**PROJECT NO. 54046**

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| **REVIEW OF 16 TAC §24.239** | **§** | **PUBLIC UTILITY COMMISSION** |
| | **§** | |
| | **§** | **OF TEXAS** |

**ORDER ADOPTING AMENDMENTS TO 16 TAC §24.239**
**AS APPROVED AT THE MARCH 9, 2023 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to §24.239 (relating to Sale, Transfer, Merger, Consolidation, Acquisition, Lease, or Rental). The commission adopts this rule with changes to the proposed text as published in the October 14, 2022, issue of the *Texas Register* (47 TexReg 6713). The amended rule implements Texas Government Code (Tex. Gov't Code) §1502.055 as revised by House Bill 3717, enacted by the 87th Legislature. Specifically, the adopted amendments clarify the entities to which the rule applies and implement specific requirements for transactions involving the purchase of a municipal retail water or sewer utility system from a municipally owned utility (MOU).

The commission received comments on the proposed rule from Aqua Texas. Inc. (Aqua Texas) and Texas Association of Water Companies, Inc. (TAWC).

***Applicability and Statutory Alignment***

Tex. Gov't Code §1502.055(a) and (b) prohibit a municipality from selling a utility system unless the sale is approved by a majority vote of the qualified voters of the municipality. Subsection (d) lays out an exception to the majority vote requirement. Under this exception, a municipality can bypass the majority vote requirement for a municipal retail water or sewer utility system if the Texas Commission on Environmental Quality (TCEQ) has issued a notice of violation to the utility

system, and the governing board of the municipality finds by official action that the municipality is either financially or technically unable to restore the system to compliance with the applicable law or regulations.

Section 24.239 imposes requirements on any water supply or sewer service corporation or a water and sewer utility owned by an entity required to possess a certificate of convenience and necessity that is acquiring a retail water or sewer system. Conversely, Texas Gov't Code §1502.055 imposes requirements on the sale of a utility system by a municipality. Therefore, to appropriately orient the requirements of Tex. Gov't Code §1502.055 to the structure of the rule, the statutory requirements imposed on municipalities are implemented as rule requirements applicable only to applicant purchasers that are subject to the commission's original jurisdiction and must therefore seek commission approval for the transaction under Texas Water Code §13.301. Accordingly, the adopted rule does not apply to the purchase of a municipal utility system by an entity not within the commission's jurisdiction or displace any additional requirements a municipality may have for such transactions – with the exception of any local election requirements, which are displaced statutorily by Tex. Gov't Code §1502.055(d) and discussed in further detail below.

The adopted rule recognizes the local jurisdiction of municipalities by deferring to local practices for what constitutes an "official action" by a municipality's governing board. The adopted rule also acknowledges that a municipality may determine, if applicable, which of the utility systems under its control are part of the municipal utility system being purchased as part of a transaction under this rule. Specifically, the adopted rule defines a municipal utility system as "one or more

retail water or sewer utility systems that comprise all or part of the facilities used by a municipally owned utility to provide retail water or sewer utility service."

The adopted rule also respects the TCEQ's jurisdiction over its own enforcement process by interpreting "notice of violation" broadly to also include other means the TCEQ uses to notify utilities of compliance issues, such as via notices of enforcement or field citations. The adopted rule further supports the TCEQ's compliance efforts by requiring the applicant to notify the TCEQ of any transactions that are authorized based upon the issuance of a TCEQ notice of violation.

***Proposed §24.239(c)(1)(A) – Transactions involving a municipal utility system; majority vote authorization***

Proposed §24.239(c)(1)(A) requires an applicant to provide documentation to the commission indicating the sale has been authorized by a majority vote of the qualified voters of the municipality in an election held by the governing body of the municipality and in the manner provided for bond elections in the municipality.

TAWC recommended the phrasing of proposed §24.239(c)(1)(A) be broadened to allow the sale of a municipal utility system after an election or referendum under other applicable laws, not just bond elections. As support for this recommendation, TAWC referred to the language of Tex. Gov't Code §1502.055(d), which begins with "[n]otwithstanding Subsection (a) or *other law*, a municipality is not required to hold an election to authorize the sale of a [municipal water system] if… (emphasis added)." TAWC argues this shows legislative intent to cover all of the possible election requirements that might apply. TAWC provided draft language consistent with its recommendations.

