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**Collaborative Regional Planning or Territorial Chess Match?  
A Primer on the Ever-Evolving Laws and Regulations Governing Retail Public Utility Service  
in Texas, with Critical Updates following the 88<sup>th</sup> Legislature**

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

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## **I. Introduction**

The broader theme of this article is to review the laws and regulations that govern urban sprawl in Texas from a water planning and needs perspective. The Texas population boom is no secret. Cities and counties throughout the State are experiencing high growth at unprecedented rates. Growth is generally viewed as good for local communities. It can be, and often is, a sign of improved economic stability and opportunity. But with high population growth comes an increased pressure on cities, counties, water utilities, local groundwater conservation districts (“GCDs”) and their respective tax and rate bases to plan, develop, and effectively manage water to meet the growing demands of new households and businesses. High growth, coupled with a persistent drought also materializes in added pressure on the state’s groundwater and surface water resources and infrastructure. As urban sprawl displaces once undeveloped rural areas, pressure on local water resources has impelled water utility providers to look beyond their traditional sources for water supply, and in some instances, collaborate regionally with each other to tackle largescale innovative water management strategies.

While regional collaboration can be beneficial, developing workable solutions amongst various stakeholders with different visions, needs, financial stakes and risks, any varying political dynamics is difficult work. Ultimately, each utility has the basic obligation to provide continuous and adequate service to its customers within their respective constraints. This article explores those constraints, which beyond basic water availability, span the legal, economic, and political spectrum. CCN law has played a significant role in materializing the territorial nature of water security in Texas.

This article (i) reviews and explores Texas water certificate of convenience and necessity or “CCN” laws, regulations, and policies; (ii) provides a summary of the statutes and regulations applicable to urban sprawl beyond a cities’ corporate limits and within their extraterritorial jurisdictions (“ETJs”); (iii) reviews the administrative processes applicable to retail public utilities serving the urban sprawl areas beyond a city’s corporate limits; (iv) explores recent legislative changes empowering water utilities and landowners alike in the territorial chess match caused by urban sprawl; and (v)

make the reader aware of important recent litigation impacting landowners, developers, retail public water utilities in times of urban sprawl.

## (II) CCN Laws and Regulations

### (i) CCNs—State Sanctioned Monopolies

To begin, Texas Water Code Chapter 13, Subchapter G, and PUC’s implementing regulations under 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>

In Texas, most retail public utility providers are required to obtain a CCN approved by the Public Utility Commission of Texas (“PUC”), certifying the State’s recognition of the CCN-holder’s retail public utility service area.<sup>2</sup> Bear in mind that while retail public *utilities* generally fall under the jurisdiction of the PUC, *public water systems* are governed primarily by the Texas Commission on Environmental Quality (“TCEQ”).<sup>3</sup> 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 service. On the other hand, the term “public water system,” refers to the operational aspects (i.e. public health) of providing drinking water supply to the public. While there is necessarily some overlap, the

distinction is important. This article focuses principally on the utility aspects of water planning.

As described in detail below, a retail public utility pursues a CCN by filing an application with 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.” Though a retail public utility may, in certain instances, provide service outside its designated CCN service area.<sup>4</sup> 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.<sup>5</sup>

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 a specified area, the provider of utility service is “unhampered by competitive forces.”’<sup>6</sup> CCNs grant the CCN-holder (i.e. the retail public utility) a state-sanctioned monopoly for a designated geographic area.<sup>7</sup> 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.<sup>8</sup> 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

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

<sup>2</sup> TEX. WATER CODE § 13.242.

<sup>3</sup> See generally, TEX. HEALTH & SAFETY CODE, CH. 341.

<sup>4</sup> 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).

<sup>5</sup> TEX. WATER CODE § 13.257(r).

<sup>6</sup> *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.).

<sup>7</sup> *City of Carrollton*, 170 S.W.3d at 209.

<sup>8</sup> TEX. WATER CODE § 13.250(a).

duty) to provide service within that geographical area.<sup>9</sup>

While it has been the general practice and experience in American jurisprudence to encourage market competition, and shun monopolistic market barriers, utilities offer a unique commodity that the public depends on for health and safety, which requires expensive, publicly funded infrastructure. The principles of free market enterprise that typically help facilitate economic growth in more traditional market sectors, would 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 (rate payers) and/or tax payers. Water and sewer systems require many costly components to work together to provide the services sought, not the least of which are the acquisition of water rights, easements, real estate, and installation of water facilities and lines sprawling across the region it serves. 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.<sup>10</sup>

The justifications for state sanctioned utility monopolies stretch beyond economics. In fact, the primary policy justification for CCNs is to ensure reliability and integrity of utility service across the state.<sup>11</sup> CCNs obligate the CCN holder to provide service when requested by a new or existing customer located within the service area.<sup>12</sup> A

CCN holder “shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas.”<sup>13</sup> CCNs provide certainty to both the CCN holder and potential and existing customers residing within a CCN’s boundaries as to (1) who is statutorily required to provide service, and (2) what the minimum standards of such utility service are.

The legislature’s policy justifications for CCNs are provided in the Texas Utility Code:

- (a) Continuous service by a public utility is essential to the life, health, and safety of the public. A person’s willful interruption of that service is a public calamity that cannot be endured.
- (b) A public utility is dedicated to public service. The primary duty of a public utility, including its management and employees, is to maintain continuous and adequate service at all times to protect the safety and health of the public against the danger inherent in the interruption of service.
- (c) Each court and administrative agency of this state shall:
  - (1) recognize the policy stated in this section; and

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<sup>9</sup> TEX. WATER CODE § 13.242; 30 TEX. ADMIN. CODE § 291.101.

