



## **Filing Receipt**

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**Item Number - 31**

**DOCKET NO. 55304**

<b>APPLICATION OF TEXAS WATER UTILITIES, L.P. AND SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY COMPANY, INC. FOR SALE, TRANSFER, OR MERGER OF FACILITIES AND CERTIFICATE RIGHTS IN TRAVIS COUNTY</b>	§ § § § § § §	<b>PUBLIC UTILITY COMMISSION  OF TEXAS</b>
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**TEXAS WATER UTILITIES, L.P.'S MOTION FOR RECONSIDERATION OF ORDER NO. 7 GRANTING MOTION TO ABATE AND ABATING PROCEEDING**

Texas Water Utilities, L.P., on behalf of itself and SWWC Utilities, Inc. dba Hornsby Bend Utility Company, Inc. (collectively, Movants) files this Motion for Reconsideration of Order No. 7 Granting Motion to Abate and Abating Proceeding.<sup>1</sup> Under 16 Texas Administrative Code (TAC) § 22.123(b)(2), a motion for reconsideration is due within five business days of the date an order is issued. Therefore, this pleading is timely filed.

**I. MOTION FOR RECONSIDERATION**

Movants request the reconsideration of Order No. 7 Granting Motion to Abate and Abating Proceeding. The abatement was requested and granted as a result of the decision of the Public Utility Commission of Texas (Commission) to “table [Docket Nos. 54617 and 55157] to a future open meeting so we can consider these dockets at the same time or after the rulemaking in Project No. 53924.”<sup>2</sup> Delaying the consideration of these pending proceedings until the Commission is ready to adopt a rule in Project No. 53924 improperly contravenes the presumption that administrative rules operate prospectively. It is also inappropriate in a proceeding where no hearing has been requested for the purpose of protesting the initial rates requested by the transferee.<sup>3</sup> Consequently, the abatement granted in Order No. 7 should be lifted.

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<sup>1</sup> Order No. 7 Granting Motion to Abate and Abating Proceeding (Jan. 4, 2024).

<sup>2</sup> Oral Motion to Table, Open Meeting Broadcast of Item Nos. 7 and 8 at 21:27–39 (Dec. 14, 2023).

<sup>3</sup> The hearing request made in this proceeding does not indicate that it was made to protest TWU’s request for initial rates. Office of Public Utility Counsel’s Request for Hearing (Jan. 3, 2024).

Under the Administrative Procedure Act,<sup>4</sup> a rule does not take effect until the 20th day after the date on which it is filed with the Texas Secretary of State. The earliest the Commission can consider and approve a Proposal for Adoption (PFA) in Project No. 53924 is the January 18, 2024 open meeting, which places the earliest possible effective date in February 2024. However, it is most likely that the effective date will be beyond February 2024 due to the request for a public hearing that was made in Project No. 53924.<sup>5</sup>

The application in the instant case was filed on July 31, 2023, and was found administratively complete on October 9, 2023.<sup>6</sup> Notice was found sufficient on November 21, 2023.<sup>7</sup> The only material purpose served by abating this case until a rule is adopted is to proceed with the processing of this application under the new rule. Consequently, Order No. 7 equates to a decision to retroactively apply the new rule.

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 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 any rule adopted in Project No. 53924.

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<sup>4</sup> Tex. Gov’t Code §§ 2001.001–.903.

<sup>5</sup> *Water and Sewer Utility Rates After Acquisition*, Project No. 53924, Texas Association of Water Companies, Inc.’s Initial Comments and Request for Public Hearing on Proposed Rule at 10 (Oct. 13, 2023).

<sup>6</sup> Order No. 3 Finding Application, As Supplemented, Administratively Complete, Requiring Notice, and Establishing Procedural Schedule (Oct. 8, 2023).

<sup>7</sup> Order No. 5 Finding Notice Sufficient and Establishing Procedural Schedule (Nov. 21, 2023).

<sup>8</sup> *In re CenterPoint Energy Houston Electric, LLC*, 629 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.*, 997 S.W.2d 248, 254 (Tex. 1999).

The Commission is not expressly granted any rulemaking authority in Texas Water Code (TWC) § 13.3011, retroactive or otherwise. While Movants do not challenge the Commission’s authority to adopt a rule to implement this statute, they do challenge the notion that any rule adopted after the application was filed would apply to the instant matter. As proposed, new 16 TAC § 24.240 establishes criteria to be used to review a request for initial rates that goes beyond the criteria enumerated in TWC § 13.3011(a) and establishes notice requirements when the statute does not require notice at all.<sup>12</sup> Therefore, any further processing of this case that is performed using the version of 16 TAC § 24.240 that may eventually be adopted in Project No. 53924 will immediately prejudice Movants’ material rights because it will impose requirements that did not exist at the time the application was prepared, filed, and deemed administratively complete.

