



## **Filing Receipt**

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<b>APPLICATION OF TEXAS WATER</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>UTILITIES, LP AND SOUTHERN</b>	<b>§</b>	
<b>HORIZONS DEVELOPMENT, INC. FOR</b>	<b>§</b>	<b>OF TEXAS</b>
<b>SALE, TRANSFER, OR MERGER OF</b>	<b>§</b>	
<b>FACILITIES AND CERTIFICATE</b>	<b>§</b>	
<b>RIGHTS IN LIBERTY AND</b>	<b>§</b>	
<b>MONTGOMERY COUNTIES</b>	<b>§</b>	

**COMMISSION STAFF'S REPLY BRIEF**

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 and a reply brief by 3:00 p.m. on November 3, 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?**

Staff agrees with the Office of Public Utility Counsel's (OPUC)<sup>1</sup> and Anna Miller's<sup>2</sup> Initial Briefs, which conclude that 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 its Initial Brief, Texas Water disagrees with Staff, OPUC, and Anna Miller, and argues that the filed rate doctrine, Texas Code Construction Act, legislative intent, case law, and other

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<sup>1</sup> Office of Public Utility Counsel's Response to Order Requesting Briefing on Threshold Issues (Oct. 27, 2023).

<sup>2</sup> Brief on Threshold Issues (Oct. 27, 2023).

rules of statutory construction require the Commission to approve a request for an initial rate under TWC § 13.3011.<sup>3</sup>

**(i) TWC § 13.3011's Permissive Language and Statutory Construction**

Texas Water argues that TWC § 13.3011's permissive language does not apply to the Commission and instead only “permits, but does not require, an acquiring utility to request an initial rate under TWC § 13.3011.”<sup>4</sup> This reading of TWC § 13.3011 creates an absurd result and renders the introductory language of subsection (a) entirely superfluous, as it would permit acquiring utilities to request the Commission to authorize the acquiring utility to do something that the Commission is already required to authorize. There would be no point for an acquiring utility to request the Commission to authorize it to charge initial rates for service that are shown on a tariff for another water or sewer system if the Commission is already required to authorize the acquiring utility to charge those rates for service regardless. Further, Texas Water's interpretation of TWC § 13.3011 implies that, absent the existence of a word such as “may” in a statute, the Commission is required to take whatever action is included in the statute. This is contrary to the rules of statutory interpretation, which provide that “words and phrases shall be read in context and construed according to the rules of grammar and common usage.”<sup>5</sup> Nothing in the context of subsection (a) of TWC § 13.3011 states or even suggests that words imposing obligations shall be implied where the statute is silent.

Texas Water's interpretation also ignores the construction of other statutes in the TWC that require the Commission to perform a certain action. For example, TWC § 13.1872 requires the Commission to grant a Class D utility's application for up to a five percent annual rate adjustment if certain criteria are met. The statute makes the Commission's obligations clear, stating:

(e) The utility commission by rule **shall adopt procedures** to allow a utility to receive without a hearing an annual rate adjustment. The rules must:

(1) include standard language to be included in the notice described by Subsection (c)(1) describing the rate adjustment process; and

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<sup>3</sup> Texas Water Utilities, L.P.'s Initial Brief on Threshold Issues (Oct. 27, 2023) (Texas Water's Initial Brief).

<sup>4</sup> *Id.* at 7.

<sup>5</sup> Tex. Gov't Code § 311.011(a).

(2) provide that an annual rate adjustment described by this section **may not** result in a rate increase to any class or category of ratepayer of more than five percent.<sup>6</sup>

The plain language of TWC § 13.1872 clarifies that, if the criteria enumerated in the statute are met, the Commission must allow a utility to receive the authorized annual rate adjustment. The restrictive language of TWC § 13.1872 when compared to the language of TWC § 13.3011, illustrates that if the legislature intended to impose a requirement on the Commission to grant an acquiring utility's request, it would have used different language imposing an obligation on the Commission.

**(ii) Texas Code Construction Act**

When reading the plain language of TWC § 13.3011, it is clear that 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. TWC § 13.3011 states:

(a) A person who files an application described by Section 13.301(a) for the purchase or acquisition of a water or sewer system may request that the regulatory authority with original jurisdiction over the rates for water or sewer service provided by the person to the customers of the system authorize the person to charge initial rates for the service that are:

- (1) shown in a tariff filed with a regulatory authority by the person for another water or sewer system; and
- (2) in force for the other water or sewer system on the date the application described by Section 13.301(a) is filed.

(b) The regulatory authority may not require a person who makes a request under Subsection (a) to initiate a new rate proceeding to establish the initial rates for service the person will provide to the customers of the purchased or acquired system.