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

<sup>11</sup> Tex. Water Code § 13.250 (“Continuous and Adequate Service; Discontinuance, Reduction, or Impairment of Service”); *see also* Tex. Util. Code, subch. A (“Continuity of Utility Service”).

<sup>12</sup> TEX. WATER CODE § 13.250(a).

<sup>13</sup> *Id.*

- (2) interpret and apply this subchapter in accordance with that policy.<sup>14</sup>

This sentiment is supported by the Texas Water Code:

(b) The legislature finds that:

- (1) retail public utilities are by definition monopolies in the areas they serve;
- (2) the normal forces of competition that operate to regulate prices in a free enterprise society do not operate for the reason stated in Subdivision (1) of this subsection; and
- (3) retail public utility rates, operations, and services are regulated by public agencies, with the objective that this regulation will operate as a substitute for competition.<sup>15</sup>

**(ii). Some, but not all retail public utilities are required by law to secure a CCN**

Investor-owned utilities (“IOUs”), non-profit water supply corporation (“WSCs”), and certain county-operated utilities adjacent to the United States-Mexico border, are mandated by state law to hold a CCN before providing retail public water service.<sup>16</sup>

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<sup>14</sup> Tex. Util. Code § 186.002(a)-(c) (This statute applies only to a private corporation that does business in this state and has the right of eminent domain, a municipality, or a state agency, authority, or subdivision engaged in the business of...furnishing water to the public, as well as electric and gas power, but not wastewater service, *see* TEX. UTIL. CODE § 186.001).

<sup>15</sup> TEX. WATER CODE §§ 13.001(b)-(c).

<sup>16</sup> TEX. WATER CODE § 13.242.

<sup>17</sup> For water utility service, the PUC shall ensure that the applicant (1) is capable of providing drinking water that meets the requirements of Chapter 341,

However, unlike IOUs, WSCs, and certain county-operated utilities—municipalities and other political subdivisions are generally exempt from the CCN requirement, unless the entity seeks to serve an area already being served by another utility service provider.

While not required by law, many municipalities do pursue single certification of their service area to take advantage of the safeguards and benefits CCNs offer to the CCN holder’s customer base, investments, and future growth—and particularly to protect their service areas from encroachment by other retail public utilities.

Like all retail public utilities, a municipality may acquire a CCN if the PUC determines it “possesses the financial, managerial, and technical capability to provide continuous and adequate service.”<sup>17</sup> But, the mere acquisition of a CCN does not shield the CCN holder from later decertification of some or all of the certificated area.<sup>18</sup> The PUC may, on its own motion, make findings relevant to decertification and revoke or amend an existing CCN.<sup>19</sup>

**(III) CCN Laws and Regulations Applicable to High Growth Areas Surrounding Cities**

Municipalities are a distinct creature under Texas CCN law. Municipalities “may purchase, construct, or operate a utility

Health and Safety Code, and requirements of this code; and (2) has access to an adequate supply of water (TEX. WATER CODE § 13.241(a)). For sewer utility service, the commission shall ensure that the applicant is capable of meeting the commission's design criteria for sewer treatment plants and the requirements of this code (TEX. WATER CODE § 13.241(a)).

<sup>18</sup> See generally, TEX. WATER CODE §§ 13.254-13.2541.

<sup>19</sup> 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 (TEX. WATER CODE § 13.254(c)).

system inside or outside the municipal boundaries and may regulate the system in a manner that protects the interests of the municipality.”<sup>20</sup> Further, municipalities, “may extend the lines of its utility systems outside the municipal boundaries and may sell water, sewer, gas, or electric service to any person outside its boundaries.”<sup>21</sup> In essence, they have free reign to own and operate a water and/or sewer utility inside and outside of its municipal limits.

But city services, powers, and duties range far beyond water and sewer utility service. As such, there are many other considerations to account for when a city seeks to expand such services, powers, and duties geographically outside its corporate boundaries.

It follows that the legislature has provided special provisions delineating the rights of cities and people just outside a city’s corporate limits, including between municipal retail public utilities and non-municipal retail public utility.

### **(i) Municipal Annexation Authority**

The primary reason most cities choose to annex an area into its corporate boundaries is projected and/or unexpected ongoing population growth. Growth is nearly ubiquitous throughout the state in 2024, but particularly near the metropolitan areas and surrounding suburban areas of Austin, San Antonio, Houston, and Dallas-Fort Worth, and along the major corridors leading in and out of these cities. These cities, and the smaller surrounding cities throughout these

growth corridors tend often see annexation as beneficial for two reasons: (1) acquiring more regulatory control over land use and development in the city’s ETJ, and (2) spreading the tax burden associated with infrastructure, utilities, and city services across the residents and businesses outside the corporate limits that benefit from city-funded infrastructure, utilities, and city services.<sup>22</sup> Historically, the municipal annexation was the Legislature’s solution for managing growth while growing and maintaining the state’s economic dynamics.<sup>23</sup> Cities house the people and businesses who fuel the state’s economy. By providing essential services—like water and sewer utility services—cities are the bedrock for economic vitality throughout the state. Annexation has allowed cities to expand as necessary to accommodate growing demand.

