

**CURRENT WATER UTILITY CCN
DECERTIFICATION ISSUES AT THE
PUBLIC UTILITY COMMISSION OF TEXAS**

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By Leonard H. Dougal and Mallory Beck¹

I. INTRODUCTION

The responsibility for the regulation of water and sewer service, including the oversight of certificates of public convenience and necessity (“CCNs”), was recently transferred from the Texas Commission on Environmental Quality (“TCEQ”) to the Public Utility Commission (“PUC”), effective September 1, 2014. Senate Bill 567 (“SB 567”) and House Bill 1600 (“HB 1600”) transferred “the powers, duties, functions, programs, and activities . . . relating to the economic regulation of water and sewer service, including the issuance and transfer of certificates of convenience and necessity, the determination of rates, and the administration of hearings and proceedings involving those matters, under Section 12.013 and Chapter 13, Water Code . . .” from the TCEQ to the PUC.² Among those duties, the PUC is now responsible for the streamlined expedited release process by which certain landowners may petition to have their property removed from the existing retail service provider’s CCN. This paper discusses the transition to the PUC, the basics of decertification, expedited release, and some of the issues that have arisen since the PUC began implementing the expedited release process.

¹ This paper is an update to a CLE paper titled “*SB 573, CCN Decertification, and Water Utility Service Issues*” authored by Leonard Dougal, Cassandra Quinn, Ty Embrey, and Stefanie Albright, which was presented at the State Bar of Texas, Changing Face of Water Rights 2012 CLE program. We greatly appreciate the assistance of Cassandra Quinn, Ty Embrey, and Stefanie Albright in preparation of that paper and for allowing us to update it. The views and opinions stated in this paper are solely those of the authors and do not necessarily represent the views or opinions of Jackson Walker L.L.P. or any of its clients.

² Tex. S.B. 567, 83d Leg., R.S. (2013); Tex. H.B. 1600, 83d Leg., R.S. (2013).

II. TRANSITION FROM THE TCEQ TO THE PUC

As of September 1, 2014, the PUC has assumed responsibility for oversight and enforcement of the statutory scheme applicable to CCNs. In transferring the duties of the TCEQ related to CCNs to the PUC, the Legislature specifically provided that “A rule, form, policy, procedure, or decision of the [TCEQ] related to a power, duty, function, program, or activity transferred under this Act continues in effect as a rule, form, policy, procedure, or decision of the [PUC] and remains in effect until amended or replaced by that agency.”³ Initially, the PUC adopted the substantive rules regulating water and sewer utilities from the TCEQ (30 Texas Administrative Code, Chapter 291) with the only changes being those necessary to implement the rules in accordance with PUC procedures and correct typographical errors.⁴ The PUC has adopted revisions to those rules.⁵ However, no changes have been made to the rule governing expedited releases (as of September 1, 2015).

III. BACKGROUND ON DECERTIFICATION OF CCNs

A CCN is a permit issued by the PUC that authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area.⁶ While all retail public utilities can attempt to secure CCNs, “utilities” (which generally include private for-profit entities) and water supply corporations are required to obtain a CCN from the PUC before rendering retail water or sewer utility service directly or indirectly to the public.⁷ Agency review ensures that the applicant for a CCN has the financial, managerial, and technical qualifications to

³ Acts May 14, 2013, 83d Leg., R.S., ch. 170, § 2.96(j) Tex. Gen. Laws 770 (2013); *see also* 16 Tex. Admin. Code (“TAC”) § 24.1.

⁴ 39 Tex. Reg. 2667 (2014); 39 Tex. Reg. 5903 (2014).

⁵ 16 TAC § 24.1, et seq.; *see also* PUC Order Adopting Amendments, Item No. 43, PUC Docket No. 43871 (August 24, 2015).

⁶ 30 TAC § 291.3(10); 16 TAC § 24.3(10).

⁷ TEX. WATER CODE § 13.242(a). By rule, the PUC may allow operations without a CCN for service to less than 15 connections, not located in another’s CCN. TEX. WATER CODE § 13.242(c).

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provide continuous and adequate service to the subject territory and customers.

Typically, a retail public utility with a CCN is the sole water or sewer service provider in the territory covered by the CCN. Having a single service provider to provide service on a regional basis is designed to ensure that utility services are supplied efficiently, such as by avoiding fragmented utility systems and producing economies of scale by spreading fixed costs over a larger number of customers. By this method, CCNs allow utilities to plan for growth on a long-term basis by being able to identify their service area.

In general, no other retail public utility may extend water or sewer utility service into the certificated territory of another retail public utility without first seeking to obtain the CCN rights for the area from the PUC.⁸ As a result, entities that are not required to obtain CCNs, such as municipalities, may choose to do so in order to protect their service areas from encroachment by other retail public utilities.

However, acquiring a CCN does not protect the CCN holder from later decertification of all or part of the territory covered by the CCN. The PUC may make findings relevant to decertification on its own motion and revoke or amend an existing CCN.⁹

If a CCN is revoked or amended, the PUC may require one or more retail public utilities with their consent to provide service to the area in question.¹⁰ The retail public utility taking over the service area must provide compensation to the decertified retail public utility for any property that the PUC determines is rendered useless or valueless due to the decertification.¹¹ While the revocation process is still available, the Texas Legislature has created alternatives that are designed to accomplish decertification more quickly and easily.

IV. SECTION 1926(B) FEDERAL DEBT PROTECTION.

When discussing CCNs and decertification, reference is often made to 7 U.S.C. § 1926(b). Non-profit water utilities may obtain loans from the United States Department of Agriculture Rural Development Division (“USDA”) pursuant to 7 U.S.C. § 1926(b) to construct water infrastructure. When acquiring these

loans, utilities must pledge as collateral their systems and infrastructure, including the right to provide service within the defined CCN service area.

Under Section 1926(b), a federally indebted utility’s service territory may be protected by federal law. Section 1926(b) states that

“The service provided or made available [by a federally indebted rural water] association shall not be curtailed or limited by inclusion of the area . . . within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan.”¹²

Section 1926(b) is often discussed in the context of decertification, as debate exists as to the exact nature of the protection a federally indebted water association has regarding its defined service area.

In *North Alamo Water Supply Corp. v. City of San Juan*,¹³ the United States Court of Appeals for the Fifth Circuit addressed the requirement of service being “made available.” The *North Alamo* court noted that the purpose of § 1926(b) was to prohibit the encroachment of local governments upon the services provided by rural water associations.¹⁴ The court found two congressional goals behind § 1926(b): “(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and [the federal government’s] loans) by protecting them from the expansion of nearby cities and towns.”¹⁵ The *North Alamo* court then explained the requirement of Texas law that a water utility in possession of a CCN must provide continuous and adequate service to all customers within its service area.¹⁶ The court concluded that “when state law obligates a utility to provide water service, that utility has, for the purposes of § 1926(b), ‘made service available.’”¹⁷

In contrast, several other federal circuit courts apply the “pipes in the ground” test requiring a water

⁸ *Id.*

⁹ *Id.* § 13.254(a).

¹⁰ *Id.* § 13.254(c).

¹¹ *Id.* § 13.254(d).

¹² 7 U.S.C. § 1926(b).

¹³ 90 F.3d 910 (5th Cir. 1996).

¹⁴ *Id.* at 915.

¹⁵ *Id.*

¹⁶ *Id.* at 915-16 (citing Tex. Water Code § 13.250(a)).

¹⁷ *Id.* at 916 (quoting *Glenpool Util. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988)).

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