*Commission Response*

**The commission declines to amend the majority vote requirement in §24.239(c)(1)(A) to include other election or referendum types in addition to bond elections. The "[n]otwithstanding Subsection (a) or other law" statutory language cited by TAWC does not apply to this rule provision. The majority vote requirement in §24.239(c)(1)(A) is the default process for the sale of a utility system as described under Tex. Gov't Code §1502.055(a) and (b). In relevant part, Tex. Gov't Code §1502.055(a) states "[u]nless authorized by a majority vote of the qualified voters of the municipality, a municipality may not sell a utility system…." Tex. Gov't Code §1502.055(b) further clarifies that the election must be held "in the manner provided for bond elections in the municipality." Accordingly, an election authorizing a sale of a municipal utility system must be held in the manner provided for bond elections.**

**The language cited by TAWC only applies to the exception to the default process, allowing the governing body to authorize the sale by official action without an election in certain circumstances. The phrase "notwithstanding Subsection (a) or other law" in Tex. Gov't Code §1502.055(d) indicates the exception laid out in that subsection takes primacy over any other legal requirement that the municipality hold an election prior to the sale of the municipal utility system, including the majority vote requirement of Tex. Gov't Code §1502.055(a). For example, if a municipal ordinance required certain procedures to be followed in addition to the majority vote requirement prescribed by Tex. Gov't Code §1502.055(a), both the local ordinance and the majority vote requirement would be overridden if the conditions of Tex. Gov't Code §1502.055(d) are met. The language does**

**not, as argued by TAWC, allow a municipality to substitute the majority voting requirements of Tex. Gov't Code §1502.055(a) and (b) with alternate requirements that may exist in other applicable laws.**

**The commission also modifies the rule to add a reference to Tex. Gov't Code, Chapter 1251, which governs municipal bond elections. This modification provides the location of the general law governing bond elections for reference, while also acknowledging a municipality may have additional requirements for such proceedings.**

***Proposed §24.239(c)(1)(B) – Transactions involving a municipal utility system; TCEQ notice of violation***

Proposed §24.239(c)(1)(B) requires an applicant to provide documentation to the commission that the TCEQ has issued a notice of violation to the municipally owned utility for the municipal utility system and the governing body of the municipality has found by official action that the municipality is either financially or technically unable to restore the municipal utility system to compliance with the applicable law or regulations.

Aqua Texas and TAWC recommended language be included in §24.239(c)(1)(B) that indicates the provision is an exception to, and takes priority over, the requirement that a municipality authorize the sale of a municipal utility system by majority vote under §24.239(c)(1)(A).

***Commission Response***

**The commission declines to modify §24.239(c)(1)(B) to clarify that it is an exception to the majority voting requirements of §24.239(c)(1)(A), because it is unnecessary. The rule**

**requires an applicant to provide documentation of compliance with either subparagraph (A) *or* (B). The use of "or" indicates that if an applicant complies with subparagraph (B), it is not required to comply with subparagraph (A). This interpretation is consistent with the plain language of Tex. Gov't Code §1502.055(d).**

Aqua Texas and TAWC recommended that the phrase "at an open meeting under Tex. Gov't Code Subchapter 551" be removed from proposed §24.239(c)(1)(B). Aqua Texas argued that the phrase "official action" is sufficient to encapsulate the requirement and that municipalities should be presumed to be aware of all statutory requirements to take "official action." Aqua Texas also noted that, on a municipality-by-municipality basis, there may be additional statutory or municipal requirements for an "official action." Accordingly, the specific reference to the Open Meetings Act may not apply. TAWC similarly recommended that proposed §24.239(c)(1)(B) be revised to more accurately track the statutory language of Tex. Gov't Code §1502.055(d) and not restrict official action to actions taken at an "open meeting."

***Commission Response***

**The commission agrees with Aqua Texas and TAWC that the requirements for a municipality's governing body taking official action may vary by municipality. The commission modifies the rule to eliminate the requirement that the official action take place "at an open meeting under Tex. Gov't Code Subchapter 551." An official action taken by the governing body in the manner generally authorized within the municipality will satisfy that relevant requirement in §24.239(c)(1)(B).**

**Additionally, for the reasons outlined in the commission's response to comments to §24.239(c)(3)(B) below, the commission modifies §24.239(c)(1)(B) to clarify that "any official written notification from the TCEQ, such as a notice of violation letter, a notice of enforcement letter, or a field citation, that a retail water or sewer system is out of compliance with a rule or statute within the TCEQ's jurisdiction will be considered a notice of violation."**

***Proposed §24.239(c)(2) – Transactions involving a municipal utility system; record of proceedings for sale authorized under (c)(1)(A)***

Proposed §24.239(c)(2) requires, for sales authorized under §24.239(c)(1)(A), the applicant to provide a copy of the record of proceedings for the election authorizing the sale of the municipal utility system that complies with the requirements for bond elections in Tex. Gov't Code Subchapter 1251.