As of late, however, the legislature has taken steps to limit municipal authority to annex areas within the ETJ. In 2017, the Texas Legislature passed Senate Bill (“S.B.”) 6, which sought to restrict cities’ annexation authority by requiring landowner or voter approval of annexations in counties with 500,000 population or more (i.e. the counties that are seeing the most rapid growth), and in counties that opt-in through a petition and election process.<sup>24</sup> With the passage of House Bill (“H.B.”) 347 in 2019, the legislature expanded the voter-approved annexation requirement to all 254 counties of Texas, effectively halting most unilateral municipal annexations, irrespective of population. H.B. 4257, which also passed in 2019, placed even more pressure on municipalities, providing

symbolically reserving S.B. 6 and including S.B. 6 in the 1st Called Legislative Session. S.B. 6, known commonly as the “vote to be annexed” bill, restricted city power to annex within certain high-growth areas and empowered landowners to vote whether to allow annexation.

<sup>20</sup> TEX. LOC. GOV’T CODE § 552.001(b).

<sup>21</sup> TEX. LOC. GOV’T CODE § 552.001(c).

<sup>22</sup> Texas Municipal League website: <https://www.tml.org/DocumentCenter/View/233/Annexation---2018-01-PDF>.

<sup>23</sup> *Id.*

<sup>24</sup> In 2017, the Texas Governor and Legislature considered municipal annexation reform a top priority,

that (1) voter disapproval of a proposed annexation does not affect a city's existing legal obligation to continue providing governmental services to the area—including water or sewer services—regardless of whether the municipality holds a CCN to serve the area; and (2) a city that sales wholesale water to a special district may not charge higher rates than rates charged in other similarly situated areas solely because the district is wholly or partially located within an area that rejected a proposed annexation.<sup>25</sup> Most recently, the 88th Legislature passed S.B. 2038 in 2023, providing landowner-authority to petition a city for release from the city's ETJ, with few exceptions.<sup>26</sup>

Now, at a time of unprecedented growth throughout the state, cities are grappling with how best to plan for the seemingly endless growth in their respective ETJs. While cities benefit from the utility revenues and *ad valorem* taxes of water and wastewater customers located *inside* the corporate boundaries—*outside* the corporate limits, utility customers are not contributing to cities' *ad valorem* tax revenue.<sup>27</sup>

The demand increase for water and utility services throughout these high-growth corridors has impelled cities to forecast, plan and budget for securing new water supplies, building utility infrastructure, and obtaining regulatory approvals to expand service area and utility facilities. But, if a city is restricted from expanding its boundaries and geographical tax-base, city leadership may be less willing to commit funding and utility services beyond their existing geographical tax-base. Likewise, serving retail water service outside a city's corporate limits to communities and landowners not contributing to the city's tax revenue may be

politically unpopular. On the other hand, a city may desire to promote higher-quality buildout and regionalization adjacent to city limits by providing a higher, municipal-level utility service. Service outside municipal boundaries does not necessarily result in financial strain to a city, but cities may have to reassess their budgeting options, and future impacts to their core constituencies.

How the PUC will consider new annexation laws when evaluating a city's request to expand its service area outside city limits remains unclear. The new annexation laws are somewhat inconsistent with the existing statutes requiring applicants seeking to acquire or expand its CCN in an area that would require the construction of a physically separate water or sewer system, to first demonstrate to the PUC that regionalization or consolidation with another retail public utility is not economically feasible.<sup>28</sup>

The post-S.B. 6 annexation laws do not directly implicate Chapter 13 of the Texas Water Code, which governs the issuance of CCNs and restrictions regarding certificated service territories. The legal framework for municipalities seeking to obtain a CCN remains unchanged: *a municipality is not required to obtain a CCN to provide water or sewer retail service unless it is an area which is already being served by another retail public utility, and a municipality is not restricted to providing service within its municipal boundaries.* Despite the lack of any substantive post-S.B. 6 change in the Texas Water Code, the limitations on municipal annexation *could* affect the factors considered and willingness of municipalities to serve areas outside of their municipal boundaries where they currently have a CCN,

<sup>25</sup> Codified at TEX. LOC. GOV'T CODE § 42.0688).

<sup>26</sup> SB 2038

<sup>27</sup> TEX. LOC. GOV'T CODE § 42.902.

<sup>28</sup> TEX. WATER CODE § 13.241(d).

or in which they plan to one day serve, but are now limited in their ability to annex.

**(ii) Texas Water Code, Chapter 13  
Treatment of Municipalities**

As noted above, Texas Water Code Chapter 13, governs retail public utilities, and Subchapter G specifically governs service areas and CCNs.<sup>29</sup> Additionally, as explained in the previous section, Texas municipalities enjoy broad authority under the Texas Local Government Code to purchase, construct, operate, and regulate utility systems inside or outside its corporate boundaries, including the authority to extend the utility lines outside its boundaries, and to sell water and sewer service to any person outside its boundaries.<sup>30</sup> However, that authority is subject to Chapter 13 of the Texas Water Code.

Before diving too far into the nuances of municipal CCN law, it is important to understand some basic definitions. Chapter 13 defines a “retail public utility” as “any person, corporation, public utility, water supply or sewer service corporation, **municipality**, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.”<sup>31</sup> The Chapter 13 definition of a “utility,” by contrast, specifically excludes municipalities (and most other political subdivisions).<sup>32</sup> Therefore, for Chapter 13 purposes, all “utilities” are also “retail public utilities,” but not all “retail public utilities” are “utilities.” Municipalities are considered retail public utilities, but not utilities under Chapter 13. This definitional difference determines municipal authority throughout Chapter 13.

