GROWING PAINS:

THE EVOLVING LAW AND REGULATIONS GOVERNING RETAIL PUBLIC UTILITY SERVICE IN TEXAS MUNICIPAL ETJ DURING TIMES OF URBAN SPRAWL

Presented to:

UT CLE LAND USE CONFERENCE

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Cole Ruiz
cruiz@lglawfirm.com
(512) 322- 5887

Overview And Purpose

- Texas Regulatory Framework for Utilities and Public Water Systems
- Certificates of Convenience and Necessity Basics
- Review of laws applicable to a municipality's rights within its extraterritorial jurisdiction (ETJ)
- Review of the CCN Application Process and Requirements
- Recent Case Law concerning municipality CCN decertification within the ETJ.

Key Take-Aways

- Water systems and utilities (including CCNs) are historically born out of the concept of regionalization.
- Human health, population demand, and economic need require a regional state-sanctioned monopolies (aka CCNs).
- CCNs provide ***municipalities*** with certain protections and control over development and investment of public dollars.
- CCNs also protect ***customers*** by ensuring a level of continuous and adequate service that meets minimum drinking water standards.
- Municipalities should pay attention to recent and ongoing developments in decertification cases implicating 7 USC 1926(b)—which generally protects infrastructure and CCN territory from decertification that is encumbered by federal debt. Fifth Circuity recently adopted a new test for what qualifies for 1926(b) protection.

"Financial, Managerial & Technical Capability" (FMT)

- Descriptor referenced throughout the Federal and State laws and regulations pertaining to public water systems and retail public utilities.
- Refers to capabilities of the owner/operator of a PWS with regard to **asset management**, **financial health**, **compliance**, **reliability**, **facility adequacy**, **technical sophistication**, **system capacity**.
- FMT barometer is used for gauging :
  - whether a PWS is sufficiently sophisticated to provide continuous and adequate service;
  - which utility is best positioned to serve a particular geographic area; and
  - whether regionalization is feasible.

Regionalization

Generally:

- The combining of certain aspects of two or more water and wastewater systems operations, physical plants, and/or service areas.
- Goal is to achieve the best service at reasonable rates that will ensure that the system is maintained and stable (i.e. improve FMT resources and provide quality drinking water).
- Might involve water partnerships, including joint ventures and formal agreement—not always full consolidation.
- Could be as simple as agreeing to buy treatment chemicals together to achieve savings from bulk purchasing, or participating in regional water planning.

Regulatory Definition:

- *"A pooling of financial, managerial, or technical resources that achieve economies of scale or efficiencies of service…"*

16 Tex. Admin. Code § 24.41(d)(1)(C)(ii)

Regionalization Examples

- Agreement to share equipment or buy treatment chemicals together to achieve bulk savings.
- Formal partnership to share operators, facilities, or build emergency interconnections.
- Engage in regional water planning with neighboring water systems.
- Consolidation by sale, transfer, or merger of facilities, customers, and finances
- Certificates of Convenience and Necessity (CCNs) (combining of service areas).

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