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APPLICATION OF TEXAS WATER UTILITIES, LP AND SOUTHERN HORIZONS DEVELOPMENT, INC. FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS IN LIBERTY AND MONTGOMERY COUNTIES	§ § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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COMMISSION STAFF’S BRIEF ON THRESHOLD ISSUES

On February 2, 2023, Texas Water Utilities, LP (Texas Water) and Southern Horizons Development, Inc. (Southern Horizons) (collectively, Applicants) filed an application for approval of the sale, transfer, or merger of facilities and certificate rights in Liberty and Montgomery Counties.

On October 13, 2023, the Office of Policy and Docket Management (OPDM) filed an Order Requesting Briefing on Threshold Issues, directing any interested party to file a brief on threshold issues in the docket by 3:00 p.m. on October 27, 2023. Therefore, this pleading is timely filed.

I. THRESHOLD ISSUES

- 1. Under Texas Water Code (TWC) § 13.3011, is the Public Utility Commission of Texas (Commission) required to grant an acquiring utility’s request to charge its existing filed rates for another water or sewer system owned by the acquiring utility to customers in the acquired utility’s service area?**

No, the Commission is not required to grant an acquiring utility’s request to charge its existing filed rates for another water or sewer system owned by the acquiring utility to customers in the acquired utility’s service area. In accordance with the Commission’s proposed rule 16 Texas Administrative Code (TAC) § 24.240, an acquiring utility may request Commission approval to charge authorized acquisition rates to the customers of the system for which the utility seeks approval to acquire under 16 TAC § 24.239, however an acquiring utility must use existing rates as initial rates until the Commission approves other rates.

The language of TWC § 13.3011 also implies that the Commission may choose whether or not to grant an acquiring utility’s request, as the utility “may request” that the Commission authorize it to charge filed rates for another water or sewer system. This is in contrast to other

statutes in TWC Chapter 13, Subchapter H that intentionally use alternative language when an action is required.¹

- 2. If the Commission is not required to grant a request under TWC § 13.3011(a), what criteria, if any, should the Commission use to determine whether to grant such a request?**

Because the Commission is not required to grant a request under TWC § 13.011(a), the Commission should use the criteria included in proposed rule 16 TAC § 24.240² to determine whether to grant an acquiring utility's request to charge authorized acquisition rates.

- 3. If the Commission is not required to grant a request under TWC § 13.3011(a) and does not do so, what rates may the Commission authorize the acquiring utility to charge the customers of the acquired system in light of the prohibition in TWC § 13.3011(b)?**

If the Commission does not grant an acquiring utility's request to charge authorized acquisition rates to the customers of the system for which the utility seeks approval to acquire, the Commission may authorize the acquiring utility to charge the customers of the acquired system the existing rates that the acquired utility charges its customers under a tariff filed with a regulatory authority prior to the acquisition.

- 4. Does a request for a hearing to contest approval of rates under TWC § 13.3011(a) constitute proper grounds for a hearing under 13.301(e) and 16 TAC § 24.239(h)?**

A request for a hearing to contest approval of rates under TWC § 13.3011(a) does not constitute proper grounds for a hearing under TWC § 13.301(e) and 16 TAC § 24.239(h) when the application was filed under TWC § 13.301(a). Specifically, TWC § 13.3011(a) permits an acquiring utility to request that the Commission authorize the utility to charge initial rates for service that are shown in a tariff filed with the Commission for another water or wastewater system if those rates are in force for the other water or sewer system on the date the application was filed.

¹ See, e.g., TWC § 13.304(a-b) (“...*shall notify* the utility commission...”) (“... *but shall provide* written notice to the utility commission...”) (*emphasis added*); see also TWC § 13.305(b) (“*The utility commission shall maintain* a list of experts qualified to conduct economic valuations...”) (*emphasis added*) and TWC § 13.301(d) (“*The utility commission shall*, with or without a public hearing, investigate the sale, acquisition, lease, or rental...”) (*emphasis added*).

² See Project No. 53924, Water and Sewer Utility Rates after Acquisition (pending).

While an acquiring utility may request that the Commission authorize it to charge initial rates for service that are shown in a tariff filed with the Commission for another water or sewer system if those rates are in force for the other water or sewer system on the date the application was filed under TWC § 13.301(a), the Commission is not required to grant the acquiring utility's request. If the Commission does not approve the acquiring utility's request, the acquiring utility can file a rate case proceeding to change its rates. Further, TWC § 13.3011(b) prevents the Commission from requiring an acquiring utility who makes a request under TWC § 13.3011(a) to initiate a new rate proceeding to establish the initial rates for service the acquiring utility will provide to the customers of the purchased or acquired system. Therefore, a request for a hearing to contest approval of rates under TWC § 13.3011(a) does not constitute proper grounds for a hearing under TWC § 13.3011(a) and 16 TAC § 24.239(h). Permitting a request for a hearing to contest approval of rates under TWC § 13.3011(a) would require the utility to defend its rates, as is done in a rate case proceeding, and would equate to requiring the utility to initiate a rate case proceeding. The proper avenue to contest a utility's rates is through a rate case proceeding. Customers who wish to contest a utility's rates may contest those rates during that utility's next rate case proceeding, but not during a sale, transfer, or merger application proceeding.

