. As such, it is not possible to reconcile how a showing of substantial similarity differs from the showing contemplated in 16 TAC § 24.240(f)(2)(B), and the PFD provides no insight on this issue. In this proceeding, a showing of similarity is particularly unpersuasive because TWU currently provides service to over 140 public water systems, only very few of which are not currently charged the requested initial rates. Stated another way, requiring a showing of similarity contravenes the Commission’s approval of a systemwide rate for TWU in Docket No. 50944.

**I. Taken as a whole, the PFD’s analysis of whether the requested initial rates are in the public interest and just and reasonable presents an unworkable framework that does not take into account the record evidence as a whole.<sup>60</sup>**

Rather than attempt to create a unified framework that can be used to evaluate a request for initial rates under TWC § 13.3011, the PFD reads as though the questions of, (1) whether approval of the transaction, including the requested initial rates, is in the public interest; and (2) whether the requested initial rates are just and reasonable, are two separate issues.<sup>61</sup> In doing

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<sup>56</sup> PFD at 53.

<sup>57</sup> 16 TAC § 24.240(f)(2)(A).

<sup>58</sup> 16 TAC § 24.240(f)(2)(B).

<sup>59</sup> TWC § 13.145.

<sup>60</sup> See PFD at 49–52.

<sup>61</sup> See *id.*

so, the PFD implies that TWC §§ 13.301(e) and 13.246(c) and 16 TAC § 24.239(h)(5) control the public interest inquiry,<sup>62</sup> while TWC § 13.182 (and 16 TAC § 24.240(f)) control the just and reasonable inquiry.<sup>63</sup> Under this paradigm, a requested initial rate could be found just and reasonable but not in the public interest or vice versa.

Separating the inquiries in this manner also results in a situation where the probable improvement of service or lowering of costs to customers becomes the dispositive factor in the public interest inquiry even though the plain language of TWC §§ 13.301(e) and 13.246(c) do not indicate that any one factor takes precedence over another when determining whether a transaction is in the public interest. Placing this much emphasis on a single criterion is also ill-advised because it is not clear that the Legislature intended TWC §§ 13.301(e) to apply to a request for initial rates. While TWC § 13.301(e) specifically references TWC § 13.246(c), it does not reference TWC § 13.3011. Per the canon of statutory construction *expressio unius est exclusio alterius*, the express mention of one thing excludes all others. Because the public interest criteria are listed in TWC § 13.301(e) and do not reference TWC § 13.3011 or initial rates, it raises the question of whether the Legislature intended the factors in TWC §§ 13.301(e) and 13.246(c) (i.e., factors designed to evaluate whether granting or amending a certificate of convenience and necessity is in the public interest) to apply to a request for initial rates at all.

It is true that the Commission has determined that the criteria to be used to evaluate a request for initial rates will be addressed on a case-by-case basis.<sup>64</sup> Yet, the PFD adheres rigidly to the criteria enumerated in 16 TAC § 24.239(h)(5) and 16 TAC § 24.240 (which does not apply in this proceeding). As shown in Sections II.B and II.C., the record supports a finding that there will be a probable improvement of service. As shown in Sections II.D. through II.H., many of the facts relied on in the PFD's public interest and just and reasonable analysis are either inapposite, undermine widely accepted concepts like systemwide rates, or are contrary to the goal of encouraging consolidation through acquisition.

Most concerning is that the PFD places all the emphasis on facts that speak to how the initial rates will affect customers and largely ignores the facts on TWU's side of the equation, which is an unbalanced public interest analysis. Most noticeably, the PFD does not discuss TWC § 13.183, which requires fixing a utility's overall revenues at a level that permits the utility

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<sup>62</sup> *See id.*

<sup>63</sup> *See* PFD at 53.

<sup>64</sup> Preliminary Order at 3 (Mar. 7, 2024).

to earn a reasonable return on its invested capital.<sup>65</sup> The Commission determined the overall level of revenue that satisfied this requirement in Docket No. 50944. The requested initial rates are uniform, systemwide rates that are designed to allow TWU to recover that level of revenue.<sup>66</sup> TWU is not currently earning the full 7.73% return authorized in Docket No. 50944,<sup>67</sup> and approving the initial rates will not result in TWU earning greater than its authorized return.<sup>68</sup>

Further compounding the return issue is the fact that Southern Horizons' last rate increase was a Class D rate adjustment, which provides an automatic increase of up to 5% and does not entail any review whatsoever of the utility's cost of service.<sup>69</sup> Therefore, Southern Horizons' cost of service has not been comprehensively reviewed since 2009 when it filed its last rate case with the TCEQ.<sup>70</sup> Southern Horizons' witness Steve Sullivan testified that operating costs since then have risen with inflation.<sup>71</sup> He also opined that the current rates have not generated revenues sufficient to cover his costs in years when a substantial repair or improvement was needed for one of the Southern Horizons' water systems.<sup>72</sup>

The PFD also appears to give no weight to the calculation provided by TWU witness Brian Bahr that is based on the ratemaking rate base for Southern Horizons and the operating expenses per customer from TWU's 2022 Annual Report. This calculation results in an estimated bill that is higher than what a Southern Horizons customer would pay at TWU's requested initial rates. To reach the total bill amount, Mr. Bahr divided TWU's total water operations and maintenance (O&M) expense for 2022 by its normalized water customer count, to calculate a monthly O&M cost per customer.<sup>73</sup> He then used the requested ratemaking rate base for Southern Horizons, including the amount requested for the fees paid to the utility valuation experts, the current customer count of 461,<sup>74</sup> and TWU's pre-tax weighted average cost of

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<sup>65</sup> TWC § 13.183(a).