Aqua Texas and TAWC each recommended modifying the phrase "a copy of the record of proceedings...that comply with Tex. Gov't Code, Subchapter 1251." Specifically, Aqua Texas argued that the phrase "a copy of the record of proceedings" is undefined and therefore introduces ambiguity that could complicate and delay the application process. Aqua Texas also noted that the proposed language is ambiguous as it fails to identify the applicable documentation requirements of Tex. Gov't Code Subchapter 1251. TAWC opposed the specific reference to Tex. Gov't Code, Subchapter 1251, because this subchapter is specific to bond election proceedings. Aqua Texas and TAWC provided draft language consistent with their recommendations.

***Commission Response***

**The commission modifies the rule to replace the requirement that the applicant provide a copy of the record of proceedings that complies with Tex. Gov't Code, Subchapter 1251 with a requirement that the applicant "include with its application documentation that the sale was authorized by a majority vote in an election that complies with the requirements of this section." This language addresses concerns raised by commenters by allowing the applicant to identify appropriate documentation relating to the particular practices of each municipality. However, this documentation must be sufficient to demonstrate that the requirements of this section have been met.**

***Proposed §24.239(c)(3) – Transactions involving a municipal utility system; transaction documentation to be provided to TCEQ and the commission***

Proposed §24.239(c)(3) requires, for a sale authorized under §24.239(c)(1)(B), the applicant to provide notice to the TCEQ of the transaction by certified mail.

TAWC recommended the requirement to notify TCEQ by certified mail under proposed §24.239(c)(3) be removed from the rule because it is not a statutory requirement. TAWC recommended that, if the commission elects to preserve such a requirement, it be moved to the general public notice requirements under proposed §24.239(b).

Aqua Texas recommended that the commission remove the requirement that the notice provided to TCEQ be provided by certified mail.

***Commission Response***

**The commission declines to remove the requirement that the applicant notify TCEQ of the sale. The issuance of a notice of violation indicates that the TCEQ may still be actively investigating or monitoring the municipal utility system. Ensuring that TCEQ has accurate information on the sale of the municipal utility system will prevent potential confusion over ownership and mitigate potential enforcement issues during and after the sale.**

**The commission agrees with Aqua Texas and TAWC that the notice provided to TCEQ should not be required to be provided by certified mail. The commission removes the phrase "by certified mail" from §24.239(c)(3) and specifies that notice to the TCEQ must be "in writing." Written notification is sufficient to reliably inform the TCEQ of the transaction in a manner that is verifiable.**

***Proposed §24.239(c)(3)(A) – Documentation to provide to the commission; copy of active notice of violation***

Proposed §24.239(c)(3)(A) requires a copy of the active notice of violation from the TCEQ involving the MOU to be provided to the commission.

Aqua Texas and TAWC recommended the commission modify the term "active notice of violation" in proposed §24.239(c)(3)(A), because "notice of violation" is neither a defined term nor is it apparent from the context of the provisions what constitutes an "active notice of violation." Aqua Texas and TAWC explained that the TCEQ can notify a utility of violations in many ways, such as an investigation letter, that do not rise to the level of an "active" enforcement case. Aqua

Texas and TAWC argued that a municipality should not have to wait for an "active" enforcement case before initiating the sale and repair of a non-compliant utility system. Further, such an outcome is contrary to the legislative intent of the statute to "quickly facilitate the sale of the municipal system to rectify compliance issues." Aqua Texas also contended that requiring an "active" enforcement case risks either the municipality or purchaser of the municipal utility system incurring fines or penalties, diminishing the commercial advantages of acquiring the system. TAWC also noted that Tex. Gov't Code §1502.055(d) does not require a violation be "active."

Aqua Texas recommended the "active notice of violation" requirement in proposed §24.239(c)(3)(A) be revised to permit acquisition when the municipality or the TCEQ identify noncompliance issues, regardless of whether an official notice of violation letter has been issued. In support of this recommendation, Aqua Texas noted that some violations are so severe as to require immediate action and correction. A municipality may also identify potential violations before they become "active." Aqua Texas also contended the proposed rule language would allow the commission to determine that no "active" violation existed after the acquisition of a municipal utility system, and that the parties therefore did not comply with the requirements of §24.239 or statute. Such an outcome would force the municipality to hold a majority vote, further delaying the sale.