Further, at the June 29, 2023 Open Meeting, Commissioner McAdams, while discussing Docket No. 54341, explained that during the stage of a sale, transfer, or merger application when the Commission is determining whether the transaction should be permitted to proceed, "the Commission will set rates for Aqua to charge customers in the certificated service area it is acquiring when the Commission issues its final order in this proceeding ultimately approving the transaction, and rates should not be set before then."³ He also stated that "it would be premature and unnecessary to address the initial rate approval in the interim order [approving the sale and allowing the transaction to proceed]."⁴

- a. In addressing this question, please address whether the determination of which rate to implement might result in public-interest concerns under TWC § 13.301(e)(5) and 16 TAC § 24.239(h)(5).**

³ Open Meeting Tr. at 18:18-22 (Jun. 29, 2023).

⁴ *Id.* at 18:15-17.

The determination of which rate to implement—either the current rate charged by the transferor or a rate of the transferee in a tariff on file with the Commission—might result in public interest concerns raised by several considerations in TWC § 13.301(e)(5) and 16 TAC § 24.239(h)(5). TWC § 13.301(e)(5) permits the Commission to hold a hearing if there are concerns that the transaction may not serve the public interest, after the considerations provided by TWC § 13.246(c) have been evaluated. The determination of which rate to implement might result in the following public interest concerns raised in TWC § 13.246(c) and 16 TAC § 24.239(h)(5): (1) the adequacy of service currently provided to the requested area; (2) the need for additional service in the requested area, including whether any landowners, prospective landowners, tenants, or residents have requested service; (3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment on the landowners in the area; (4) the ability of the transferee to provide adequate service, including meeting the standards of the Commission, taking into consideration the current and projected density and land use of the area; (5) the financial ability of the transferee to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant; (6) the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and (7) the probable improvement of service or lowering of cost to customers in the requested area resulting from approving the transaction. The determination of which rate to implement, and whether the rate determined results in a rate increase or decrease, might affect the seven aforementioned public interest concerns found in TWC § 13.246(c) and 16 TAC § 24.239(h)(5). For example, if the rate determined results in an increase, then this may create a public interest concern for the customers in the requested area—namely, an inability or difficulty to pay, especially for those on fixed incomes. Conversely, a rate increase could allow the transferee to improve the quality of service in the requested area or increase capacity needs if there are additional requests for service. A rate increase could be needed to bring an acquired system into compliance with Commission or Texas Commission on Environmental Quality rules. Further, allowing the transferee to charge rates that are in the transferee's tariff on file with the Commission that the transferee is charging for its other systems could remove administrative burdens on the transferee, who would not have to bill and keep track of customers' different rates. Permitting the transferee to charge its prior approved rates also ensures that the utility can pay its administrative fees.

If the rate determination results in no change in rates, it also might result in public interest concerns. For example, customers would be relieved that they are paying the same rates for water or sewer service. However, if the transferee can only charge rates that are lower than the rates charged to customers in their other systems, it could negatively affect the adequacy of service or the ability of the transferee to provide continuous and adequate service.

The above examples are just some of the ways the determination of rates might have an effect on the public interest concerns raised in TWC § 13.246(c) and 16 TAC § 24.239(h)(5). There are likely more public interest concerns that may be affected by the determination of rates, but those concerns will be more evident on a case-by-case basis, depending on the circumstances of each specific case.

- b. In addressing subpart 4a, please specifically address whether the rate determination may be relevant to the probable improvement of service or lowering of cost to consumers in the requested area resulting from approving the transaction under TWC § 13.246(c)(8) and 16 TAC § 24.239(h)(5)(H).**

The rate determination will be relevant to the probable improvement of service and lowering of cost to customers in the requested area resulting from approving the transaction under TWC § 13.246(c)(8) and 16 TAC § 24.239(h)(5)(H). As previously mentioned, a determination of rates that results in increased rates or no change in rates will effect the probable improvement of service and lowering of costs to customers. If rates are not increased, the transferee might be unable to make certain improvements that could result in better service to customers that a rate increase could make possible. However, a determination of rates that results in a rate increase would increase the costs that all customers are required to pay.

II. CONCLUSION

As detailed above, Staff respectfully requests that the Commission issue an order consistent with Staff's recommendations.

Dated: October 27, 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 27, 2023, in accordance with the Second Order Suspending Rules, filed in Project No. 50664.

/s/ Kelsey Daugherty
Kelsey Daugherty