Moreover, all the evidence currently available indicates that the rule to implement TWC § 13.3011 will not prohibit a request for an initial rate that is made in conjunction with a sale, transfer, or merger (STM) between affiliates. There is no statute or rule that prohibits an STM between two affiliates under TWC § 13.301, such a prohibition cannot be construed from TWC § 13.301, and such applications are commonplace at the Commission.<sup>13</sup> Similarly, the plain language of TWC § 13.3011(a) does not restrict the type of STM that may be accompanied by a request for initial rates—it applies to any person who “files an application for the purchase or acquisition of a water or sewer system.” This plain language stands in contrast to the statute addressing the use of the fair market valuation process, which defines both “acquiring utility” and “selling utility” to refer to a utility that is engaging in “a voluntary arm’s-length transaction,”<sup>14</sup> and the corresponding rule, which expressly states that it does not apply to a transaction between a utility and its affiliate.<sup>15</sup> Absent any language describing the type of application or transaction under TWC § 13.301 to which TWC § 13.3011 is applicable, it is

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<sup>12</sup> Project No. 53924, Proposal for Publication of New 16 TAC §24.240 as Approved at the September 14, 2023 Open Meeting at 7–8 (Sept. 14, 2023).

<sup>13</sup> See, e.g., *Application of Aqua Utilities, Inc. and Aqua Texas, Inc. for Sale, Transfer, or Merger of Facilities and Certificate Rights in Brazoria, Harris, Liberty, Matagorda, and Montgomery Counties*, Docket No. 51506, Notice of Approval (May 24, 2022); *Application of SWWC Utilities, Inc. dba Water Services, Inc. and Monarch Utilities I.L.P. for Sale, Transfer, or Merger of Facilities and Certificate Rights in Bandera, Bexar, Comal, Gillespie, Guadalupe, Hays Kendall, Kerr, and Medina Counties*, Docket No. 50319, Notice of Approval (May 11, 2021).

<sup>14</sup> TWC § 13.305(a)(1) and (3).

<sup>15</sup> 16 TAC § 24.238(a).

reasonable to conclude that this provision is applicable to any STM, including an STM between affiliates.

In addition, the Proposal for Publication (PFP) approved by the Commission in Project No. 53924 does not prohibit a request for an initial rate under TWC § 13.3011 that is made in conjunction with an STM between affiliates. Instead, it provides that a request for initial rates must include “a disclosure of whether the acquired and acquiring systems are affiliates or have been affiliates in the five year period before the proposed transaction.”<sup>16</sup> Even the Office of Public Utility Counsel’s comments on the PFP rejected an outright prohibition on the use of TWC § 13.3011 in conjunction with a transaction between affiliates in favor of a recommendation that new 16 TAC § 24.240 “comport with the aims of TWC § 13.185(e) relating to affiliate transaction [*sic*].” Accordingly, there is nothing to suggest that the adoption of a rule would materially alter the way this application must be reviewed.

The decision to delay the further consideration of Docket Nos. 54617 and 55157 was made without any discussion regarding when the Commission might finish the rulemaking in Project No. 53924 or when the Commission might make a decision regarding the threshold issue on affiliate transactions that include a request for initial rates. The decision to abate this proceeding was made absent a request for a hearing to protest TWU’s request for an initial rate. The result of both decisions is to ignore the valid and enforceable provisions of TWC § 13.3011, and to prejudice Movants’ material rights by inappropriately freezing three of TWU’s pending transactions in the administrative process in anticipation of a literal changing of the rules in the middle of the game.

## II. CONCLUSION

Movants respectfully request the reconsideration of Order No. 7 and the entry of an order lifting the abatement. Additionally, Movants request any further relief to which they have shown themselves justly entitled.

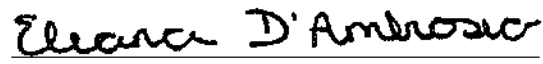
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<sup>16</sup> Project No. 53924, Proposal for Publication of New 16 TAC §24.240 as Approved at the September 14, 2023 Open Meeting at 8 (Sept. 14, 2023).

Respectfully submitted,

SPENCER FANE, LLP  
816 Congress Avenue  
Suite 1200  
Austin, Texas 78701  
Telephone: (512) 840-4550  
Facsimile: (512) 840-4551

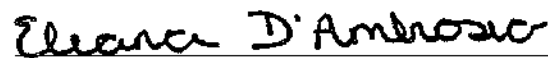
William A. Faulk, III  
State Bar No. 24075674  
[cfaulk@spencerfane.com](mailto:cfaulk@spencerfane.com)  
Taylor P. Denison  
State Bar No. 24116344  
[tdenison@spencerfane.com](mailto:tdenison@spencerfane.com)

  
Eleanor D' Ambrosio  
State Bar No. 24097559  
[edambrosio@spencerfane.com](mailto:edambrosio@spencerfane.com)

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

**CERTIFICATE OF SERVICE**

I hereby 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 January 8, 2024, in accordance with the Order Suspending Rules, issued in Project No. 50664.

  
Eleanor D' Ambrosio