***Commission Response***

**The commission removes the term "active" from the phrase "active notice of violation" used in §24.239(c)(3)(A). The commission agrees with Aqua Texas and TAWC that the term**

**"active" is not required by statute and could result in uncertainty over when the exception to the majority vote requirement can be utilized.**

**Commenters also expressed concern that that a municipality would still be subject to the majority vote requirement if the system was out of compliance with TCEQ rules, but the TCEQ has not yet issued a notice of violation. The commission agrees with this characterization. Under the adopted rule, and as required by statute, the exception to the majority vote requirement is not available until a notice of violation has been issued. Knowledge by the municipality that a system is out of compliance with the applicable TCEQ rules or that the TCEQ is investigating a system is not sufficient to trigger the availability of the exception. The majority vote requirement provides the voters of a municipality with a statutory right to vote on whether the municipality can sell a municipal utility system. The commission cannot, by rule, limit that statutory right until the conditions laid out in statute for the exception – including the requirement that the TCEQ has issued a notice of violation – are met.**

Aqua Texas recommended that "notice of violation" be defined as "any notification from the TCEQ of an immediate violation or a condition that will result in a future violation that the municipality is either financially or technically unable to restore the system to compliance." Aqua Texas notes that the TCEQ issues a number of different types of notices to alert utilities of compliance issues including notice of violation letters, notice of enforcement letters, area of concern letters, and field citations. TAWC similarly recommended that the term "notice of

violation" be construed more broadly and encompass any non-compliance notification by the TCEQ.

***Commission Response***

**The commission agrees with Aqua Texas that the statutory term "notice of violation" should not be interpreted to only include TCEQ-issued notice of violation letters. Notice of violation letters are only one of the tools that the TCEQ uses to notify utilities of compliance issues. For example, for the most serious class of violations, the TCEQ will bypass sending a notice of violation letter entirely and initiate enforcement proceedings with a notice of enforcement letter. Not allowing a municipality that is facing compliance issues that are serious enough to merit enforcement proceedings to make use of the exception to the majority vote requirement would delay the municipality's ability to sell these systems, contrary to the intent of the statute.**

**The commission modifies §24.239(c)(1)(B) to clarify that "any official written notification from the TCEQ, such as a notice of violation letter, a notice of enforcement letter, or a field citation, that a retail water or sewer system is out of compliance with a rule or statute within the TCEQ's jurisdiction will be considered a notice of violation."**

***Proposed §24.239(c)(3)(B) – Documentation to provide to the commission; certified mail receipt of notice to TCEQ***

Proposed §24.239(c)(3)(B) requires a copy of the certified mail receipt for the notice issued to the TCEQ regarding the transaction to be provided to the commission.

Aqua Texas and TAWC recommended the requirement to provide a certified mail receipt of the notice of violation be removed as it is not required by Tex. Gov't Code §1502.055(d). Aqua Texas stated that notice is generally performed via affidavit by the utility as opposed to by regulatory authorities. Aqua Texas noted that certified mail in such circumstances is "rarely, if ever, required" and that no basis exists for such a heightened requirement in the rule. TAWC commented that if the commission elects to retain the requirement to notify the TCEQ by certified mail, such notice should be permitted after an application is accepted by the commission along with other mailed notices which only require an affidavit of mailing, not a certified mail receipt.

***Commission Response***

**The commission agrees with Aqua Texas and TAWC that the reference to certified mail in §24.239(c)(3)(B) should be deleted, because the adopted rule no longer contains the requirement that the applicant notify TCEQ of the transaction by certified mail. Accordingly, the commission replaces the phrase "a copy of the certified mail receipt for the notice to the TCEQ regarding the transaction" with "a copy of the written notice issued to the TCEQ regarding the transaction."**

***Proposed §24.239(c)(3)(C) – Documentation to provide to the commission; copy of official action***

Proposed §24.239(c)(3)(C) requires the application to include a copy of the official action taken by the governing body of the municipality at an open meeting under Tex. Gov't Code Subchapter

551 finding the municipality is financially or technically unable to restore the municipal utility system to compliance with the applicable law or regulations.

Mirroring its recommendation for proposed §24.239(c)(1)(B), Aqua Texas recommended that the phrase "at an open meeting under Tex. Gov't Code Subchapter 551" be removed from §24.239(c)(3)(C) as the phrase "official action" is sufficient to encapsulate the requirement.