<sup>66</sup> Docket No. 50944, Order at Conclusion of Law No. 13.

<sup>67</sup> Confidential Ex. TWU-2 at 14:7–15; Docket No. 50944, Order at Conclusion of Law No. 14.

<sup>68</sup> *Id.* at 14:1–17.

<sup>69</sup> 16 TAC § 24.49(c); Tr. at 48:8–16 (Bahr Re-Direct) (Jul. 23, 2024).

<sup>70</sup> Direct Testimony of Steve Sullivan, Ex. TWU-3 at 7:1–6 and Attachment SCS-1.

<sup>71</sup> *Id.* at 7:7–10.

<sup>72</sup> *Id.* at 7:10–13.

<sup>73</sup> Rebuttal Testimony of Brian D. Bahr, Confidential Ex. TWU-6 at 4:14–20 and Attachment BDB-R-2 at lines 18–21.

<sup>74</sup> Ex. TWU-3 at 5:18–21.

capital to calculate a monthly capital cost of service per customer.<sup>75</sup> When added together, these per-customer amounts would result in an estimated monthly bill that is higher than the \$85.27 (5,000 gallons) or \$125.17 (10,000 gallons) a Southern Horizons customer would pay<sup>76</sup> at TWU's requested initial rates.<sup>77</sup>

Approving initial rates that are designed recover a cost of service that was last reviewed 15 years ago and based on a level of overall revenues needed to operate a utility with a service model that is not as robust or comprehensive as TWU's is at best not in the public interest and at worst confiscatory. At a minimum, the Southern Horizons' customers should be charged initial rates that put them on a schedule of increases that results in the rate the Commission has found will comply with TWC § 13.183(a). The legislative policy and purpose of Chapter 13 of the TWC is "to establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities."<sup>78</sup> One of the key factors in determining whether a rate is just and reasonable to the utility is the opportunity to earn a reasonable return. If the PFD is upheld, and the existing Southern Horizons rates are approved, the Commission will be actively denying TWU that opportunity. Taken as a whole, and in light of the issues with several of the facts relied on by the PFD, the record evidence is sufficient to overcome the fact that Southern Horizons is currently providing continuous and adequate service, i.e., is meeting minimum regulatory standards, and sufficient to support approval of TWU's requested initial rates.

**J. The findings of fact and conclusions of law included in the PFD are incomplete.**

The PFD does not specifically state each fact expressly identified as supporting its public interest and just and reasonable analyses as a finding of fact addressing the initial rates and does not include all corresponding conclusions of law. For example, the PFD does not include a finding of fact stating that TWU did not request initial rates that included the water pass-through charge applicable to the majority of TWU's customers; there is no finding of fact that the requested initial rates are not based on the cost of service to serve the Southern Horizons' customers; and there is no finding of fact regarding the size of the rate increase the Southern

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<sup>75</sup> Confidential Ex. TWU-6 at 4:20–5:3 and Attachment BDB-R-2 at lines 5–16 and 24.

<sup>76</sup> Direct Testimony of James Harville, Staff Ex. 2, Attachment JH-2 at 1.

<sup>77</sup> Confidential Ex. TWU-6 at 5:3–5.

<sup>78</sup> TWC § 13.001(c).

Horizons' customers will experience if the requested initial rates are approved.<sup>79</sup> The PFD also omits a conclusion of law stating that the requested initial rates are not just and reasonable or citing to 16 TAC § 24.240(f)(2)(B) when it expressly relied on this rule provision to support its just and reasonable analysis.<sup>80</sup>

If, as the PFD indicates, there are four facts relevant to the determination that the requested initial rates are in the public interest,<sup>81</sup> then those four facts should be stated as findings of fact. If the requested initial rates are not just and reasonable,<sup>82</sup> then the PFD should include that conclusion of law. Moreover, citing to all rules relied on is of particular import in this proceeding because 16 TAC § 24.240 includes several elements that are not found in TWC § 13.3011. Rather than embracing the analysis that led to its ultimate decision regarding the requested initial rates, the PFD tiptoes around the facts and rule relied on. Without more, the findings of fact and conclusions of law addressing initial rates do not indicate that the PFD is supported by substantial evidence.

