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**Growing Pains: The Evolving Law and Regulations
Governing Retail Public Utility Service in
Texas Municipal ETJs during Times of Urban Sprawl**

C. Cole Ruiz

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Growing Pains: The Evolving Law and Regulations Governing Retail Public Utility Service in Texas Municipal ETJs during Times of Urban Sprawl

Learn about the laws and state-regulations affecting certificated service areas in the extraterritorial jurisdiction or annexed corporate limits of municipalities in Texas.

C. Cole Ruiz
Lloyd Gosselink Rochelle & Townsend, P.C.*

I. Introduction

The purpose of this article is to (i) review and explore Texas water and sewer “CCN” laws, regulations, and policies; (ii) provide a summary of the statutes and regulations applicable specifically to municipalities while addressing a municipality’s rights and duties with regard to providing utility service to its extraterritorial jurisdiction (“ETJ”); (iii) review the administrative processes for applying for a CCN and transferring a CCN from one retail public utility to another; (iv) review the types of non-municipal retail public utilities that may hold CCNs on the outskirts or within a municipality’s ETJ or corporate boundaries; and (v) make the reader aware of important recent litigation impacting the rights and duties of retail public utilities in areas of urban sprawl.

II. CCN Laws and Regulations

A. CCNs—State Sanctioned Monopolies

To begin, 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.¹

In Texas, the Legislature requires most retail public utility providers to obtain a “certificate of convenience and necessity” (“CCN”) approved by the Public Utility Commission of Texas (“PUC”), which generally speaking, certifies the state’s recognition of the CCN-holder’s retail public utility service area.² Bear in mind that while certain activities of retail public utilities fall under the jurisdiction of the PUC, other activities of public water systems and sewer systems are governed by the Texas Commission on Environmental Quality (the “TCEQ”).³ The term “utility,” within the context of state CCN law, generally refers to the investment, business and billing aspects (i.e. economics) of providing retail water or sewer service. On the other hand, the term “public water system,” for instance, refers to

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

² TEX. WATER CODE § 13.242.

³ See generally, TEX. HEALTH & SAFETY CODE, CH. 341.

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the operational aspects (i.e. public health) of providing drinking water supply to the public.

As described in detail below, a retail public utility pursues a CCN by application filed at the PUC. Whereas the CCN is a written instrument (the certificate), the associated service area defined by an accompanying PUC-issued CCN map, is colloquially referred to as the “CCN.” A retail public utility may, in certain instances, provide service outside its designated CCN service area.⁴ The PUC provides a digital CCN map viewer at <https://www.puc.texas.gov/industry/water/utilities/map.aspx>. CCN map hard copies may also be requested at the PUC. Utilities are required by statute to file their CCN and map in their local county deed records.⁵

CCNs have been described as creatures of statute, intended to ‘provide for a rational distribution of public utility services within defined geographical areas so that, within that specific area, the provider of utility service is “unhampered by competitive forces.”’⁶ In this way, CCNs grant the CCN-holder (i.e. the retail public utility) a state-sanctioned monopoly for a designated geographic area (i.e. a public franchise).⁷ In turn, the CCN obligates the CCN-holder to provide “continuous and adequate” service to every customer and every qualifying applicant within the CCN area.⁸

A CCN represents a retail public utility’s geographical service area, as certified by the PUC, and provides the CCN holder with an exclusive, monopoly right (and duty) to provide service within that geographical area.⁹

While it has been the general practice and experience in American jurisprudence to encourage competition, and shun monopolistic market barriers, utilities offer a unique commodity that the public heavily relies on for health and safety, which requires expensive, and often publicly funded infrastructure. The principles of free market enterprise that typically help facilitate economic growth in more traditional market sectors, would more than likely inhibit economic stability in the utilities sector. This is because costly infrastructure is often paid for over many years or decades by the utility customers and/or taxpayers. Water and sewer systems require many costly components to work together in order to provide the services sought, not the least of which are easements, real estate, and water and sewer lines sprawling across the region it serves. In order to ensure utility providers can afford to maintain, operate, and upgrade these systems over decades of daily use, the utility must have a degree of economic certainty that its investments are not subject to traditional market forces. To safeguard such investments in infrastructure, CCNs offer a geographically protected right to provide water service.¹⁰

⁴ See e.g., TEX. WATER CODE § 13.243 (a retail public utility is not required to secure a CCN for an extension contiguous to an area it already serves, if within one-quarter of a mile of the CCN boundary, and not receiving service from another utility); see also 16 TEX. ADMIN. CODE § 24.229(a)(1).

⁵ TEX. WATER CODE § 13.257(r).

⁶ *City of Carrollton v. Tex. Comm’n on Env’tl. Quality*, 170 S.W.3d 204, 209 (Tex. App.—Austin 2005, no pet.), quoting *Pub. Util. Comm’n of Tex. v. Texland*

Elec. Co., 701 S.W.2d 261, 265 (Tex. App.—Austin 1985, writ ref’d n.r.e.).

⁷ *City of Carrollton*, 170 S.W.3d at 209.

⁸ TEX. WATER CODE § 13.250(a).

⁹ TEX. WATER CODE § 13.242; 30 TEX. ADMIN. CODE § 291.101.

¹⁰ Amber McKeon-Mueller, Texas Municipal League, *Legal Q&A: <https://www.tml.org/DocumentCenter/View/2693/Utilities--Water-Rates--2021-05-PDF>*.

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