

**REGULATORY AND LEGISLATIVE CHANGES IN THE LAWS
AFFECTING WATER AND SEWER CERTIFICATES OF CONVENIENCE
AND NECESSITY**

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Cities with water or sewer certificates of convenience and necessity (CCN) need to know about changes that could result in changes to service territories. On December 14, 2005, the Texas Commission on Environmental Quality (TCEQ) adopted amendments to its rules regarding water and sewer CCNs. The adoption of the rules were in response to the passage of House Bill (H.B.) 2876 by the 79th Legislature (2005). This paper analyzes the changes in CCN law imposed by H.B. 2876 and how the TCEQ is implementing those changes.

H.B. 2876

H.B. 2876 was a developer-driven bill designed to address both real and perceived abuses of the CCN process. The main goal of the legislation is to give landowners, particularly landowners of larger lots (25 acres or more) with more access to the CCN application process and a greater ability to be excluded from the CCN of an unwanted service provider. The legislation addresses the adequacy of the CCN maps, requires notice to landowners, requires landowner consent in certain situations, and provides two different ways for a landowner to be excluded from a CCN.

1. Mapping

For applications to obtain or amend a CCN, applicants are required to provide a description of the service area by metes and bounds, Texas Plane Coordinate System, verifiable landmarks, or by lot and block number if a recorded plat of

the area exists. *See* TEX. WATER CODE § 13.244(d). The TCEQ also allows the territory to be shown or describe electronically in projectable digital data with metadata. Once granted, the CCN must then be recorded in the real property records of the county. *Id.* § 13.257(r). For existing CCNs, those CCNs must be recorded in the real property records by January 1, 2007, and it is the City's responsibility to satisfy this deadline. Upon request, the TCEQ will provide the certified map to the municipality or other utility and the TCEQ is currently working to convert all CCN maps into electronic maps to complete this process.

2. Landowner Notice

H.B. 2876 requires that notice of the CCN application be mailed to all landowners of 50 acre tracts or more. *See id.* § 13.246(a-1). The TCEQ has modified this requirement by rule to require notice to landowners of tracts 25 acres or more. The landowner information must be obtained from the most current tax appraisal rolls of the county. *Id.* Thus, a city amending its CCN must send individual notice to all landowners owning tracts of 25 acres or greater.

3. Landowner Consent

If a city proposes to extend its CCN beyond its extraterritorial limits (ETJ), landowner consent to the inclusion into the CCN is required. *Id.* § 13.2451. If the CCN is issued without the consent of the landowners, the CCN is void. This provision is only applicable to

municipalities and does not apply to special districts, river authorities, water supply corporations, or investor-owned utilities.

4. Landowner Opt-Out Provisions

There are two ways a landowner is able to get out of a CCN under H.B. 2876.

a. Landowner Opt-Outs from Existing CCNs (Expedited Release)

If the CCN existed before January 1, 2006, a landowner of 50 acres or more whose property is not in a platted subdivision actually receiving water or sewer service may petition the TCEQ for expedited release from the CCN. *Id.* § 13.254(a-1). To be decertified, the landowner must show that (1) he requested service from the CCN holders, (2) the CCN holder refused to provide service, is not capable of providing the service within the time frame, at the level, or in the manner reasonably needed or requested by current or projected service demands, or the conditions the service on the payment of costs not properly allocable directly to the petitioner's service request; and (3) the alternative provider from which the petitioner will be requesting service is capable of providing the service. *Id.* The commission must grant the application unless it makes an express finding that the landowner's petition failed to satisfy the requirements of the statute. No hearing is permitted for these petitions.¹ This process is available to landowners regardless when the CCN was granted by the commission.

Once the alternative provider seeks to provide service to the decertified area, the TCEQ is to ensure monetary compensation is paid to the decertified entity. The compensation is based on the value of the real and personal property. *Id.* § 13.254(g).

This provision of the legislation cuts both ways for cities and other local governments that have CCNs. On one hand, it can be used by landowners to get out of a CCN of a city. On the other hand, if the city is the "alternative

¹ If the landowner is in a CCN of a city of 500,000 or greater in population, this petition process is not applicable; however, the landowner may request a hearing.

provider," it could be used as a tool by the city to obtain territory from neighboring utilities who are unable to meet the service demands, like fire flows, that may be required for a development.

b. Landowner Opt-Outs from Proposed CCNs

For applications for new CCNs or for areas to be added to existing CCNs, a landowner of at least 25 acres whose property is located in the proposed service area may elect to exclude some or all of his property from the proposed area by providing notice to the TCEQ within 30 days after receiving notice of the application for a new CCN or to amend an existing one. *Id.* § 13.246(h). With the exception of requests made by landowners in the requested area of a municipality with 500,000 people or more, there is no review or other evaluation of the landowner's request and the TCEQ is required to exclude the landowner's property from the proposed area. *Id.* Landowners in the requested area of municipalities with 500,000 people or more may request a contested case hearing on the inclusion of their land in the CCN. *Id.* § 13.246(i).