**K. TWC § 13.3011 must be read to harmonize with TWC § 13.190.<sup>83</sup>**

TWU strongly disagrees with the PFD's determination that the enactment of TWC § 13.3011 signals a legislative decision that the filed-rate doctrine does not apply to transactions under TWC § 13.301.<sup>84</sup> This conclusion assumes that the Commission was adhering to the decision announced in *Entex v. R.R. Comm'n of Tex.*, 18 S.W.3d 858 (Tex. App.—Austin 2000, pet. denied) prior to the enactment of TWC § 13.3011, which was not the case. As evidenced by the version of the Commission's STM application form that was approved in September 2019 and in force at the time the instant application was filed, the Commission prohibited a change to the rates charged to the customers transferred to an investor-owned utility as part of an STM.<sup>85</sup>

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<sup>79</sup> The PFD only notes states that the requested rates would represent a rate increase from the current Southern Horizons' rates. PFD at Finding of Fact 79.

<sup>80</sup> See PFD at 53.

<sup>81</sup> *Id.* at 52.

<sup>82</sup> *Id.* at 53.

<sup>83</sup> *Id.* at Conclusion of Law No. 27.

<sup>84</sup> *Id.* at 49.

<sup>85</sup> Ex. TWU-1, Attachment BDB-2 at 7 (Part 15.A. of the application states: "Explain any proposed billing change (NOTE: If the acquiring entity is an IOU, the IOU may not change the rates charged to the customers through this STM application. Rates can only be changed through the approval of a rate change application.").

Accordingly, the Commission was not reading and applying TWC § 13.190 in the same manner as the Third Court of Appeals interpreted and applied GURA<sup>86</sup> § 104.005.

“In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.”<sup>87</sup> As noted in TWU’s Initial Brief, statutes are presumed to be enacted by the Legislature with full knowledge of the common law.<sup>88</sup> Consequently, at the time TWC § 13.3011 was enacted, the old law was the plain language of TWC § 13.190, the *Entex* decision, and the public interest factors in TWC § 13.301(e); the error was the Commission’s interpretation of TWC §§ 13.190 and 13.301 despite the *Entex* decision. Given this set of circumstances, the PFD’s conclusion that the enactment of TWC § 13.3011 signaled the Legislature’s decision that the filed-rate doctrine should not apply to STMs is in doubt. If the filed-rate doctrine does not apply, then TWC § 13.3011 is rendered moot because it is stripped of any ability to provide a remedy to the “evil” under the old law.

Based on the foregoing, the PFD’s disregard of *Entex* should be rejected in favor of a decision that harmonizes the regulatory framework applicable to STMs that include a request for initial rates, including: TWC §§ 13.182, 13.183(a), 13.190, 13.301, 13.3011 and the holding in *Entex*. A decision approving TWU’s requested initial rates will achieve that goal.

### III. CONCLUSION

For the reasons discussed herein, TWU respectfully requests revisions to the PFD consistent with the foregoing exceptions as contained in Attachment A.

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<sup>86</sup> Gas Utility Regulatory Act, Tex. Util. Code §§ 101.001–141.010 (GURA).

<sup>87</sup> Tex. Gov’t Code § 312.005.

<sup>88</sup> *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999).



Respectfully submitted,

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**ATTORNEYS FOR TEXAS WATER  
UTILITIES, L.P.**

**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 15, 2024, in accordance with the Second Order Suspending Rules, filed in Project No. 50664.

/s/ William A. Faulk, III

William A. Faulk, III

## I. Findings of Fact

### Applicants

1. Texas Water Utilities, L.P. (TWU) is a Texas limited partnership registered with the Texas secretary of state under filing number 800034797.
2. TWU holds certificate of convenience and necessity (CCN) number 12983, which obligates it to provide retail water service in its certificated service areas in multiple counties, including Liberty and Montgomery counties.
3. Southern Horizons Development, Inc. (SHDI) is a Texas corporation registered with the Texas secretary of state under filing number 144217300.
4. SHDI holds CCN number 12863, which obligates it to provide retail water service in its certificated service areas in Montgomery and Liberty counties.
5. SHDI owns and operates two public water systems registered with the Texas Commission on Environmental Quality (TCEQ) as Southern Crossing Water System Phase 2 (identification number 1460158) and Southern Oaks Water System Phase 2 (identification number 1460150) (collectively, the Systems).

### Application

6. On February 2, 2023, TWU and SHDI (collectively, the Applicants) filed an application (Application) with the Public Utility Commission of Texas (Commission) for approval of the sale, transfer, or merger (STM) of facilities and CCN rights in Liberty and Montgomery counties.
7. The Applicants supplemented the Application on February 16, March 15, and June 23, 2023.
8. The Application, as supplemented, seeks approval of the following STM transaction:
  - a. sale and transfer of SHDI's Systems and 527 acres of the service area held by SHDI under CCN No. 12863 to TWU;
  - b. decertification of the remaining 98.7 acres held under SHDI's CCN No. 12863;
  - c. cancelation of SHDI's CCN No. 12863; and
  - d. amendment of TWU's CCN No. 12983 to include:
    - i. the Systems and 527 acres of service area previously held by SHDI under its CCN; and
    - ii. an additional 102.5 acres of currently uncertificated area.