***Commission Response***

**The commission agrees with Aqua Texas and TAWC and removes the reference to open meetings under Tex. Gov't Code Subchapter §551 from §24.239(c)(3)(C). Because the commission modified §24.239(c)(1)(B) to only require the governing body make a finding by "official action," the commission also modifies §24.239(c)(3)(C) to only require documentation of the official action.**

***Proposed §24.239(e)(1)(E)(i) – Notice to affected customers of municipal utility system transaction; copy of record of proceedings***

Proposed §24.239(e)(1) requires notice be given to customers affected by a transaction under the rule. Proposed §24.239(e)(1)(E)(i) additionally requires a copy of the record of proceedings order be given to affected customers if the transferor is a municipality and the sale has been authorized by a majority vote of the qualified voters of the municipality under §24.239(c)(1)(A).

Aqua Texas recommended the phrase "record of proceedings order" used in proposed §24.239(e)(1)(E)(i) be revised to "documentation evidencing the sale has been authorized

consistent with Tex. Gov't Code §1502.055" because the former phrase is ambiguous. Aqua Texas commented that more generalized language minimizes confusion and potential disputes over what constitutes a "record of proceedings order" and affords a municipality greater flexibility in documenting its actions related to the sale, transfer, or merger of the municipal utility system.

TAWC commented that the requirement for a "record of proceedings order" under proposed §24.239(e)(1)(E)(i) will need to be revised if the commission declines to eliminate the requirement that the election be in the manner of bond elections as TAWC recommended under §24.239(c)(1)(A). TAWC also requested clarification as to what "record of proceedings order" means and revision of proposed §24.239(e)(1)(E)(i) as appropriate.

***Commission Response***

**The commission agrees with Aqua Texas and TAWC that the phrase "record of proceedings order" under proposed §24.239(e)(1)(E)(i) is ambiguous. The commission modifies the language of subparagraph (E) more broadly by replacing each requirement to provide affected customers with copies of specific documents, including the record of proceedings order requirement, with a requirement to provide affected customers with "a statement describing the details of the authorizing election, including the date and outcome of the election and the text of the applicable ballot provision." This modification addresses the concerns expressed by commenters, provides customers with a summary of information on how the sale was authorized, and reduces the burden of distributing potentially lengthy documents.**

***Proposed §24.239(e)(1)(E)(ii) – Notice to affected customers of municipal utility system transaction; copy of active notice of violation and official action***

Proposed §24.239(e)(1)(E)(ii) requires, if the transferor is a municipality and §24.239(c)(1)(B) applies, the notice of violation issued to the municipal utility system by the TCEQ and a copy of the official action taken by the governing body of the municipality finding the municipality is financially or technically unable to restore the utility system to compliance, to be included as part of the notice issued to affected customers under §24.239(e)(1).

Aqua Texas and TAWC recommended the commission modify the term "active notice of violation" in proposed §24.239(e)(1)(E)(ii) as the term "notice of violation" is neither a defined term nor is it apparent from the context of the provisions what constitutes an "active" notice of violation.

Mirroring its recommendation for proposed §24.239(c)(3)(A), Aqua Texas further recommended that "notice of violation" be defined to mean "any notification from the TCEQ of an immediate violation or a condition that will result in a future violation that the municipality is either financially or technically unable to restore the system to compliance." TAWC similarly recommended that the term "notice of violation" be construed more broadly and encompass any non-compliance notification by the TCEQ.

Mirroring its recommendation for proposed §24.239(c)(3)(A), TAWC recommended that the word "active" be deleted and the phrase "at an open meeting…under Subchapter 551" language in proposed §24.239(e)(1)(E)(ii) be revised to "documentation evidencing the official action taken

by the municipality finding…". TAWC commented that its proposed language more accurately tracks the statutory language of Tex. Gov't Code §1502.055(d) and does not restrict official action to those taken at an "open meeting," which is not a requirement of statute.

***Commission Response***

**The commission agrees with Aqua Texas and TAWC and makes a number of modifications to the rule to align with similar modifications made to §24.239(c). These include removing the term "active" from "active notice of violation," construing "notice of violation" more broadly, and removing the references to the Open Meetings Act.**

**The commission also modifies the provisions of §24.239(e)(1)(E)(ii) to replace requirements to produce copies of specific documents with descriptions of the contents of those documents. This modification will reduce potentially burdensome distribution requirements and ensure that consumers are not provided with an unwieldy amount of information.**

***Pending Enforcement Actions and Penalties***

Aqua Texas recommended the commission add a new subsection clarifying that a utility acquiring a utility system from a municipality is not liable for enforcement actions or penalties that are related to a notice of violation involving activities that occurred prior to the acquisition of the system by the acquiring utility. Aqua Texas explained that it is sometimes unclear whether the purchasing entity or entity selling the utility is responsible for enforcement actions or penalties that were initiated or assessed on the utility system prior to the acquisition. Aqua Texas argued that, under the proposed rule, the exception to the majority vote provision can only be triggered

after a violation is known to the municipality and TCEQ, and therefore risks post-acquisition enforcement proceedings and penalties. Aqua Texas commented that such a risk would serve to discourage transactions involving a municipal utility system. Aqua Texas recommended the commission insert a provision to exempt the acquiring utility from liabilities incurred by the previous owner and provide the acquiring utility adequate time to address known compliance issues before being subject to potential enforcement actions or penalties for such issues.

