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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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**OFFICE OF PUBLIC UTILITY COUNSEL’S
RESPONSE TO ORDER REQUESTING BRIEFING ON THRESHOLD ISSUES**

The Office of Public Utility Counsel (“OPUC”), representing the interests of residential and small commercial consumers in Texas, files this briefing in response to the Public Utility Commission of Texas’s (“Commission”) Order Requesting Briefing on Threshold Issues.¹ Texas Water Utilities, LP (“Texas Water”), and Southern Horizons Development, Inc.’s (“Southern Horizons”) (collectively “Applicants”) filed a request for sale, transfer, or merger (“STM”) of facilities and certificate rights in Liberty and Montgomery Counties and included a request under Texas Water Code (“TWC”) § 13.3011 that the Commission approve an increase to Southern Horizon’s rates up to Texas Water’s current rates.² OPUC filed a motion to intervene in this proceeding on March 16, 2023, and its motion was granted in Order No. 3 on March 27, 2023.³ Pursuant to the Order Requesting Briefing on Threshold Issues, the deadline for briefing on the requested threshold issues is October 27, 2023.⁴ Therefore, this brief is timely filed.

I. INTRODUCTION

OPUC contends that TWC § 13.3011 provides the Commission with authority to approve *or deny* adoption of any in-force rate taken from an existing tariff of the acquiring utility, and the Commission is in no way bound to approve such a rate as part of a sales, transfer, or merger

¹ Order Requesting Briefing on Threshold Issues (Oct. 13, 2023).

² 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 at 7 (Feb. 2, 2023).

³ OPUC’s Motion to Intervene (Mar. 16, 2023); Order No. 3 – Granting Motion to Intervene (Mar. 27, 2023).

⁴ Order Requesting Briefing on Threshold Issues (Oct. 13, 2023).

proceeding if the rate is not just and reasonable for the customers of the acquired system. In fact, the Commission is expressly prohibited from doing so under TWC § 13.182.

OPUC has serious concerns with applying a pre-existing water or sewer tariff, which was never tailored to customers of an acquired system, simply based on a utility's request without any further consideration or analysis by the Commission. Doing so could routinely lend itself to rate shock for affected ratepayers via the imposition of rates that are neither just nor reasonable. Without proper safeguards in place, application of TWC § 13.3011 could result in the imposition of a higher tariff on the acquired system's customers without an adequate prudence review from which rates should be derived. The Commission's Order Requesting Briefing on Threshold Issues outlines four threshold issues to be addressed regarding the application of TWC § 13.3011.⁵ To summarize, OPUC's responses to the issues are further detailed below:

- Under TWC § 13.3011, is the 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 a utility's request to charge existing rates especially if the existing rates when applied to customers of the acquired utility are not just and reasonable.
- 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? The Commission should consider whether implementation of the requested rates would be (1) just and reasonable; (2) not unreasonably preferential, prejudicial, or discriminatory; and (3) sufficient, equitable, and consistent in application to each class of consumers.
- 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)? The Commission may continue to authorize the rates in effect of the acquired system. Prior to the passage of TWC § 13.3011, the Commission

⁵ *Id.*

approved STM applications while maintaining the rates in effect of the acquired system and TWC § 13.3011(b) does not restrict the Commission's authority to continue to do so, it only prohibits the Commission from requiring the acquiring utility to file a rate case to establish initial rates.

- Does a request for a hearing to contest approval of rates under TWC § 13.3011(a) constitute proper grounds for a hearing under TWC § 13.301(e) and 16 Texas Administrative Code ("TAC") § 24.239(h)? Yes, TWC § 13.301(e)(5) allows for the consideration of the factors outlined in TWC 13.246(c), and TWC 13.246(c)(8), as well as 16 TAC § 24.239(h)(5)(H), allows the Commission to consider the probable improvement of service or lowering of costs to consumers in the requested area. A request for a hearing to contest approval of rates under TWC § 13.3011 asserts concerns that the transaction will not serve the public interest based on an application of the factors in TWC § 13.246(c).