9. The requested area to be included in TWU's CCN No. 12983 includes approximately 728.2 acres and 461 current customers, which is comprised of the 527 acres to be transferred from SHDI's CCN No. 12863 and the 102.5 acres of currently uncertificated area.
10. The requested area is located approximately 2.4 miles northeast of downtown Splendora, Texas, and is generally bounded on the north by County Road 377; on the east 0.1 miles from County Road 3737; on the south by County Road 3737; and on the west by U.S. Highway 59.
11. Additionally, the Application, as supplemented, seeks:
  - a. an order confirming the ratemaking rate base for the Systems; and
  - b. authorization for TWU to charge initial rates to the Systems' customers equal to TWU's most-recently approved water rates, as established in Docket No. 50944 (the Requested Rates).
12. In Commission Order No. 4, filed on April 5, 2023, the Commission Administrative Law Judge (ALJ) found the Application, as supplemented, administratively complete.

**Notice**

13. On April 26, 2023, TWU filed the affidavit of Brian Bahr, Director of Rates and Regulatory Affairs, attesting that notice was provided to all current customers, neighboring utilities, and affected parties on April 20, 2023.
14. On April 27, 2023, TWU filed a confidential list of the customers to whom notice was provided.
15. On May 9, 2023, TWU filed a publisher's affidavit attesting to the publication of notice in the Houston Business Journal, a newspaper of general circulation in Liberty and Montgomery counties, on April 21 and 28, 2023.
16. On June 7, 2023, TWU filed the affidavit of Mr. Bahr attesting that there are no tracts of land greater than 25 acres located wholly or partially within the requested area.
17. The mailed and published notices included language that "[t]he proposed transaction may change the current customers' rates and services to the current approved rates and services of Texas Water Utilities, LP, which are higher than the current rate for a 5/8" meter for Southern Horizons Development, Inc.

18. In Commission Order No. 9, filed on June 22, 2023, the Commission ALJ found the notice sufficient.

**Effective Date of Proposed STM Transaction**

19. The Application was filed on February 2, 2023, and notice was completed on April 28, 2023.
20. Applicants agreed to an effective date for the proposed transaction that was no earlier than the 121st day after notice was completed.
21. The 120th day after April 28, 2023, was August 28, 2023; therefore, the Application was filed at least 120 days before the effective date for the proposed transaction.

**Interventions**

22. In Commission Order No. 3, filed on March 27, 2023, the Commission ALJ granted the intervention of the Office of Public Utility Counsel (OPUC).
23. In Commission Order No. 6, filed on May 16, 2023, the Commission ALJ granted the interventions of Colin Jones, Cecil Fairfax, Jeffrey Beny, and Anna Miller.
24. In Commission Order No. 8, filed on May 30, 2023, the Commission ALJ granted the intervention of Gerald Stover.
25. At the hearing on the merits on July 23, 2024, the State Office of Administrative Hearings (SOAH) ALJ denied the intervention of Adriana Carillo Pillow and struck Colin Jones and Jeffrey Beny as parties.
26. Constance Stover was admitted as a party in the Proposal for Decision, filed on October 22, 2024.

**Referral to SOAH**

27. On March 5, 2024, the Commission referred this proceeding to SOAH.
28. On March 7, 2024, the Commission filed a preliminary order ruling on four threshold legal issues and setting forth the issues to be addressed in this proceeding.
29. On July 23, 2024, ALJ Meaghan Bailey convened the hearing on the merits.
30. Applicants, OPUC, staff for the Commission (Staff), Ms. Fairfax, Ms. Miller, and Ms. Stover appeared at the hearing either personally or through legal counsel.

31. All parties submitted post-hearing briefing, and the record closed upon receipt of the reply briefs on August 23, 2024. The record was reopened on September 25, 2024, for the limited purpose of admitting Applicants' unopposed errata to the direct testimonies of its witnesses Mr. Bahr and Steve Sullivan.

**Testimony and Position Statements**

32. On April 18, 2024, TWU filed the redacted direct testimony of Mr. Bahr, including attachments, and his confidential direct testimony, including attachments.
33. On April 18, 2024, SHDI filed the direct testimony and attachments of Mr. Sullivan.
34. On May 5, 8, and 9, 2024, Ms. Fairfax, Ms. Stover, and Ms. Miller filed their direct testimonies, respectively.
35. On May 9, 2024, OPUC filed a statement of position.
36. On May 30, 2024, Staff filed the direct testimony and attachments of Fred Bednarski III, including confidential attachment FB-3, and the direct testimony and attachments of James Harville.
37. On June 20, 2024, TWU filed the redacted rebuttal testimony of Mr. Bahr, including attachments, and his confidential rebuttal testimony, including attachments.
38. The testimonies referenced above were admitted at the hearing.
39. On July 18, 2024, OPUC filed a supplemental statement of position.
40. On August 9, 2024, TWU filed errata to the direct testimonies of Messrs. Bahr and Sullivan. The errata were admitted in SOAH Order No. 8, filed on September 25, 2024.