**Tex. Water Code § 13.242(a)**

For example, municipalities that operate a “retail public utility” may not “furnish, make available, render, or extend retail water or sewer utility service to any area to which retail water or sewer utility service is being lawfully furnished by another retail public utility without first having obtained a CCN that includes the area in which the consuming facility is located.”<sup>33</sup>

By contrast, Chapter 13 places more restrictive requirements on “utilities,” which—unlike a retail public utility—“may not in any way render retail water or sewer utility service directly or indirectly to the public without first having obtained from the utility commission a certificate that the present or future public convenience and necessity will require that installation, operation, or extension...”<sup>34</sup>

A municipality, which is not a “utility” under Chapter 13, is only required to obtain a CCN when it is looking to serve in an area where *retail service is already being provided by another “retail public utility.”*<sup>35</sup>

**§ 13.255. Single Certification in Incorporated or Annexed Areas**

Again, while municipalities are not required by law to hold a CCN, there may be instances in which a municipality finds that holding a CCN is beneficial. There are a number of paths that a municipality may choose to take in order to obtain a CCN depending on the specific facts and circumstances, but ultimately each requires the municipality to file an application with the PUC in accordance with applicable PUC rules and

<sup>29</sup> See TEX. WATER CODE §§ 13.001 and 13.241-13.248.

<sup>30</sup> TEX. LOC. GOV'T CODE §§ 552.001(b)-(c).

<sup>31</sup> TEX. WATER CODE § 13.002(19)(emphasis added).

<sup>32</sup> TEX. WATER CODE § 13.002(23).

<sup>33</sup> TEX. WATER CODE § 13.242(a).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

guidelines.<sup>36</sup> If no other retail public utilities are serving the area for which the municipality is seeking a CCN, the process is relatively straight forward. The municipality simply files an application under Texas Water Code § 13.244 and 16 Texas Administrative Code § 24.227 (more on this process below).

However, in the event that another retail public utility is implicated by the CCN application—because the other retail public utility’s CCN extends into the corporate boundaries of the municipality—the municipality essentially has two options. The first, less hostile option is to enter into an agreement under §§ 13.248 or 13.255 of the Texas Water Code. § 13.248 provides that “[c]ontracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the [PUC] after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.” Similarly, § 13.255 authorizes municipalities specifically, to enter a written agreement providing that all or part of an area annexed or incorporated by the municipality is to be served by a municipally owned utility, a franchised utility, or another retail public utility (§ 13.255 also grants additional authority to municipalities as discussed in the following paragraph).<sup>37</sup> In short, depending on the circumstances, two or more retail public utilities can enter an agreement to assign service areas either under a single CCN or a dual CCN (i.e. an area where two retail public utilities have a certificated right to serve, or—put another way—overlapping CCNs).

<sup>36</sup> See TEX. WATER CODE §§ 13.241 (“Granting Certificates), and 13.246 (Notice and Hearing; Issuance or Refusal; Factors Considered).

<sup>37</sup> TEX. WATER CODE § 13.255(a)

The second path to acquiring a CCN that would conflict with an existing retail public utility’s CCN is more hostile. While Texas Water Code § 13.255(a) authorizes municipalities to execute water service agreements with other retail public utilities, Subsection (b) entitles a municipality to, in effect, acquire a *single* exclusive CCN over any area incorporated or annexed by the municipality—despite another retail public utility having an existing CCN in that area. In order to activate this authority, the municipality is required to give a 180-day written notice of its intent to provide retail utility service to the area prior to filing an application with the PUC for a CCN.<sup>38</sup> Under §13.255, the PUC “must grant single certification to the municipality,” potentially resulting in the decertification of all or a portion of the other retail public utility’s CCN.<sup>39</sup> Bear in mind however, that the municipality will be responsible for paying “adequate and just” compensation to the decertified retail public utility for any “property of a retail public utility being rendered useless or valueless” as a result of the decertification.<sup>40</sup>

As detailed below, the rights of municipalities under §13.255 have been recently litigated.

### **§ 13.2451 Extension Beyond Extraterritorial Jurisdiction**

Whereas § 13.255 favors the municipality within the corporate boundaries, § 13.2451 favors non-municipal retail public utilities’ authority in the ETJ and beyond. The ETJ of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality, ranging from within one-half mile to five miles depending on the population size of the municipality (and in

<sup>38</sup> TEX. WATER CODE § 13.255(b)-(c).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*



few instances, location).<sup>41</sup> Therefore, the ETJ boundaries necessarily move with adjustments to the corporate boundaries of the municipality. If a municipality annexes an area, the ETJ expands with the annexation.<sup>42</sup> A municipality may also expand its ETJ to include an area contiguous to the existing ETJ of the municipality if the owners of the area request the expansion.<sup>43</sup>

Given the evolving nature of the municipal ETJ boundaries, it is conceivable that a municipality's ETJ expansion could overlap a neighboring retail public utility's existing CCN and water or sewer infrastructure, as happens from time to time—particularly in high growth regions across the state. In such an event, § 13.2451 delineates the rights of both the neighboring retail public utility and the municipality.

§ 13.2451 provides that the impacted retail public utility may continue to extend service in its CCN service area within the ETJ.<sup>44</sup> Further, while a municipality may expand its CCN beyond its ETJ, certain landowners owning 25 acres of contiguous land or more that are located wholly or partly outside the ETJ, can opt out of the CCN expansion before it's approved by the PUC.<sup>45</sup>

§ 13.2451 goes even further, authorizing the PUC, after notice to the municipality and an opportunity for a hearing, to “decertify an area outside a municipality's [ETJ] if the municipality does not provide service to the area on or before the fifth anniversary of the date the [CCN] was granted for the area,” except where the CCN area was transferred to the municipality on approval of the PUC, and where the municipality has spent public funds.

<sup>41</sup> See TEX. LOC. GOV'T CODE § 42.021.

