

PRESENTED AT

24th Annual Land Use Conference

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Austin, Texas

## **Water and Sewer CCNs (Certificates of Convenience and Necessity)**

*Learn if these state-regulated service areas  
protect utility planning and budgeting,  
if they ensure service to landowners, and  
if they treat landowners fairly*

**Michael A. Gershon**  
**Partner, Lloyd Gosselink, P.C.**

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## **I. Introduction**

The purpose of this article is to (1) provide a primer in water and sewer “CCN” law (aka, utility service area law), (2) address whether CCNs sufficiently protect against encroachment from competing utilities and landowner “decertification” to allow for long-term planning and budgeting, (3) assess whether CCNs ensure service to property located in a CCN, (4) consider whether landowners needing service are treated fairly by their local utility that holds a CCN, and (5) make the reader aware of important pending litigation and recent and anticipated changes in CCN regulations.

## **II. What's a CCN?**

The geographical area served by a retail public utility is called the utility's service area. This service area is typically defined by a map and accompanying Certificate of Convenience and Necessity (“CCN”) issued by the Public Utility Commission of Texas (“PUC”). Although the CCN is a written instrument (the certificate), it is common to refer to the service area as CCN. CCN maps are readily available to the public at no charge [online](https://www.puc.texas.gov/industry/water/utilities/map.aspx) at <https://www.puc.texas.gov/industry/water/utilities/map.aspx> and by hard copy at PUC. Also, utilities are required by statute to file their CCN and map in their local county deed records. Bear in mind that not all utilities must hold a CCN to provide retail

public service, as reviewed in more detail below.

Texas Water Code Chapter 13, Subchapter G, and PUC's implementing regulations in Title 16 of the Texas Administrative Code, Chapter 24, Subchapter H, generally govern service areas and CCNs. As reviewed below, there has been an uptick in litigation in federal and state court in Texas involving a federal statute that protects federally indebted utilities from encroachment of their CCNs.<sup>1</sup>

## **III. CCN Law and Policy Have Taken Center Stage in April 2020**

Many of the recent statutory amendments, lawsuits, and contested proceedings at PUC have been focused on resolving circumstances where raw land has yet to be served within a CCN. Although each situation is factually unique, typically the developer initiates action to decertify the CCN because they are dissatisfied with the CCN holder's timeline, cost, or physical ability to bring new service to the raw land. Sometimes the developer intends to create its own, new utility, and sometimes a nearby, competing utility is involved and stands ready to take over the CCN. During the month of this conference, there has been

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\* The author acknowledges the contribution of his law partner Cody Faulk in preparing this article.

<sup>1</sup> See 7 U.S.C. § 1926(b) and the discussion in this article about litigation involving this statute.

a flurry of activity involving these circumstances, both in court and in contested proceedings at PUC.

The Fifth Circuit Court of Appeals in New Orleans will consider, *en banc*, whether to reverse decades of precedent that protects CCN area from encroachment if the CCN holder is encumbered by federal debt but not actually serving. See below regarding the details in this case, *Green Valley Special Utility District v. Walker*.<sup>2</sup> Amicus curiae briefs were submitted on April 22, 2020. Apparently because of COVID-19 protocol, the Court announced it will forego this case's mid-May oral arguments.<sup>3</sup> In lieu of oral argument, the Court ordered parties to be available for written Q&A on May 14-15 and May 18-19.<sup>4</sup>

This past Friday, April 17, 2020, all three topics presented in the title of this article were front and center before the PUC. Conducting the public meeting under COVID-19 protocol with the public remotely viewing and able to comment by call-in, the three Governor-appointed Commissioners tackled multiple CCN matters, and in so doing set new precedent and provided guidance on PUC's view of protecting existing utilities *versus* developers' creation of their own new utilities to cut costs.

First, acting under its consent agenda, the Commission repealed and replaced several CCN regulations with 80+ pages of new regulations intended to implement new statutory law.<sup>5</sup> In the hopper is another 30+ page set of rules that repeals and replaces PUC's decertification regulations, and appears likely to be voted on by the Commission in May or June.<sup>6</sup> The proposed new decertification regulations reflect a pendulum swing in favor of the existing CCN holder to receive more compensation if decertification is granted.

Second, reflecting another pendulum swing and evolving precedent, all three Commissioners weighed in on three related CCN decertification dockets, taking the rare action of denying a landowner/developer's petition to decertify its property from existing service area.<sup>7</sup> In all three cases, the utilities were not actually, physically serving water. It is important to point out that the Commission reasoned that utility planning and investment, with infrastructure in the ground although not serving the tract at issue, must be given great weight. PUC Chairwoman Walker emphasized that utility

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<sup>2</sup> *Green Valley Special Util. Dist. v. Walker*, 351 F. Supp. 3d 992, 996 (W.D. Tex. 2018), *appeal docketed and submitted for En Banc review without oral argument on May 20, 2020*, No. 18-51092 (5th Cir. Dec. 31, 2018).

<sup>3</sup> *Id.* at Fifth Circuit Court of Appeals Docket (April 9, 2020).

<sup>4</sup> *Id.* Docket (April 7, 2020).

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<sup>5</sup> See 16 Tex. Admin. Code §§ 24.3, 24.11, 24.14, 24.25, 24.27, 24.29, 24.33, 24.35, 24.49, 24.127, 24.129, 24.227, 24.363 (PUC Project No. 49798)(implementing Senate Bill 700 (86<sup>th</sup> Leg.)).

<sup>6</sup> See 16 Tex. Admin. Code § 24.245 (PUC Project No. 50028)(implementing House Bill 2272 (86<sup>th</sup> Leg.))(the "decertification" rule)

<sup>7</sup> Petition of Clay Road 628 Development, LP to Amend T&W Water Service Co.'s CCN (PUC Docket No. 50261, denied); Petition of Clay Road 628 Development, LP to Amend Stanley Lake MUD's CCN (PUC Docket No. 50259, remanded); Petition of Clay Road 628 Development, LP to Amend Simply Aquatic's CCN (PUC Docket No. 50260, remanded) (April 17, 2020).

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