**TWU Compliance History**

41. TWU has been subject to enforcement actions by the TCEQ in the past five years for non-compliance with rules, orders, or statutes. TWU has resolved, or is in the process of resolving, the compliance issues related to the open TCEQ enforcement actions listed in the Application.
42. TWU has either resolved or is in the process of resolving the outstanding violations related to its TCEQ enforcement actions.

43. TWU does not have a history of continuing mismanagement or misuse of revenues as a utility service provider.
44. TWU has demonstrated a compliance history that is adequate for approval of the proposed transaction.

**Adequacy of Existing Service**

45. There are 461 customers in the requested area that are currently being served by SHDI through the Systems.
46. SHDI's Systems are currently providing continuous and adequate service to the requested area.
47. The last TCEQ compliance investigation of SHDI's Southern Oaks Water System Phase 2 was on May 27, 2022. That system does not have any unresolved violations listed in the TCEQ database.
48. The last TCEQ compliance investigation of SHDI's Southern Crossing Water System Phase 2 was on March 6, 2023. That system does not have any unresolved violations listed in the TCEQ database.
49. The Commission's complaint records, which date back five years, show four complaints against SHDI, all of which have been closed.
50. There is no evidence that SHDI has failed to comply with any Commission or TCEQ order.
- ~~50.~~51. An absence of TCEQ violations by SHDI does not preclude a finding that the STM transaction will lead to a probable improvement of service for SHDI customers.

**Need for Additional Service**

- ~~51.~~52. The 461 existing water customers in the requested area have an ongoing need for service.
- ~~52.~~53. The Applicants seek to transfer only existing facilities and customers.
- ~~53.~~54. SHDI has not provided service in the 98.7 acres currently held under its CCN No. 12863 and which the Applicants seek to decertify because that area does not align with the property boundaries of the area served by SHDI's Systems.
- ~~54.~~55. There is no evidence of a need for additional service in the requested area.

~~55-56.~~ The decertification of the 98.7 acres held under SHDI's CCN No. 12863 and the addition of the 102.5 acres of uncertificated area to TWU's CCN No. 12983 will result in the alignment of the boundaries of TWU's service area post-transaction with the property boundaries of the area currently served by SHDI such that all customers transferred from SHDI will be located within TWU's CCN No. 12983.

**Effect of Approving STM Transaction and Granting the CCN Amendment**

~~56-57.~~ TWU will be the sole certificated water utility for the requested area.

~~57-58.~~ TWU will be required to provide continuous and adequate water service to current and future customers in the requested area.

~~58-59.~~ Landowners in the requested area will be able to obtain water service from TWU.

~~59-60.~~ The Applicants are the only utilities affected by the proposed STM transaction.

~~60-61.~~ All retail public utilities in the proximate area were provided notice of the Application, and no protests or adverse comments were filed by any adjacent retail public utility.

~~61-62.~~ There will be no adverse effect on any landowners in the requested area because SHDI is not providing service in the to-be-decertified 98.7 acres, and the identified uncertified 102.5 acres align with the property boundaries of the area where SHDI is currently providing service.

**Ability to Serve: Managerial and Technical Capability**

~~62-63.~~ TWU owns and operates numerous TCEQ-registered public water systems.

~~63-64.~~ TWU employs or contracts with TCEQ-licensed operators who will be responsible for the operation of the Systems being transferred from SHDI.

~~64-65.~~ TWU has access to an adequate supply of water and is capable of providing water that meets the requirements of chapter 341 of the Texas Health and Safety Code, chapter 13 of the Texas Water Code (TWC), and the TCEQ's rules.

~~65-66.~~ TWU has the technical and managerial capability to provide continuous and adequate service to the requested area.

**Ability to Serve: Financial Ability and Stability**

~~66-67.~~ TWU's affiliate, Southwest Water Company, is capable, available, and willing to cover any temporary cash shortages and has a debt-service coverage ratio that is greater than 1.25. Therefore, TWU satisfies the leverage test.

~~67-68.~~ TWU projects no operating and maintenance shortages in the first five years after completion of the proposed STM transaction. Therefore, TWU satisfies the operations test.

~~68-69.~~ TWU submitted documentation indicating it possesses the funds necessary for the purchase of SHDI's Systems and for the construction of its proposed capital improvements.

~~69-70.~~ TWU demonstrated the financial capability and stability to provide continuous and adequate water service to the Systems.

#### *Financial Assurance*

~~70-71.~~ There is no need to require TWU to provide a bond or other financial assurance to ensure continuous and adequate service.

#### *Feasibility of Obtaining Service from an Adjacent Retail Public Utility*

~~71-72.~~ SHDI is currently serving customers throughout the requested area, except for the to-be-decertified 98.7-acre portion, and such service has been continuous and adequate.

~~72-73.~~ Obtaining service from an adjacent retail public utility would likely increase costs to customers because new facilities would need to be constructed, including, at a minimum, an interconnect to connect to a neighboring retail public utility.

~~73-74.~~ It is not feasible to obtain service from an adjacent retail public utility.

#### *Environmental Integrity*

~~74-75.~~ The proposed transaction will not adversely affect the environmental integrity of the land.