5. Effective Dates

House Bill 2876 states that a holder of a CCN on the effective date of the act must comply with the mapping requirements no later than January 1, 2007. Other changes to the law apply to applications for CCNs submitted to the TCEQ on or after January 1, 2006 or to proceedings to amend or revoke a CCN initiated on or after January 1, 2006. During the rulemaking process, there was considerable disagreement as to which provisions this section applied.

TCEQ RULE CHANGES

As previously noted, the TCEQ's rules implementing H.B. 2876 stirred up quite a bit of controversy. Again, the issues of concern related to landowner consent, the ability of the landowner to get out of a CCN, and to which existing CCNs and applications for CCNs the legislation would be applicable.

1. Landowner Consent

With respect to the landowner consent requirements in the Act, several commenters argued that the statute makes void all existing CCNs of municipalities that are located outside the ETJ of the cities. The cities argued that the legislation only applied prospectively to void any CCN that is issued to a city for areas outside its ETJ if the city does not have landowner consent to certificate the area. In response to comments on the issue, the TCEQ declined to analyze the Act and noted that the legislation is "self-implementing and does not require further action by the Commission." 30 TEX. REG. 8958, 8961 (December 30, 2005). The Commission went on, however, to state that it will not take any affirmative action on cities' CCN outside their ETJs until after January 1, 2008, in order to "conduct a study" and to provide the cities with an opportunity to obtain landowner consent. *Id.*

With respect to pending CCN applications, the TCEQ stated it will consider granting a CCN to those portions of a city's CCN request that are outside the city's ETJ only if the city provides landowner consent for those areas. *Id.* This position by the TCEQ is legally questionable in light of the clear language in the implementation section of the H.B. 2876, which limits the Act's applicability to applications filed on or after January 1, 2006. Nevertheless, because of the cost of litigation, if a city does not have landowner consent to certificate territory outside the ETJ, the city should consider obtaining the consent or carving the landowners out of the request.

2. Expedited Releases

The TCEQ, during the rulemaking process, specifically requested that commenters address whether a proposed district should qualify as "an alternate retail public utility" for the purposes of expedited releases from a CCN. H.B. 2876 requires a landowner to show he has an alternative retail provider ready to serve in order to obtain a release of the land from the existing CCN holder. Most cities took the position that the term "retail public utility" requires the utility to have a present ability to serve. Others commented that proposed districts should be considered alternative providers because the landowner is in a "Catch-22" situation if the

district cannot be created because of the existence of a CCN, but also the area cannot be decertified because the district is yet to be created. The TCEQ agreed that proposed districts can be alternative retail providers; however, the release must be conditioned upon final and unappealable creation of the district. During the transition period, the decertified utility's obligation to provide continuous and adequate service is held in abeyance.

WAYS TO PROTECT SERVICE TERRITORY UNDER THE NEW RULES

There are several ways that a city might be able to protect its service territory in spite of the new landowner expedited release and opt-out provisions.

1. Extension Policy

Under the TCEQ's CCN rules, every CCN holder is required to provide service to all "qualified service applicants." 30 TAC § 291.85(a). A "qualified service applicant" is an applicant "who has met all of the retail public utility's requirements contained in its tariff, schedule of rates, and service policies and regulations for extension of service . . ." *Id.*

For a landowner to obtain an expedited release from a CCN, he must first make a written request for service from the CCN holder. A good and complete extension policy will define exactly what the landowner must do to obtain service. If the landowner does not like the requirements imposed upon him in order to obtain service, he will have to show that the CCN holder's conditions of service are not properly allocable directly to the landowner's request for service. An extension policy that clearly lays out the requirements for service and places the burden of expansion of the system equally on all those that request service is likely to have a better chance of defeating a landowner's petition for release.