In addition to the considerations of the (1) object sought to be attained; (2) circumstances under which the statute was enacted; and (3) legislative history that Texas Water listed as statute construction aids, the Code Construction Act also includes the consequences of a particular

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<sup>6</sup> TWC § 13.1872(e)(1)-(2) (emphasis added).

construction as a factor the court may consider in construing a statute.<sup>7</sup> For TWC § 13.3011, the consequences of adopting Texas Water's interpretation of TWC § 13.3011 are ignoring the plain language of subsection (a) in a way that renders the entire statute meaningless. Construing the language of TWC § 13.3011(a) as allowing acquiring utilities to request the Commission to take action that the Commission is already obligated to take is simply illogical. Not only does interpreting subsection (a) as requiring the Commission to authorize an acquiring utility to use its tariff for another water or sewer system contradict the plain language of subsection (a), it also directly precludes the Commission's responsibility to "...ensure that every rate made, demanded, or received by any utility or by any two or more utilities jointly shall be just and reasonable."<sup>8</sup>

Factors to be considered when enacting a statute also support a plain language reading of TWC § 13.3011 that gives the Commission discretion to decide whether or not to grant a utility's request. Among other considerations, in enacting a statute it is presumed that "(3) a just and reasonable result is intended" and "(5) public interest is favored over any private interest."<sup>9</sup> Staff contends that not only is the express language of TWC § 13.3011 contrary to Texas Water's interpretation of the statute, enactment of such a statute would run afoul of both of these factors, creating a result that is not just and reasonable and that does not favor the public interest over a private one. Allowing an acquiring utility to automatically copy and paste its rates shown in a tariff for another water and sewer system would allow the acquiring utility to adopt arbitrary rates that are not based on the acquired utility's fair return on the invested capital used and useful in rendering service to the public, cost of facilities, revenues, expenses, taxes, net income, or capital improvements necessary for providing service. Ignoring all of these factors that the Commission is required to consider in a ratemaking proceeding, while also prohibiting the Commission from requiring an acquiring utility to initiate a new rate proceeding, permits utilities to charge rates that may not be just or reasonable based on the expenses and needs of the newly acquired system. Because there is no rule or statute requiring an acquiring water or sewer utility to initiate a ratemaking proceeding, if the Commission were 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

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<sup>7</sup> Tex. Gov't Code § 133.023(5).

<sup>8</sup> Texas Water Code (TWC) 13.182(a).

<sup>9</sup> Tex. Gov't Code § 311.021(3),(5).

customers in the acquired utility's service area, the Commission would have no recourse or mechanism to ensure that the rates charged are just and reasonable.

### (iii) Legislative Intent

Contrary to Texas Water's arguments in its Initial Brief, an examination of the legislative intent behind HB 1484, the bill that enacted the language codified in TWC § 13.3011, supports Staff's, OPUC's, and Anna Miller's interpretation of TWC § 13.3011 and a plain language reading of the statute. Texas Water cited the following statements from the bill analysis for TWC § 13.3011 to bolster its argument:

When specific water or wastewater utility companies are acquired, the acquiring utility is required to use the acquired utility's rates. If the acquiring utility wishes to use its current filed rate instead, the utility must file a rate increase with the Public Utility Commission of Texas (PUC) . . . **Therefore the bill seeks to address this issue by authorizing acquiring utilities to use previously approved rates immediately after acquiring another utility.**<sup>10</sup>

Texas Water ignored the paragraph of the bill analysis for TWC § 13.3011 directly following this quoted section, which states:

The bill amends the Water Code to authorize a person who files an applicable application with the PUC for the purchase or acquisition of certain water or sewer systems **to request** that the regulatory authority with original jurisdiction over the rates for water or sewer service provided by the person to such a system's customers **authorize the person to charge initial rates for the service** . . . .<sup>11</sup>

Although it is true that cherrypicked sections of a bill analysis may often be used to support differing interpretations of a bill and the resulting statute, a review of the bill analysis and TWC § 13.3011 in its entirety only leads to one result: the legislature wished to give acquiring utilities *an opportunity* to charge their existing filed rates for another water or sewer system owned by the acquiring utility to customers in the acquired utility's service area. The legislature did not wish to require the Commission to allow any and all acquiring utilities to charge their existing filed rates for another water or sewer system to every water and sewer system they acquire. Instead, the legislature recognized that there may be circumstances where it makes sense to allow an acquiring

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<sup>10</sup> Texas Water's Initial Brief at 3; *see also* Bill Analysis, Tex. H.B. 1484, 88<sup>th</sup> Leg., R.S. (2023) (HB 1484 Bill Analysis) (emphasis added).

<sup>11</sup> HB 1484 Bill Analysis (emphasis added).

utility to charge its existing filed rates for another water or sewer system, i.e., if the acquired system's financial projections for the first five years in which the authorized acquisition rates will be charged, capital improvement plans, rate schedules, billing comparisons, or other relevant information support the implementation of authorized acquisition rates for the acquired utility.<sup>12</sup>

Neither the bill analysis nor the language of the bill and resulting statute itself suggest that the Commission must allow an acquiring utility 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.