~~75-76.~~ The effect on the land should be minimal as the requested area will continue to be served with existing facilities.

#### *Probable Improvement of Service or Lowering of Cost to Consumers*

~~76-77.~~ The reliability and quality of water service for the Systems ~~are not~~ is expected to improve once the Systems are transferred to TWU as ~~no capital improvements or construction are needed for the Systems to meet minimum regulatory standards or to continue providing continuous and adequate service as~~ TWU intends to make [REDACTED] in planned capital improvements including a [REDACTED]



~~77. TWU intends to make capital improvements in the future for the long-term health of the Systems once the transfer has been completed and it can do a more in-depth investigation of the Systems. The specific improvements are subject to change, and the timeframe for initiating any improvements is unknown.~~

~~78. The STM transaction will not result in a probable improvement of service record contains evidence of planned capital improvements sufficient to support a finding that there will be a probable improvement of service for SHDI's customers post-acquisition.~~

~~79. SHDI's customers will also benefit from having a water service provider with greater access to capital leading to lower capital costs and less variability in rates for SHDI customers.~~

~~78-80. The record contains sufficient evidence that the STM transaction would lead to a probable improvement of service for SHDI's customers.~~

~~79-81. The Requested Rates would represent a rate increase from SHDI's existing rates.~~

**Regionalization or Consolidation**

~~80-82. The construction of a physically separate water system is not necessary for TWU to serve the requested area.~~

~~81-83. Because the requested CCN amendment will not require the construction of a physically separate water system, consideration of regionalization or consolidation with another retail public utility is not required.~~

**Voluntary Valuation of Acquired Utility**

~~82-84. On September 16, 2022, prior to filing the Application, Applicants filed in Project No. 49859 a notice of intent to use the Commission's fair-market-value (FMV) process to determine the ratemaking rate base of the Systems to be acquired by TWU.~~

~~83-85. The Application included copies of the three appraisal reports required by the FMV process and evidence of the purchase price agreed upon by the Applicants.~~

~~84-86. The appraisal reports submitted with the Application were filed under confidential seal.~~

~~85-87. The average of the three appraisals yields the FMV for SHDI and is listed in the direct testimony of Staff's witness Mr. Bednarski at confidential Attachment FB-3.~~

~~86-88. The purchase price for SHDI was filed under confidential seal.~~

~~87-89.~~ No party contested Applicants' use of the FMV process to determine the ratemaking rate base of the Systems or Applicants' resulting proposed rate base.

~~88-90.~~ The ratemaking rate base for SHDI is the purchase price and is listed in the direct testimony of Mr. Bednarski at confidential Attachment FB-3.

~~89-91.~~ The Application included the amount of fees paid to the three utility valuation experts and the known transaction and closing costs that will be reviewed for inclusion in TWU's rate base in a future base-rate case.

~~90-92.~~ No additional conditions for the acquisition based on the FMV process are needed.

~~91-93.~~ Because the Applicants used the FMV process, it is not necessary to address whether the Systems were partially or wholly constructed with customer contributions in aid of construction derived from specific surcharges approved by the Commission.

**Customer Deposits**

~~92-94.~~ SHDI currently holds deposits for 398 customer accounts.

~~93-95.~~ The amount of each deposit is \$50, consistent with the tariff for SHDI's CCN No. 12863.

~~94-96.~~ SHDI has the funds necessary to refund all 398 deposits with interest.

~~95-97.~~ SHDI will issue final bills after the closing of the proposed STM transaction; if a customer's final bill is paid in full by the due date, SHDI will refund the deposit with interest, and if the final bill is not paid in full by the due date, SHDI will apply the deposit to the final bill and refund any remaining portion with interest.

**STM Transaction: Public Interest**

~~96-98.~~ The Applicants' proposed STM transaction, including any necessary CCN amendments, as described in FoF No. 8 will serve the public interest.

**Initial Rates: Public Interest**

~~97-99.~~ At the time the Application was filed the Requested Rates were approved by the Commission in Docket No. 50944 and were being implemented for a majority of TWU's water systems.

100. As part of the settlement agreement in Docket No. 50944, TWU agreed to implement phased-in rates for 16 of its water systems. Upon reaching the final phase, those systems will be charged TWU's full approved rate.

101. TWU's Requested Rates are uniform, systemwide rates that are designed to allow TWU to recover revenues that allow TWU to earn the rate of return authorized in Docket No. 50944.
102. TWU's Requested Rates did not include water pass-through charges.
103. The appropriate legal authority for reviewing TWU's request for initial rates is TWC § 13.3011.
104. The initial rates charged to SHDI customers should be tailored to recover the annual cost the utility incurs to serve all its systems and customers not the cost to serve only SHDI customers.
105. The current rates charged to SHDI customers includes 2,000 gallons of usage in the monthly minimum charge and a flat, rather than a tiered, volumetric rate.
106. The current rate structure for SHDI does not encourage conservation.
107. The current rates for SHDI customers have not been comprehensively reviewed since 2009 when it last filed a general rate case.
108. The current rates for SHDI customers have not generated revenues sufficient to cover costs for the System in years when substantial repairs or improvements were needed.
- 98-109. The evidence in the record demonstrates that standalone rates based on the ratemaking rate base for SHDI would be higher than TWU's Requested Rates.
- 99-110. Approving the Requested Rates to be charged by TWU as initial rates for the Systems' customers ~~would not serve~~ serves the public interest.
- 100-111. ~~It would serve the public interest to maintain SHDI's existing rates for the Systems until TWU requests and receives Commission approval for a rate change for the Systems.~~ TWU's Requested Rates are just and reasonable.

