

CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS.

Subchapter H. CERTIFICATES OF CONVENIENCE AND NECESSITY.

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

- (a) **Application for approval of transaction.** Any water supply or sewer service corporation, or water and sewer utility, owned by an entity required to possess a certificate of convenience and necessity (CCN) must, 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) **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.
- (c) **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 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.
 - (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.
- (d) **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.
- (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.
- (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 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.
- (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.