#### **(iv) Filed Rate Doctrine**

Texas Water argues that the filed rate doctrine supports an interpretation that the Commission is required to approve an acquiring utility's request for initial rates under TWC § 13.3011. Texas Water's interpretation of the filed rate doctrine overlooks the fact that a plain language reading of TWC § 13.3011 is supported by the filed rate doctrine. Under TWC § 13.3011, if the Commission does not approve an acquiring utility's request to charge its existing filed rates for another water or sewer system owned by the acquiring utility, the acquiring utility must instead charge the existing filed rates of the acquired utility. Implementing the existing filed rates of an acquired utility observes the filed rate doctrine, because the filed rate doctrine only prohibits utilities from charging rates for their services that have not been properly filed with an appropriate regulatory authority.<sup>13</sup> The existing filed rates of the acquired utility have, in their definition, been properly filed with the appropriate regulatory authority.

#### **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?**

As stated in Staff's initial brief, the Commission is not required to grant a request under TWC § 13.3011(a). If the Commission does not grant a request under TWC § 13.3011(a), the Commission should look at the criteria included in proposed rule 16 TAC § 24.240.<sup>14</sup> Further,

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<sup>12</sup> *Water and Sewer Utility Rates After Acquisition*, Project No. 53924, Discussion Draft at 16 TAC § 24.240(d)(1)-(7) (May 17, 2023).

<sup>13</sup> See, e.g., *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex. App.—Houston 1996, writ denied); see also Public Utility Regulatory Act, Tex. Util. Code § 104.005.

<sup>14</sup> Commission Staff's Initial Brief at 2 (Oct. 27, 2023).

although the factors listed in TWC §§ 13.246(c) and 16 TAC §§ 24.239(h) do not inquire into the just and reasonableness of a utility's rates, the Commission may use these factors when considering if a proposed transaction will serve the public interest. The Commission can also look at the current rates the transferor is charging to determine whether to grant such a request,<sup>15</sup> and uses a just and reasonable standard to determine the feasibility of the rates to be charged.<sup>16</sup>

**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)?**

Staff disagrees with Texas Water's argument that the Commission is required to approve a request for an initial rate.<sup>17</sup> However, Staff reiterates the argument made in Staff's initial brief and the argument made by Texas Water in its initial brief that 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. 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).**
  - 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).**

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<sup>15</sup> See TWC § 13.246(c) (detailing the considerations made by the Commission when determining whether to grant a certificate of public convenience and necessity and amendments to certificates).

<sup>16</sup> TWC 13.182(a).

<sup>17</sup> Texas Water's Initial Brief at 9.



Staff disagrees with Texas Water's argument that the Commission is required to approve an initial rate requested under TWC § 13.3011.<sup>18</sup> The Commission may approve an initial rate requested under TWC § 13.3011, but it is not required to do so. However, as stated in Staff's initial brief, Staff agrees with Texas Water's argument that a request for a hearing to contest approval of rates under TWC § 13.301(e) and 16 TAC § 24.239(h) is improper regardless of which rates the Commission determines to implement. As stated in Staff's initial brief, the proper avenue to contest a utility's water or sewer rates is in a rate case proceeding.<sup>19</sup>

Staff disagrees with OPUC's argument that 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). OPUC argues that the factors identified in TWC § 13.301(e)(5) and TWC § 13.246(c) allow the Commission to consider requests for a hearing to contest approval of rates under TWC § 13.3011(a). While it is true that TWC § 13.301(e)(5) states that the Commission *may* hold a hearing if "there are concerns that the transaction may not serve the public interest, after application of the considerations provided by Section 13.246(c) for determining whether to grant a certificate of convenience and necessity,"<sup>20</sup> the factors listed in TWC §§ 13.246(c)(1)-(9) and 16 TAC §§ 24.239(h)(1)-(5) do not inquire into the just and reasonableness of a utility's rates. OPUC specifically argues that TWC § 13.246(c)(8), which states that the Commission will consider "the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment" when considering whether or not to grant a utility's sale, transfer, or merger application also allows a hearing to contest approval of rates. This is not an accurate interpretation of TWC § 13.301(e), TWC § 13.246(c)(8), and 16 TAC § 24.239(h)(5)(H). TWC § 13.246(c)(8), 16 TAC § 24.239(h)(5)(H) and every other factor listed in TWC § 13.246(c), 16 TAC § 24.239(h), and TWC § 13.301(e) may be included in the Commission's considerations regarding whether or not to hold a hearing to determine **if the transaction will serve the public interest**, not a hearing to determine whether the rates proposed in that transaction are just and reasonable.

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<sup>18</sup> *Id.* at 10.

<sup>19</sup> Commission Staff's Initial Brief at 3.

<sup>20</sup> TWC § 13.301(e)(5).

Staff maintains that the proper avenue to contest the just and reasonableness of a utility's water or sewer rates is in a rate case proceeding, which TWC § 13.3011(b) expressly prohibits the Commission from requiring under TWC § 13.3011.

## **II. CONCLUSION**

For the reasons stated above, Staff respectfully requests that its reply brief in response to the questions posed by OPDM be considered for purposes of the pending interim order approving the sale and transfer to proceed.

Dated: November 3, 2023

Respectfully submitted,

### **PUBLIC UTILITY COMMISSION OF TEXAS LEGAL DIVISION**

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**DOCKET NO. 54617**

**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 November 3, 2023, in accordance with the Second Order Suspending Rules, filed in Project No. 50664.

/s/ Kelsey Daugherty  
Kelsey Daugherty