## II. Conclusions of Law

1. The Commission has authority over this proceeding under TWC §§ 13.041, .241, .244, .246, .301, .3011, and .305.
2. Applicants are retail public utilities as defined by TWC § 13.002(19) and 16 Texas Administrative Code (TAC) § 24.3(31).

- ~~2.3.~~ 16 TAC § 24.240 is not applicable to this proceeding and cannot be retroactively applied.
- ~~3.4.~~ The Application was filed and notice was provided at least 120 days before the effective date of the proposed transaction, as required by TWC § 13.301(a) and 16 TAC § 24.239(b).
- ~~4.5.~~ As part of the Application, TWU requested approval to charge its Requested Rates as initial rates pursuant to TWC § 13.3011. The Requested Rates complied with the conditions in TWC § 13.3011(a)(1)-(2).
- ~~5.6.~~ Notice of the Application was provided in compliance with TWC §§ 13.246 and .301(a)(2), and 16 TAC §§ 24.235 and .239(e).
- ~~6.7.~~ The Application meets the content requirements of TWC § 13.244 and 16 TAC § 24.233.
- ~~7.8.~~ The Commission processed the Application as required by the TWC, Administrative Procedure Act, and Commission rules.
- ~~8.9.~~ Under TWC § 13.301(e)(5) and 16 TAC § 24.239(h)(5), the Commission may hold a hearing to determine whether a proposed STM transaction will serve the public interest if there are concerns the transaction may not serve the public interest.
- ~~9.10.~~ If the Commission holds a public interest hearing under TWC § 13.301(e)(5) and 16 TAC § 24.239(h)(5), the Commission must consider the factors set forth in TWC § 13.246(c)(1)-(9) and 16 TAC § 24.239(h)(5)(A)-(I).
- ~~10.11.~~ After consideration of the factors in TWC § 13.246(c)(1)-(9) and 16 TAC § 24.239(h)(5)(A)-(I), TWU demonstrated it is capable of rendering continuous and adequate water service to every customer within the requested area, as required by TWC § 13.251.
- ~~11.12.~~ After consideration of the factors in TWC § 13.246(c)(1)-(9) and 16 TAC § 24.239(h)(5)(A)-(I), TWU demonstrated adequate financial, managerial, and technical capability for providing adequate and continuous service to the requested area as required by TWC §§ 13.241(a) and .301(b).
- ~~12.13.~~ It is not necessary for TWU to provide a bond or other financial assurance under TWC §§ 13.246(d) and .301(c).
- ~~13.14.~~ Regionalization and consolidation concerns under TWC § 13.241(d) do not apply in this proceeding because construction of a physically separate water system is not required.

- ~~14-15.~~ Applicants filed their notice of intent to use the Commission's FMV process in compliance with TWC § B.305(c)(1) and 16 TAC § 24.238(d).
- ~~15-16.~~ The Commission's Executive Director selected three utility valuation experts to perform appraisals of SHDI in compliance with TWC § 13.305(c)(2) and 16 TAC § 24.238(e).
- ~~16-17.~~ The Application included copies of the three appraisal reports completed by the Commission's utility valuation experts as required by TWC § 13.305(h)(1).
- ~~17-18.~~ The Application included the purchase price agreed to by the Applicants as required by TWC § 13.305(h)(2).
- ~~18-19.~~ The Application included the ratemaking rate base determined under TWC § 13.305(g) and 16 TAC § 24.238(f)(6), as required by TWC § B.305(h)(3).
- ~~19-20.~~ The Application included the known transaction and closing costs incurred by TWU to be requested for review and recovery in TWU's rate base in a future rate case as permitted by TWC § 13.305(e) and 16 TAC § 24.238(k).
- ~~20-21.~~ The calculation of the FMV for SHDI complies with TWC § 13.305(f) and 16 TAC § 24.238(b)(3).
- ~~21-22.~~ The calculation of the ratemaking rate base for SHDI complies with TWC § 13.305(g) and 16 TAC § 24.238(b)(4).
- ~~22-23.~~ The disclosure requirement in TWC § 13.3010) and 16 TAC § 24.239(q) does not apply because the original sources of funding for the Systems is not relevant to determine the value of the Systems' assets under TWC § 13.305(k).
- ~~23-24.~~ The Applicants demonstrated that the sale of SHDI's Systems and the transfer of a portion of the service area held under SHDI's CCN No. 12863 to TWU will serve the public interest and is necessary for the service, accommodation, convenience, and safety of the public, as required by TWC §§ 13.246(b) and 13.301(d)-(e) and (g).
- ~~24-25.~~ The Applicants demonstrated that the decertification of 98.7 acres currently held by SHDI under CCN No. 12863 and the amendment of TWU's CCN No. 12983 to include 102.5 acres of currently uncertificated area will serve the public interest and is necessary for the service, accommodation, convenience, and safety of the public, as required by TWC §§ 13.246(b) and 13.301(d)-(e) and (g).

