

**PROJECT NO. 54046**

**REVIEW OF 16 TAC § 24.239**

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**PUBLIC UTILITY COMMISSION**

**OF TEXAS**

**PROPOSAL FOR PUBLICATION OF AMENDMENTS TO 16 TAC §24.239  
AS APPROVED AT THE SEPTEMBER 29, 2022 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §24.239, relating to Sale, Transfer, Merger, Consolidation, Acquisition, Lease, or Rental. This proposed rule will implement Texas Water Code (TWC) §13.301 and Tex. Gov't Code §1502.055 as revised by House Bill 3717 during the Texas 87<sup>th</sup> Regular Legislative Session. The amended rule will clarify the entities to which the rule applies and implement specific requirements for transactions involving the purchase of a municipally owned utility.

***Growth Impact Statement***

The agency provides the following governmental growth impact statement for the proposed rule, as required by Tex. Gov't Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rule will not create a government program and will not eliminate a government program;

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rule will not create a new regulation;

(6) the proposed rule will not expand, limit, or repeal an existing regulation;

(7) the proposed rule will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rule will not affect this state's economy.

***Fiscal Impact on Small and Micro-Businesses and Rural Communities***

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Tex. Gov't Code §2006.002(c).

***Takings Impact Analysis***

The commission has determined that the proposed rule will not be a taking of private property as defined in Tex. Gov't Code Chapter 2007.

***Fiscal Impact on State and Local Government***

Tammy Benter, Division Director, Utility Outreach, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of

local government under Tex. Gov't Code §2001.024(a)(4) as a result of enforcing or administering the section.

### ***Public Benefits***

Ms. Benter has determined that for each year of the first five years the proposed section is in effect the public benefits anticipated as a result of enforcing the section will be enhanced clarity to the applicability of the rule, guidance to entities involved in transactions to purchase a municipally owned utility, and expedited approval of the sale of municipally owned utilities. There will be no probable economic cost to persons required to comply with the rule under Tex. Gov't Code §2001.024(a)(5).

### ***Local Employment Impact Statement***

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Tex. Gov't Code §2001.022.

### ***Costs to Regulated Persons***

Tex. Gov't Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under §2001.0045(c)(7).

### ***Public Hearing***

The commission staff will conduct a public hearing on this rulemaking if requested in accordance with Tex. Gov't Code §2001.029. The request for a public hearing must be received by November

4, 2022. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

### *Public Comments*

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by November 4, 2022. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to Project Number 54046.

**Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments.**

### *Statutory Authority*

The amendment is proposed under TWC §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. The amendment is also proposed under TWC §13.301, which governs the sale, acquisition, lease, or rental of water and sewer utilities by entities required to possess a certificate of public convenience and necessity; and Tex. Gov't 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 Statute: Public Utility Regulatory Act §14.002; TWC §13.301; Tex. Gov't Code §1502.055.

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

(a) **Application ~~for approval of transaction.~~** 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 (CCN) must comply with this section. ~~A municipality, district, or political subdivision may, but is not required to, comply with this section, and a retail public utility that possesses a CCN may, file a written application with the commission and give public notice of any sale, transfer, merger, consolidation, acquisition, lease, or rental at least 120 days before the effective date of the transaction. The 120-day period begins on the most recent 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~~

(b) **Filing requirements for approval of transaction and public notice.** No later than 120 days before the effective date of any sale, transfer, merger, consolidation, acquisition, lease, or rental, a written application must be filed with the commission and public notice of the transaction must be given. 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) **Transactions involving a municipally owned utility.** A transaction involving the purchase of a municipally owned utility must comply with this subsection.

(1) A water supply or sewer service corporation or a water and sewer utility owned by an entity required to possess a CCN applying to purchase a municipally owned utility must provide documentation indicating either:

(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 and in the manner provided for bond elections in the municipality; or

(B) the Texas Commission on Environmental Quality (TCEQ) has issued a notice of violation to the municipally owned utility and the governing body of the municipality finds by official action during an open meeting under Tex. Gov't Code Subchapter 551 that the municipality is either financially or technically unable to restore the municipally owned utility to compliance with the applicable law or regulations.

(2) For a sale authorized as described by paragraph (1)(A) of this subsection, the applicant must provide a copy of the record of proceedings authorizing the sale of the municipally owned utility that comply with Tex. Gov't Code Subchapter 1251; and

(3) For a sale authorized as described by paragraph (1)(B) of this subsection, the applicant must provide notice to the TCEQ of the transaction by certified mail and the following information to the commission:

(A) a copy of the active notice of violation from the TCEQ involving the municipally owned utility;

(B) a copy of the certified mail receipt for the notice issued to the TCEQ regarding the transaction; and

(C) 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 municipally owned utility to compliance with the applicable law or regulations.

(d)(b) **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)(e) **Notice to affected parties.**

(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 at (512) 936-7136. 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 a copy, or a description of where a copy can be accessed electronically, of the following information, as applicable:
  - (i) the record of proceedings order if subsection (c)(1)(A) of this section applies; or

(ii) the active notice of violation issued by the TCEQ and the official action taken by the governing body of the municipality at an open meeting under Tex. Gov't Code Subchapter 551 relating to financial or technical insufficiency if subsection (c)(1)(B) of this section applies.

- (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)(4) **Requirements for application with fair market valuation.**

- (1) An application filed under this section for approval of a transaction that includes a fair market valuation of the transferee or the transferee's facilities that was determined using the process established in §24.238 of this title, relating to Fair Market Valuation must include:
  - (A) copies of the three appraisals performed under §24.238(f);

- (B) the purchase price agreed to by the transferor and transferee;
  - (C) the transaction and closing costs incurred by the transferee that will be requested to be included in the transferee's rate base; and
  - (D) if applicable, a copy of the transferor's commission-approved tariff that contains the rates in effect at the time of the acquisition.
- (2) The commission will review the transaction and closing costs, including fees paid to appraisers, in the rate case in which the transferee requests rate recovery of those costs.

~~(g)(e)~~ A retail public utility or person that files an application under this section to purchase, transfer, merge, acquire, lease, rent, or consolidate a utility or system must demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and the transferee's certificated service area as required by §24.227(a) of this title, relating to Criteria for Granting or Amending a Certificate of Convenience and Necessity.

~~(h)(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.

~~(i)(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.

~~(j)(h)~~ Before the expiration of the 120-day period described in subsection ~~(b)(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 Texas Commission on Environmental Quality (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.

~~(k)~~ 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 ~~(b)(a)~~ of this section; or
- (2) at any time after the transferee receives notice from the commission that a hearing will not be required.

~~(l)~~ 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.

~~(m)~~ 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.

~~(n)~~(+) 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.

~~(o)~~(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.

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

~~(q)~~(+) 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.

~~(r)(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.

~~(s)(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.



~~(t)(+)~~ 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 hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 29<sup>th</sup> DAY OF SEPTEMBER 2022 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
ADRIANA A. GONZALES**