<sup>42</sup> TEX. LOC. GOV'T CODE § 42.022(a).

<sup>43</sup> TEX. LOC. GOV'T CODE § 42.022(b).

<sup>44</sup> TEX. WATER CODE § 13.2451(a).

### **§ 13.245. *Municipal Boundaries or Extraterritorial Jurisdiction of Certain Municipalities***

Conversely municipalities in certain *populous* counties (i.e. counties with populations of 500,000 or more) enjoy added protection in the ETJ under § 13.245. Absent the consent of the municipality, the PUC may not grant a CCN to a retail public utility for a service area within the boundaries or ETJ of a municipality in a *populous* county—but the municipality may not *unreasonably* withhold the consent.<sup>46</sup> Note however, that the PUC is authorized under subsections (c), (c-1), and (c-2) to grant the CCN without the consent of the municipality if the PUC makes certain findings.<sup>47</sup>

Under Subsection (c), the PUC may grant a retail public utility's application for a CCN within the ETJ without municipal consent if after 180 days after the date the municipality received the retail public utility's CCN application, the PUC finds the municipality is incapable of providing service, or has failed to make a good faith effort to provide service on reasonable terms and conditions.<sup>48</sup>

Subsection (c-1) authorizes the PUC to grant the neighboring retail public utility a CCN without municipal consent, if 180 days have passed since the date a landowner or a retail public utility submits to the municipality a formal request for service that contains the same or substantially similar terms as provided by the retail public utility's application to the PUC for a CCN, and if:

(1) the utility commission makes the findings required by Subsection (c);

(2) the municipality has not entered into a binding commitment to serve the area that is

<sup>45</sup> TEX. WATER CODE § 13.2451(b).

<sup>46</sup> TEX. WATER CODE § 13.245(b).

<sup>47</sup> TEX. WATER CODE § 13.245(c)-(c-2).

<sup>48</sup> TEX. WATER CODE § 13.245(c).

the subject of the retail public utility's application to the utility commission before the 180th day after the date the formal request was made; and

(3) the landowner or retail public utility that submitted the formal request has not unreasonably refused to:

(A) comply with the municipality's service extension and development process; or

(B) enter into a contract for water or sewer services with the municipality.<sup>49</sup>

Under Subsection (c-2), the PUC does not need to make any of the aforesaid findings to grant the retail public utility a CCN if the municipality refuses to provide service in the proposed area, as evidenced by a formal vote of the municipality's governing body or an official notification from the municipality. The 180-day notice period is waived under this scenario.<sup>50</sup>

### § 13.247. Area within Municipality

§ 13.247 must be read in conjunction with § 13.255. To recap, § 13.255 entitles a municipality to acquire a single CCN over any area *incorporated or annexed by the municipality*—despite another retail public utility having an existing CCN in that area. On the other hand, § 13.2451 underscores a retail public utility's right to continue serving its CCN service area that has been wholly or partially swallowed by a *municipality's ETJ*.

§13.247 strikes a balance between §§ 13.255 and 13.2451, allowing a retail public utility to “continue and extend service” in its CCN area that is located within the *corporate boundaries of a municipality*, and reiterating that, a “municipally owned or operated utility may not provide retail water and sewer utility service within the area certificated to another retail public utility without first having obtained from the utility commission a [CCN] that includes the areas to be served.”<sup>51</sup> However, while §13.247 bolsters non-municipal retail public utilities rights within the municipal boundaries, these rights are ultimately subject to a municipalities § 13.255 authority to acquire service area over any area *incorporated or annexed by the municipality* under a single certificate, and—the eminent domain authority of municipalities with populations of 500,000 or more.<sup>52</sup>

In *Tyler v. Liberty Utilities*, Liberty Utilities provided retail sewer utility service in Smith County under a CCN.<sup>53</sup> When the City of Tyler expanded its corporate limits by annexing a territory under Liberty Utilities CCN, the City applied for a CCN under §13.255 to provide sewer utility service in those areas.<sup>54</sup> The PUC granted the City a single certification for about 30 percent of the territory at issue, and it obtained dual certification with Liberty for another 10 percent. Liberty objected to Tyler's application to certify the remaining 60 percent of the territory, resulting in a denial

<sup>49</sup> TEX. WATER CODE § 13.245(c-1).

<sup>50</sup> TEX. WATER CODE § 13.245(c-2).

<sup>51</sup> TEX. WATER CODE § 13.247(a)

<sup>52</sup> See TEX. WATER CODE § 13.247(a) and (d). § 13.247 is also subject to § 13.2475—a narrowly drawn local statute only applicable to the City of Tyler, Texas, which carved out an exception by authorizing Tyler to provide sewer service to an area entirely within its boundaries “without first having to obtain from the [PUC] a [CCN] that includes the area to be served, regardless of whether the area to be served is certificated to another retail public utility. The

Houston Court of Appeals ruled that the § 13.2475 violated the Texas Constitution, which did not authorize the legislature to control privileges and franchises, or to authorize perpetuities and monopolies, by local or special law. *City of Tyler v. Liberty Utilities (Tall Timbers Sewer) Corp.*, 571 S.W.3d 336, 345 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

<sup>53</sup> *City of Tyler v. Liberty Utilities (Tall Timbers Sewer) Corp.*, 571 S.W.3d 336 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

<sup>54</sup> *Tyler*, 571 S.W.3d 336 at 339.

of the City's CCN application for those areas.<sup>55</sup> Since § 13.247(a) requires a municipal utility to obtain a CCN before providing sewer utility service in an area certificated to another retail public utility, the denial of a CCN barred the City from providing sewer service to a portion of its residents.<sup>56</sup>

The foregoing set of facts and legal conclusions leading up to *Tyler v. Liberty Utilities* demonstrate the manner by which §§13.247 and 13.255 distribute rights between growing municipalities and non-municipal retail public utilities. While § 13.247 protected Liberty's certificated service area within the annexed boundaries of the City, the City leveraged §13.255 to gain control or equal footing over about 40 percent of the annexed area.