- ~~25-26.~~ The Applicants demonstrated that the cancelation of SHDI's CCN No. 12863 will serve the public interest and is necessary for the service, accommodation, convenience, and safety of the public, as required by TWC §§ 13.246(b) and 13.301(d)-(e) and (g).
27. SHDI has the funds necessary to address customer deposits as required by 16 TAC § 24.239(k) and (l).
- ~~26-28.~~ The filed rate doctrine, codified as TWC § 13.190, is applicable to transactions under TWC § 13.3011.
- ~~27.~~ The field rate doctrine, as codified at Texas Water Code § 13.190, is not applicable to this proceeding.
- ~~28-29.~~ TWU did not demonstrate that approval of its Requested Rates as initial rates under TWC § 13.3011(a) would serve the public interest, as required by TWC § 13.301(d) (e) and (g). TWU demonstrated that approval of its Requested Rates meets the requirements of TWC § 13.3011(a) and serves the public interest.
- ~~29.~~ Maintaining SHDI's existing rates as the initial rates to be charged by TWU to the Systems' customers will serve the public interest, as required by TWC § 13.301(d) (e) and (g). 16 TAC § 24.240(e)(1).

### III. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders:

1. Commission adopts the proposal for decision, including findings of facts and conclusions of law, to the extent provided in this Order.
2. The Commission approves the:
  - a. sale and transfer of SHDI's public water systems, the Southern Crossing Water System Phase 2, and the Southern Oaks Water System Phase 2 (Systems), and 527 acres of service area held under SHDI's CCN No. 12863 to TWU;
  - b. decertification of the remaining 98.7 acres held under SHDI's CCN No. 12863;
  - c. cancelation of SHDI's CCN No. 12863; and
  - d. amendment of TWU's CCN No. 12983 to include:

- i. the Systems and 527 acres of service area previously held by SHDI's CCN;  
and
- ii. an additional 102.3 acres of currently uncertificated area.

3. The transaction between the Applicants in this proceeding is approved and may be completed.
- ~~3.4. TWU's Requested rates will become effective to be charged by TWU as initial rates for the Systems' customers on the date of the signing of this order.~~
- ~~4. SHDI's existing rates will remain in effect to be charged by TWU as initial rates for the Systems' customers.~~
5. After the closing of the transaction, SHDI will issue final bills to the Systems' customers. If a customer's final bill is paid in full by the due date, SHDI will refund the customer's deposit with interest, and if the final bill is not paid in full by the due date, SHDI will apply the deposit to the final bill and refund any remaining portion with interest.
6. As soon as possible after the effective date of the transaction, but not later than 30 days after the effective date, the Applicants must file proof that the transaction has been completed and customer deposits, if any, have been addressed.
7. The Applicants have 180 days from the date of this Order to complete the transaction.
8. Under 16 TAC § 24.239(m), if the transaction is not completed within this 180-day period and no extension has been granted, this approval is void and the applicants must reapply for approval.
9. Upon completion of the transaction, TWU must provide service to every customer or qualified applicant for service within the approved area under CCN number 12983 that requests water service and meets the terms of TWU's water service policies, and such service must be continuous and adequate.
10. TWU must comply with the recording requirements in TWC § 13.257(r) and (s) for the area in Montgomery and Liberty counties affected by the Application and must submit to the Commission evidence of the recording no later than 45 days after completion of the transaction.

11. The Commission determines the ratemaking rate base for SHDI to be the fair market value stated in confidential Commission Staff Exhibit 1B.
12. TWU must file a tariff consistent with this Order within 30 days after the effective date of the transaction in Compliance Tariff for Final Order in Docket No. 54617 (*Application of Texas Water Utilities, L.P. and Southern Horizons Development, Inc. for Sale, Transfer, or Merger of Facilities and Certificate of Rights in Liberty and Montgomery Counties*), Control No. \_\_\_\_
13. Copies of all tariff-related filings must be served on all parties of record.
14. No later than 10 days after the date the tariff is filed, Staff must file its comments recommending approval, modification, or rejection of the individual sheets of the tariff proposal, unless the presiding officer in Control No. \_\_\_\_ files an order stating otherwise. Responses to Staff's recommendation must be filed no later than 15 days after the filing of the tariff, unless the presiding officer in Control No. \_\_\_\_ files an order stating otherwise. The presiding officer in Control No. \_\_\_\_ must approve, modify, or reject each proposed tariff sheet. If any proposed tariff sheets are modified or rejected, TWU must file proposed revisions to those tariff sheets in accordance with any applicable order by the presiding officer.
15. The Commission denies all other motions and any other requests for general or specific relief that have not been expressly granted.