***Commission Response***

**The commission declines to add a provision to §24.239 that would address the liability of the acquiring utility for any pending enforcement actions or accrued penalties, or that would provide the acquiring utility with a grace period to come into compliance before being subject to enforcement actions. The commission does not have jurisdiction over the TCEQ's enforcement process, and Tex. Gov't Code §1502.055 does not provide any legal basis for the inclusion of such a provision.**

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other minor modifications for the purpose of clarifying its intent.

The amended rule is adopted under the following provisions of the Texas Water Code and Texas Government Code: Texas Water Code §13.041(a), which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by the Texas Water Code that is necessary and

convenient to the exercise of that power and jurisdiction; Texas Water Code §13.041(b), which provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; Texas Water Code §13.301, which governs the sale, acquisition, lease, or rental of water utilities by entities required to possess a certificate of public convenience and necessity; and Texas Government Code §1502.055, which requires the sale of a utility system to be authorized by a majority vote of the qualified voters of the municipality unless certain circumstances apply.

Cross reference to statutes: Texas Water Code §13.041(a) and (b), §13.301; and Texas Government Code §1502.055.

**§24.239. Sale, Transfer, Merger, Consolidation, Acquisition, Lease, or Rental.**

(a) **Application.** A water supply or sewer service corporation or a water and sewer utility owned by an entity required to possess a certificate of convenience and necessity (CCN) must comply with this section. A municipality, district, or political subdivision may, but is not required to, comply with this section.

(b) **Notice and filing requirements for approval of transaction.** No later than 120 days before the effective date of any sale, transfer, merger, consolidation, acquisition, lease, or rental, an applicant must file an application with the commission and give public notice of the transaction in accordance with this section. Notice is considered given under this subsection on the later of:

(1) the last date the applicant mailed the required notice as stated in the applicant's affidavit of notice; or

(2) the last date of the publication of the notice in the newspaper as stated in the affidavit of publication, if required.

(c) **Transaction involving a municipal utility system.** A transaction involving the sale of a municipal utility system to an entity to which this section applies must comply with this subsection. For purposes of this subsection, a municipal utility system means one or more retail water or sewer utility systems that comprise all or part of the facilities used by a municipally owned utility to provide retail water or sewer utility service. If the municipal utility system being acquired does not include all of the facilities used by the municipally owned utility to provide retail water or sewer utility service, the applicant must provide sufficient detail in its application to identify the specific retail water or utility systems and facilities being acquired.

(1) A water supply or sewer service corporation or a water and sewer utility required to possess a CCN may purchase a municipal utility system if:

(A) the sale has been authorized by a majority vote of the qualified voters of the municipality in an election held by the governing body of the municipality

in the manner provided for bond elections in the municipality including, if applicable, Tex. Gov't Code Title 9, Subtitle C, Chapter 1251; or

(B) the Texas Commission on Environmental Quality (TCEQ) has issued a notice of violation to the municipality for one or more of the retail water or sewer systems that comprise the municipal utility system, and the governing body of the municipality finds by official action that the municipality is either financially or technically unable to restore the retail water or sewer system or systems to compliance with the rules or statutes cited in the notice of violation. For purposes of this section, any official written notification from the TCEQ, such as a notice of violation letter, a notice of enforcement letter, or a field citation, that a retail water or sewer system is out of compliance with a rule or statute within the TCEQ's jurisdiction will be considered a notice of violation.

(2) For a sale authorized under paragraph (1)(A) of this subsection, the applicant must include with its application documentation that the sale was authorized by a majority vote in compliance with the requirements of this section.

(3) For a sale authorized under paragraph (1)(B) of this subsection, the applicant must provide notice to the TCEQ of the transaction in writing. For a sale authorized under paragraph (1)(B) of this subsection, the applicant must also include the following information to the commission as a part of its application:

(A) a copy of the notice of violation issued by the TCEQ involving the municipal utility system;

(B) a copy of the written notice provided to the TCEQ as required by this paragraph; and

(C) documentation of the official action taken by the governing body of the municipality finding the municipality is financially or technically unable to restore the municipal utility system to compliance with the rules or statutes cited in the notice of violation.