However, *Tyler v. Liberty Utilities* was ultimately about the constitutionality of a local law the City pursued after the PUC denied the City from obtaining a CCN over the remaining 60 percent of its annexed territory. After some lobbying and support from then, Senator Kevin Eltife, the 84th Legislature adopted a narrowly drawn S.B. 789, designed to exempt a covered municipality (i.e. City of Tyler) from § 13.247, and allowing the municipality to provide *sewer service* to an area entirely within its boundaries without first having to obtain a CCN—regardless if the area is certificated to another retail public utility (effectively nullifying Liberty's monopoly).<sup>57</sup> The Houston Court of Appeals ultimately decided that S.B. 789 violated the Texas Constitution's prohibition of legislative laws regulating the affairs of cities under Article III, Section 56(a)(2).<sup>58</sup>

### *PUC's Evaluation Criteria for CCN Applications*<sup>59</sup>

As explained above, a CCN may be required to accommodate growth in some instances, while in others a CCN is not required. Whether a CCN is required is determined by the type of retail public utilities involved, and whether the area to be served is currently receiving service from another utility. As further detailed under section VI of this article, whether a particular area is "receiving service" has historically been the subject of federal causes of action brought under 7 U.S.C. § 1926(b). § 1926(b) secures a federally indebted utility from curtailment of its service area to ensure that it can repay its federal loan. When one utility extends service within another utilities' CCN—or asks the PUC to decertify the area for a reason authorized by Chapter 13 of Texas Water Code, the CCN-holding utility may use § 1926(b) to protect its CCN by indebting itself to the U.S. Department of Agriculture under its Water and Waste Disposal Loan Program. Therefore, whether or not a utility is required to hold a CCN, obtaining a CCN, growing it, and protecting it with federal debt may have other benefits—particularly in those areas where urban sprawl is reaching into formerly rural areas. Before the PUC issues a CCN or CCN amendment, the utility must first file an application with the PUC.

Both the Texas Water Code and PUC's regulations set forth the relatively extensive criteria that must be met before a retail public utility may be granted a CCN. The minimum requirements for applying for and being granted a CCN apply to all retail public utilities. Generally, a retail public utility must demonstrate that it has the "financial, managerial and technical capability" to

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> TEX. WATER CODE § 13.2475.

<sup>58</sup> *Tyler*, 571 S.W.3d 336 at 339-40.

<sup>59</sup> 30 TEX. ADMIN. CODE § 291.102 (PUC, Criteria for Considering and Granting Certificates or Amendments).

provide service and that there is need for service within the proposed CCN boundaries.<sup>60</sup> For water utility service, the PUC must ensure that the applicant (1) is capable of providing drinking water that meets the requirements of Chapter 341, Health and Safety Code, and Chapter 13 of the Texas Water Code; and (2) has access to an adequate supply of water.<sup>61</sup> The latter consideration is becoming more relevant as neighboring utilities encumber more and more local water resources to accommodate growth.

Additionally, if granting the CCN “would require construction of a physically separate water or sewer system, the applicant must demonstrate to the [PUC] that regionalization or consolidation with another retail public utility is not economically feasible.”<sup>62</sup> The PUC has also established a number of additional criteria that they will consider in granting a CCN, which include economic needs, environmental needs, reports or market studies demonstrating existing or anticipated growth in the area, the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service, the financial stability of the applicant, the effect on the land to be included in the requested area.<sup>63</sup> In the interest of considering regionalization of utility service, PUC also considers the economic feasibility of an adjacent retail public utility to serve the requested area.<sup>64</sup>

Sometimes the PUC may require a bond or financial assurance to ensure that the service provider is capable of continuously providing service.<sup>65</sup> The type of financial

assurance is specified in PUC Rule 24.11 (relating to Financial Assurance).<sup>66</sup> Where applicable, in addition to the other factors in this section, the PUC must consider the efforts of the applicant to extend service to any economically distressed areas located within the service areas certificated to the applicant.<sup>67</sup>

These criteria are intended to exemplify the substantive nature of the CCN application requirements; for an exhaustive list, see PUC Rule 24.227.<sup>68</sup>

### ***Sale, Transfer, or Merger of a CCN***

Another territorial chess maneuver authorized by Chapter 13 is the sale, transfer, or merger of two or more utilities “Sale, Transfer, or Merger” (“STM”). From time to time, a water utility encountering growth (e.g. urban sprawl within a municipality’s ETJ), may consider acquiring an existing retail public utility’s CCN, customers, and water system by STM to regionalize and consolidate infrastructure—particularly if an annexed area is being served by a once rural CCN-holder unable or unwilling to keep up with growing demand. In such an event, the two retail public utilities would apply to transfer the CCN, customers, and facilities to the acquiring utility by apply to the PUC for approval of the proposed STM.<sup>69</sup>

All transfers of CCNs must be sought from, and approved by the PUC.<sup>70</sup> Recall that Texas Water Code § 13.255(a) empowers a municipality to authorize a municipally owned utility, franchised utility, or a retail public utility to serve an area incorporated or annexed by the municipality by written

<sup>60</sup> TEX. WATER CODE § 13.241(a).