2. Subdivision Requirements

The expedited release process is applicable regardless if the property is located in the ETJ or not. While it will not help in areas outside the ETJ, having a thorough subdivision ordinance that place specific conditions on what is required for water and wastewater infrastructure in the

ETJ may help protect a service area from encroachment by other utilities. For example, if the subdivision ordinance requires fire flow, and a neighboring water supply corporation is unable to provide fire flows unless major improvements are made, the landowner will likely have no choice, unless he or she creates a district, but to obtain service from the city. The TCEQ does not have authority to override or otherwise allow a utility to disregard a city's subdivision ordinance.

3. Section 13.248 Agreements

Section 13.248 of the Texas Water Code states:

“Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the Commission after public notice and hearing are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.

TEX. WATER CODE ANN. § 13.248. If two utilities are certain about the territory they intend to serve, they could enter into a Section 13.248 agreement. This type of agreement would establish the areas each utility will serve by contract. Such an agreement, if approved by TCEQ, should keep landowners from trying to play one utility off another utility.

4. Regional Service Provider

One way a CCN holder may be able to defeat a CCN expedited release petition is to argue the release does not meet the regionalization requirements. Section 341.0315 of the Texas Health and Safety Code requires the TCEQ to encourage and promote the development and use of regional and area-wide drinking water systems. TEX. HEALTH AND SAFETY CODE ANN. § 341.0315. Additionally, Texas Water Code § 13.241(d) provides that before the TCEQ issues a new CCN for an area which would require the construction of a physically separate water and sewer system, the applicant must demonstrate regionalization is

not economically feasible. TEX. WATER CODE ANN. § 13.241(d).

To implement these requirements, the TCEQ has adopted rules that require the applicant to list all the public drinking water systems within a two-mile radius, submit copies of written requests for service and the responses, and provide an explanation as to why connecting to the neighboring system is not economically feasible. 30 TAC § 291.102(b). Even if the entity is not required to obtain a CCN,² it is nevertheless required to demonstrate that it is unable to obtain service from a neighboring utility. 30 TAC § 290.39(c). Arguably, if a landowner files a petition for expedited release and the alternative retail public utility is required to construct a physically separate system to serve the land, the landowner should be required to show that it is not economically feasible to obtain service from the CCN holder in addition to the other factors required for an expedited release. The position is untested, however.

On the wastewater side, a similar argument can be made regarding the demonstration of economic infeasibility to obtain service if the landowner's alternative provider is proposing from the CCN holder to construct a physically separate wastewater treatment plant. TEX. WATER CODE ANN. § 13.241(d).

Additionally, while it will not affect the decertification process, a decertified CCN holder might be able to defeat the establishment of a utility at the wastewater permitting stage on the basis of regionalization. The TCEQ is required the availability of existing disposal systems in the area. TEX. WATER CODE ANN. § 26.0282. At least one permit has been denied on the basis of regionalization. *See An Order: Application of Lake Travis II for a Water Quality Land Application Permit*, SOAH Docket No. 582-03-2828, TCEQ Docket No. 2002-1378-MWD (Feb. 28, 2005). However, the city or entity wanting to defeat the permit should be careful not to present conflicting positions. In order to obtain a new wastewater permit, the applicant must first show that it cannot obtain wastewater

² Political subdivisions are not required to have a CCN. *See* TEX. WATER CODE ANN. §§ 13.002(23), 13.242(a).

service from the neighboring utilities within two miles. *See* 30 TAC § 291.102(d). The entity seeking the permit will request service (wholesale or retail) from the utility. If the utility states it does not have capacity to service, refuses to service, or fails to respond, the entity seeking the permit will be able to move forward with the permit application. The utility that denied service will have a difficult case to make in any subsequent challenge to the wastewater permit.

One other thing a city or utility that desires to protect its wastewater service territory from encroachment should consider is becoming a designated regional or area-wide waste collection treatment, and disposal system. *See* TEX. WATER CODE ANN. Chp. 26, Subchapter C. In order to become one of these systems a hearing and election is required. *Id.* Moreover, the TCEQ may only designate these types of systems in standard metropolitan statistical areas of the state. *See id.* § 26.081(b). Upon designation, the TCEQ may refuse to grant any permits in the area that are not consistent with the designation order. Cities that would like to protect their service territory should evaluate whether or not becoming a designated regional provider is a desirable and legally viable option.

CONCLUSION

H.B. 2876 and the TCEQ rules have placed cities at a disadvantage as compared to water supply corporations, municipal utility districts, and other utilities because the legislation and the rules specifically target cities with CCNs and utility service outside their ETJs. Nevertheless, there are ways cities can protect service territory under the new rules, including adopting extension policies and subdivision ordinances, and ensuring that they are the regional providers in the areas they intend or wish to serve.