II. RESPONSES TO PROPOUNDED QUESTIONS

A. Under TWC § 13.3011, is the 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?

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 acquiring utility's service area. It is inaccurate to assume that just because the applicant *may request* to use an existing tariff from its other water utility that the Commission must approve such a request by the applicant, because this interpretation would not be in the public interest and conflicts with the principles of statutory construction. Specifically, this interpretation would remove the Commission's jurisdiction over ratemaking outlined in TWC §§ 13.181 and 13.182, conflict with the enactment presumptions outlined in Tex. Gov't Code § 311.021(5), and potentially produce absurd results in the application of the acquiring utility's tariff.

Statutory interpretation principles established by the Supreme Court of Texas in *Youngkins v. Hines* require that statutes be considered as a whole rather than by its isolated provisions.⁶ Therefore, when interpreting TWC § 13.3011, the Commission should consider the entirety of the water code with its interpretation, including TWC § 13.182.

TWC § 13.181 grants the Commission jurisdiction over fixing and regulating rates and TWC § 13.182(a) requires that the Commission ensures “every rate made, *demande*d, or received by any utility . . . *shall be just and reasonable*.” [Emphasis added.] Furthermore, TWC § 13.182(b) mandates that “rates may not be *unreasonably preferential, prejudicial or discriminatory* but shall be sufficient, *equitable*, and consistent in application to each class of consumers.” [Emphasis added.] Interpreting TWC § 13.3011 to mean that the Commission is required to grant a utility’s request would remove the Commission’s jurisdiction over ratemaking outlined in TWC §§ 13.181 and 13.182. The principles of statutory construction require that a provision not be interpreted to limit jurisdiction absent clear legislative intent to interpret the provision as jurisdictional.⁷ The legislature did not carve out any exception or provide any legislative intent to limit the jurisdictional mandates in TWC § 13.182 for the rates a utility applies for under TWC § 13.3011. Therefore, the rates applied for by a utility under TWC § 13.3011 are subject to Commission review to ensure they are: (1) just and reasonable; (2) not unreasonably preferential, prejudicial or discriminatory; and (3) sufficient, equitable, and consistent in application to each class of consumers.

Additionally, interpreting TWC § 13.3011 to mean that the Commission is required to grant a utility’s request would logically remove the Commission’s review of the application of the acquiring utility’s rates. This would violate the presumptions outlined in Tex. Gov’t Code § 311.021(5), which requires a presumption that public interest is favored over any private interest.⁸ The Commission was granted authority to review rates to protect the public

⁶ *Youngkins v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). (See also, *Tex. Indus. Energy Consumers v. Pub. Util. Comm’n of Texas*, No. 03-17-00490-CV, 2021 WL 3518884, at *3 (Tex. App. – Austin Aug. 11, 2021, pet. denied) (mem. op.) (citing, *Youngkins*, 546 S.W.3d at 680); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985)).

⁷ See *City of DeSoto v. White*, 228 S.W.3d 389, 393 (Tex. 2009) (noting “reluctan[cc] to conclude that a provision is jurisdictional, absent clear legislative intent to that effect.”).

⁸ Tex. Govt. Code § 311.021(5).

interest.⁹ Therefore, Commission review of rates, even rates applied for under TWC § 13.3011, is in the public interest.

Lastly, simply approving a utility's request to implement a rate without further review from the Commission could lead to several absurd results. Foremost, an acquiring utility could impose massive rate increases, resulting in rate shock that the Commission would have no ability to address. Second, rates that were specifically tailored by the Commission to apply to unique circumstances (such as pass-through rates, rate case surcharges, and system improvement charges) would be applied to customers who do not derive the benefit from such correlating charges. Finally, if the Commission does not review whether the rates applied for by a utility should be applied to customers of the acquired system, a utility may be able to manipulate rates so as to avoid Commission review by buying a system with higher rates under an affiliate company and then transferring all of the systems with lower rates to the affiliate.

Therefore, the Commission should interpret TWC § 13.3011 to be permissive with regard to granting a utility's request to implement the acquiring utility's rates.