<sup>61</sup> TEX. WATER CODE § 13.254(b); 16 TEX. ADMIN. CODE § 24.227.

<sup>62</sup> TEX. WATER CODE § 13.241(d).

<sup>63</sup> 16 TEX. ADMIN. CODE § 24.227.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, see also 16 TEX. ADMIN. CODE § 24.11.

<sup>66</sup> *Id.*

<sup>67</sup> 16 TEX. ADMIN. CODE § 24.239.

<sup>68</sup> *Id.*

<sup>69</sup> TEX. WATER CODE § 13.301; 16 TEX. ADMIN. CODE § 24.239.

<sup>70</sup> TEX. WATER CODE § 13.301.

agreement. Otherwise, a utility or a water supply or sewer service corporation may not sell, assign, or lease a CCN or any right obtained under a CCN unless the PUC has determined that the purchaser, assignee, or lessee is capable of rendering adequate and continuous service to every consumer within the certificated area, after considering the factors under Texas Water Code § 13.246(c).<sup>71</sup> The sale, assignment, or lease may only be on the conditions prescribed by the PUC.<sup>72</sup>

In addition to notice to all affected customers, the applicant must mail notice of its STM application to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an ETJ which overlaps the proposed service area boundaries.<sup>73</sup> The Commission may require the applicant to publish notice once each week for two consecutive weeks in a newspaper of general circulation in the area in which the retail public utility being transferred is located and publication may be allowed in lieu of individual notice as required in this subsection.<sup>74</sup>

The PUC considers several factors when deciding whether to approve an STM application, including whether the acquiring utility has experience and is capable of rendering adequate and continuous service to every consumer within the certificated area, the experience of the person purchasing or acquiring the water system as a utility service provider, the enforcement history of the acquiring utility, or the ability of the entity

purchasing or acquiring the water system to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water system.<sup>75</sup>

### ***Planning for Drought and System Failure***

In theory, water planning is a simple task that starts with identifying an existing demand or future need. A group of stakeholders form a utility, identify a source for water supply, design a public water system, acquire requisite water rights, apply for a CCN if necessary or appropriate, builds the system, adopts policies and rates, and begins delivering water to customers. In practice, however, the planning never ceases. Water utilities need to be nimble enough to adjust to changing water markets, population density, outward growth, changing laws and regulations. Above all, water utilities need to be ready for the unexpected, including drought and system failure, often caused by events outside the control of the utility.

Chapter 291 of the Texas Commission on Environmental Quality's ("TCEQ's") rules provides regulations for utilities that possess or are required to possess a CCN.<sup>76</sup> Each retail public utility which provides water service must operate production, treatment, and distribution facilities of sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses.<sup>77</sup> The water system quantity and quality requirements made by the TCEQ must be the minimum standards for determining the sufficiency of treatment of water suppliers and the safety of the water supplied for household usage.<sup>78</sup> Utilities must provide additional capacity to meet the

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<sup>71</sup> TEX. WATER CODE § 13.251; 16 TEX. ADMIN. CODE § 24.239.

<sup>72</sup> 16 TEX. ADMIN. CODE § 24.239(a).

<sup>73</sup> 16 TEX. ADMIN. CODE § 24.239(c).

<sup>74</sup> *Id.*

<sup>75</sup> 16 TEX. ADMIN. CODE § 24.239(h).

<sup>76</sup> 30 TEX. ADMIN. CODE § 291.91 (TCEQ, Applicability).

<sup>77</sup> 30 TEX. ADMIN. CODE § 291.93 (TCEQ, Adequacy of Water Utility Service).

<sup>78</sup> 30 TEX. ADMIN. CODE § 291.93(1).

reasonable and local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock.<sup>79</sup>

In times of drought or when water supply is limited due to equipment failure, restrictions may be instituted to limit water usage in accordance with the utility's approved drought contingency plan.<sup>80</sup> For utilities, these temporary restrictions must follow an approved drought contingency plan.<sup>81</sup> Prior to implementing the provisions of the drought contingency plan, the utility must provide a written notice to each customer that contains the date water use restrictions are to begin, the expected duration of the water use restrictions, the specific restrictions which apply, and the penalties for violations of the drought contingency plan.<sup>82</sup>

After any TCEQ field inspection, a utility must analyze its system capacity to determine if it has reached 85% capacity as compared to the most restrictive criteria of the TCEQ's minimum capacity requirements in Chapter 290.<sup>83</sup> If the utility has reached 85% of its capacity, the utility shall submit a planning report to the PUC Executive Director that clearly explains how the utility will provide the expected service demands to the remaining areas within the boundaries of its certified area.<sup>84</sup> Such a report is not required if the source of supply available to the utility is reduced to below the 85% level due to a court or agency conservation order unless that order is expected to extend for more than 18 months from the date it is entered.<sup>85</sup> Also, the Executive Director may waive the reporting requirements if the utility

demonstrates that the projected growth of the area will not require the utility to exceed 100% of its current capacity for the next five years.<sup>86</sup> Any utility that is required to file a planning report, including those requesting waivers, must file updated reports within 90 days after the utility receives a copy of each subsequent TCEQ field inspection report until the system demand is below 85% capacity.<sup>87</sup>

Each utility which possesses or is required to possess a CCN must furnish safe water which meets the minimum quality criteria for drinking water prescribed by the TCEQ as well as the requirements of the Health and Safety Code.<sup>88</sup> Every utility must maintain its facilities to protect them from contamination, ensure efficient operation, and promptly repair leaks.<sup>89</sup>

## V. Urban Sprawl: A Territorial Chess Match

This article has illustrated several scenarios and dynamics that emerge when rapid population growth and persistent drought place pressure on our limited water resources (annexation, CCN disputes, competition for water resources, regionalization, to name a few). And while the competition amongst utilities for water resources is ubiquitous, it does not exist in a vacuum. The same stakeholders competing for water, are also competing for service area, laws and regulations favorable to their respective unique interests, and ultimately, control over land development. The legislature's policy to balance water and development (i.e. private property rights) with conservation is well established.<sup>90</sup> On one hand, a landowner's rights to privately

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<sup>79</sup> *Id.*

<sup>80</sup> 30 TEX. ADMIN. CODE § 291.93(2).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 30 TEX. ADMIN. CODE § 291.93(3).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 30 TEX. ADMIN. CODE § 291.93(4).