(d) **Intervention period.** The intervention period for an application filed under this section must not be less than 30 days. The presiding officer may order a shorter intervention period for good cause shown.

(e) **Notice.**

(1) Unless notice is waived by the commission, proper notice must be given to affected customers and to other affected parties as required by the commission on the form prescribed by the commission. The notice must include the following:

(A) the name and business address of the utility currently holding the CCN (transferor) and the retail public utility or person that will acquire the facilities or CCN (transferee);

(B) a description of the requested area;

(C) the following statement: "Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission, P.O. Box 13326, Austin, Texas 78711-3326, or call the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas at 1-800-735-2989. The deadline for intervention in the proceeding is (date 30 days from the mailing or publication of notice, whichever occurs later, unless otherwise provided by the presiding officer). If you wish to intervene, the commission must receive your letter requesting intervention or motion to intervene by that date."; and

(D) if the transferor is a nonfunctioning utility with a temporary rate in effect and the transferee is requesting that the temporary rate remain in effect under TWC §13.046(d), the following information:

(i) the temporary rates currently in effect for the nonfunctioning utility; and

(ii) the duration of time for which the transferee is requesting that the temporary rates remain in effect.

(E) if the transferor is a municipality, the notice must also provide the following information as an attachment, as applicable:

(i) If subsection (c)(1)(A) of this section applies, a statement describing the details of the authorizing election, including the date and outcome of the election and the text of the applicable ballot provision.

(ii) If subsection (c)(1)(B) of this section applies, a statement:

(I) indicating that the TCEQ has issued a notice of violation for one or more systems within the municipal utility system and that the governing board of the municipality has found that it is either financially or technically unable to restore the system to compliance with the applicable rules or statutes;

(II) providing a basic description of the violations cited in the notice of violation, including the systems involved, the nature of the violations, and the rules or statutes cited in the notice of violation; and

(III) describing the details of the official action of the governing board including the date and forum in which the official action was taken and how to locate a transcript or recording of the official action, if available.

(2) The transferee must mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles from the outer boundary of the requested area, and any city with an extraterritorial jurisdiction that overlaps the requested area.

(3) The commission may require the transferee to publish notice once each week for two consecutive weeks in a newspaper of general circulation in each county in which the retail public utility being transferred is located. The commission may allow published notice in lieu of individual notice as required by paragraph (2) of this subsection.

(4) The commission may waive published notice if the requested area does not include unserved area, or for good cause shown.

(f) If the transferee cannot demonstrate adequate financial capability, the commission may require that the transferee provide financial assurance to ensure continuous and adequate retail water or sewer utility service is provided to both the requested area and any area already being served under the transferee's existing CCN. The commission will set the amount of financial assurance. The form of the financial assurance must meet the requirements of §24.11 of this title (relating to Financial Assurance). The obligation to obtain financial assurance under this title does not relieve an applicant from any requirements to obtain financial assurance to satisfy another state agency's rules.

(g) The commission will, with or without a public hearing, investigate the sale, transfer, merger, consolidation, acquisition, lease, or rental to determine whether the transaction will serve the public interest. If the commission decides to hold a hearing, or if the transferee fails either to file the application as required or to provide public notice, the transaction proposed in the application may not be completed unless the commission determines that the proposed transaction serves the public interest.

(h) Before the expiration of the 120-day period described in subsection (a) of this section, the commission will determine whether to require a public hearing to determine if the transaction will serve the public interest. The commission will notify the transferee, the transferor, all intervenors, and the Office of Public Utility Counsel whether a hearing will be held. The commission may require a hearing if:

(1) the application filed with the commission or the public notice was improper;

(2) the transferee has not demonstrated adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any area already being served under the transferee's existing CCN;

(3) the transferee has a history of:

(A) noncompliance with the requirements of the TCEQ, the commission, or the Texas Department of State Health Services; or

(B) continuing mismanagement or misuse of revenues as a utility service provider;

(4) the transferee cannot demonstrate the financial ability to provide the necessary capital investment to ensure the provision of continuous and adequate service to the requested area; or

(5) there are concerns that the transaction does not serve the public interest based on consideration of the following factors:

(A) the adequacy of service currently provided to the requested area;

(B) the need for additional service in the requested area;

(C) the effect of approving the transaction on the transferee, the transferor, and any retail public utility of the same kind already serving the area within two miles of the boundary of the requested area;

(D) the ability of the transferee to provide adequate service;

(E) the feasibility of obtaining service from an adjacent retail public utility;

(F) the financial stability of the transferee, including, if applicable, the adequacy of the debt-equity ratio of the transferee if the transaction is approved;

(G) environmental integrity;

(H) the probable improvement of service or lowering of cost to consumers in the requested area resulting from approving the transaction; and

(I) whether the transferor or the transferee has failed to comply with any commission or TCEQ order. The commission may refuse to approve a sale, transfer, merger, consolidation, acquisition, lease, or rental if conditions of a judicial decree, compliance agreement, or other enforcement order have not been substantially met.