B. 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?

When considering whether to grant a request under TWC § 13.3011, the Commission should consider whether implementation of the requested rates would be (1) just and reasonable; (2) not unreasonably preferential, prejudicial or discriminatory; and (3) sufficient, equitable, and consistent in application to each class of consumers. The Commission should evaluate these requirements for each system the utility is requesting to acquire. Additionally, the Commission should consider if any special circumstance, such as pass-through rates, exists in either the acquired system's tariff or the acquiring system's tariff, and whether those special circumstances should still apply. For the reasons discussed above, evaluation under these requirements would be within the Commission's jurisdiction and within the public interest.

⁹ TWC 13.001(a).

C. *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 a request under TWC § 13.3011(a), the Commission may authorize the applicant to continue to charge the rates in the tariff of the acquired facility, as doing so will not violate TWC § 13.3011(b). TWC § 13.3011(b) says the Commission “may not require a person who makes a request under Subsection (a) to initiate a new rate proceeding to establish the *initial rates for service* the person will provide to the customers of the purchased or acquired system.” TWC § 13.3011 does not limit the Commission’s authority to direct or require the applicant to use the existing rate in the acquired system’s tariff in force at the time the STM was filed. Also, the language of TWC § 13.3011 does not prohibit the Commission from requiring the applicant to initiate a new rate proceeding once initial rates are established. The statute prohibits the Commission from requiring a rate proceeding to establish *initial* rates, not *subsequent* rates. Therefore, once initial rates are established in the STM proceeding, the Commission can require that a utility file a subsequent rate proceeding. Additionally, the Commission’s denial of a utility’s request under TWC § 13.3011 does not prevent a utility from filing a rate proceeding on its own accord if it believes the rates approved in the STM are insufficient.

D. *Does a request for a hearing to contest approval of rates under TWC § 13.3011(a) constitute proper grounds for a hearing under TWC § 13.301(e) and 16 Texas Administrative Code (“TAC”) § 24.239(h)?*

Yes, a request for a hearing to contest approval of rates under TWC § 13.3011(a) constitutes proper grounds for a hearing under TWC § 13.301(e) and 16 TAC § 24.239(h). TWC § 13.301(e)(5) allows for the consideration of the factors outlined in TWC § 13.246(c) when determining if a transaction is in the public interest.¹⁰ TWC § 13.246(c)(8), as well as 16 TAC § 24.239(h)(5)(H), allows the Commission to consider the probable improvement of service or lowering of costs to consumers in the requested area. A request for a hearing to contest approval of rates under TWC § 13.3011 asserts concerns that the transaction will not serve the public interest based on an application of the factors in TWC § 13.246(c). Lastly, the overall statutory scheme of the Texas Water Code is to protect the public interest.¹¹ TWC § 13.001(a)

¹⁰ TWC § 13.301(c)(5).

¹¹ TWC § 13.001(a).

clearly states that the legislative policy and purpose of water rates and services is “to protect the public interest inherent in the rates and services of retail utilities.”¹² The purpose of Chapter 13 of the Water Code “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.”¹³ As addressed above, TWC § 13.3011 should not be interpreted in isolation and TWC § 13.001(a) supports finding that contesting the approval of rates under TWC § 13.3011 is proper grounds for a hearing because it would be in the public interest. Therefore, the Commission should consider a request for a hearing to contest approval of rates under TWC § 13.3011(a) constitutes proper grounds for a hearing under TWC § 13.301(e) and 16 TAC § 24.239(h).

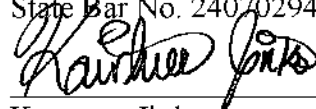
III. CONCLUSION

For the reasons stated above, OPUC believes the Commission should interpret TWC § 13.3011 in accordance with the recommendations outlined herein. OPUC appreciates the Commission’s consideration of its recommendations.

Date: October 27, 2023

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¹² *Id.*

¹³ TWC § 13.001(c).

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CERTIFICATE OF SERVICE
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I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 27th day of October 2023 by facsimile, electronic mail, and/or first class, U.S. mail.



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