(i) If the commission does not require a public hearing, the sale, transfer, merger, consolidation, acquisition, lease, or rental may be completed as proposed:

(1) at the end of the 120-day period described in subsection (a) of this section; or

(2) at any time after the transferee receives notice from the commission that a hearing will not be required.

(j) Within 30 days of the commission order that approves the sale, transfer, merger, consolidation, acquisition, lease, or rental to proceed as proposed, the transferee must provide a written update on the status of the transaction, and every 30 days thereafter, until the transaction is complete. The transferee must inform the commission of any material changes in its financial, managerial, and technical capability to provide continuous and adequate service to the requested area and the transferee's service area.

(k) If there are outstanding customer deposits, within 30 days of the actual effective date of the transaction, the transferor and the transferee must file with the commission, the following information supported by a notarized affidavit:

(1) the names and addresses of all customers who have a deposit on record with the transferor;

(2) the date such deposit was made;

(3) the amount of the deposit; and

(4) the unpaid interest on the deposit. All such deposits must be refunded to the customer or transferred to the transferee, along with all accrued interest.

(l) Within 30 days after the actual effective date of the transaction, the transferee and the transferor must file a signed contract, bill of sale, or other appropriate documents as evidence that the transaction has closed as proposed. The signed contract, bill of sale, or other documents, must be signed by both the transferor and the transferee. If there were outstanding customer deposits, the transferor and the transferee must also file documentation that customer deposits have been transferred or refunded to the customers with interest as required by this section.

(m) The commission's approval of a sale, transfer, merger, consolidation, acquisition, lease, or rental of any water or sewer system or retail public utility expires 180 days following the date of the commission order allowing the transaction to proceed. If the sale has not been completed within that 180-day time period, the approval is void, unless the commission in writing extends the time period.

(n) If the commission does not require a hearing, and the transaction is completed as proposed, the commission may issue an order approving the transaction.

(o) A sale, transfer, merger, consolidation, acquisition, lease, or rental of any water or sewer system or retail public utility required by law to possess a CCN, or transfer of customers or service area, owned by an entity required by law to possess a CCN that is not completed in accordance with the provisions of TWC §13.301 is void.

(p) The requirements of TWC §13.301 do not apply to:

(1) the purchase of replacement property;

(2) a transaction under TWC §13.255; or

(3) foreclosure on the physical assets of a utility.

(q) If a utility's facility or system is sold and the utility's facility or system was partially or wholly constructed with customer contributions in aid of construction derived from specific surcharges approved by the regulatory authority over and above revenues required for normal operating expenses and return, the utility may not sell or transfer any of its assets, its CCN, or a controlling interest in an incorporated utility, unless the utility provides a written disclosure relating to the contributions to both the transferee and the commission before the date of the sale or transfer. The disclosure must contain, at a minimum, the total dollar amount of the contributions and a statement that the contributed property or capital may not be included in invested capital or allowed depreciation expense by the regulatory authority in rate-making proceedings. This subsection does not apply to a utility facility or system sold as part of a transaction where the transferor and transferee elected to use the fair market valuation process set forth in §24.238 of this title (relating to Fair Market Valuation).

(r) For any transaction subject to this section, the retail public utility that proposes to sell, transfer, merge, acquire, lease, rent, or consolidate its facilities, customers, service area, or controlling interest must provide the other party to the transaction a copy of this section

before signing an agreement to sell, transfer, merge, acquire, lease, rent, or consolidate its facilities, customers, service area, or controlling interest.

This agency certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §24.239 (relating to Sale Transfer Merger Consolidation Acquisition Lease or Rental), is hereby adopted with changes to the text as proposed.

**Signed at Austin, Texas the _____ day of MARCH 2023.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**PETER M. LAKE, CHAIRMAN**

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**WILL MCADAMS, COMMISSIONER**

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**LORI COBOS, COMMISSIONER**

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**JIMMY GLOTFELTY, COMMISSIONER**

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**KATHLEEN JACKSON, COMMISSIONER**