<sup>89</sup> *Id.*

<sup>90</sup> Tex. Const. Art. XVI, § 59.

own, use, and develop real property (including water) at their own freewill is a bedrock principle enshrined in American jurisprudence. While underpinned by fundamental principles of freedom, the right to privately own real property is also the bedrock for sustainable economic vitality within and well beyond the Texas border. On the other hand, both the United States Constitution and the Texas Constitution allow for exceptions.<sup>91</sup> Beyond our foundational legal documents, there are some subtle, yet palpable limitations on private property ownership rights, not the least of which is the omnipresent public rights and duties carried out, in this instance, by cities, counties, special districts, and the full gamut of other types of water utilities. The challenges water utilities face in acquiring, developing, and maintaining water rights, CCNs, and water infrastructure are similar to the challenges any landowner faces in acquiring, developing, and maintaining property.

On a basic level, the tug-o-war between developer landowners and retail public utilities boils down to one principal issue: as between private interests and public interests, who should have the upper hand in controlling the development of land, and hence the development of water? The answer is nuanced, dependent on circumstances, and sometimes contradictory. It is of course, the practitioner's difficult task to weave together the patchwork of ideals immersing from the legislative sausage-making, which in Texas, occurs, at a minimum every odd-numbered year.

**(i) Landowner/Developer-initiated Decertification of a Utilities CCN**

Dating back to 2005, decertification law (i.e. the Texas Water Code provisions

governing the release of land from a CCN) underwent substantial change at the urging of influential developer-stakeholders seeking relief where CCNs were imposed over undeveloped land, but where they desired service from an alternative provider because of the cost, difficulty, and the impracticalities of working with the existing provider. Those stakeholders complained that the existing CCN holders abused their privilege of holding a CCN, because physically providing service to the developers' land was impractical and cost prohibitive for development enterprises. Recognizing the need to balance development and private property rights with the public's interest in attainable, cost-effective retail water service, the Texas Legislature took extensive testimony on the subject, and ultimately passed H.B. 2876 to address the issues underlying the homebuilders' complaints.

Most notably, statutory amendments passed in 2005 and then in 2011 benefited landowners by providing them with meaningful recourse to deal with existing or new retail public utilities. Landowners with at least 50 acres that are not in a platted subdivision and not actually receiving service were empowered to petition to be released in an expedited manner from an existing CCN upon a showing that, among other things, the existing CCN holder cannot provide the landowner with the level and manner of service on the timeline requested.<sup>92</sup> This petition process requires that the landowner to first submit to the existing CCN holder a request for service detailing the landowner's service needs and timeline required for service to come on line, a request for the utility's approximate cost to provide service at the level requested, along with a notice that it may pursue a petition for release of CCN through PUC.<sup>93</sup> The parties have 90 days to

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<sup>91</sup> See USCS Const. Amend. 5; USCS Const. Amend. 14; see also Tex. Const. Art. I, § 19.

<sup>92</sup> TEX. WATER CODE § 13.254 (a-1).

<sup>93</sup> *Id.*

attempt to work out how the existing CCN holder will make service available.<sup>94</sup> At the end of this period, if the landowner is dissatisfied with the existing CCN holder's position, the landowner can file a petition for expedited release at PUC.<sup>95</sup>

The expedited release petition must include proof that the subject land is at least 50 contiguously-owned acres, not in a platted subdivision, and not actually receiving service, and that the current CCN holder has refused to provide service, cannot provide service in the manner or level requested, or conditions the provision of service on costs not properly allocable directly to the landowner's service request.<sup>96</sup>

Upon receipt of the petition, PUC has 60 days to act on an administratively complete petition.<sup>97</sup> The decision made by PUC is final and may not be appealed to state court.<sup>98</sup> This aspect of the process was set in place by the legislature to ensure that resolution of the dispute is truly expedited, and will not result in protracted, expensive litigation. In fact, the 60-day review process at PUC does not involve any discovery or hearing; rather, PUC makes a decision based on the information outlined in the preceding paragraph. Although, the existing CCN holder does have an opportunity to submit a response to the petition within a timeframe specified by the presiding officer.<sup>99</sup>

In addition to this expedited release procedure, landowners with at least 25 acres can opt out of a CCN proposed under an application pending at the PUC.<sup>100</sup> The opt-

out procedure is relatively simple compared to the procedure for expedited release, and only requires the landowner to submit written notice to PUC of its interest in opting out of the proposed CCN.<sup>101</sup> This notice is due before the 30th day after the date the landowner receives notice of a new application for a CCN or for an amendment to an existing CCN.<sup>102</sup> The landowner's election is effective without further hearing or other process by PUC.<sup>103</sup>

Furthermore, landowners of at 25 contiguous acres in certain counties can pursue "streamlined" expedited decertification if they are not receiving water or sewer service.<sup>104</sup> The counties include a number of high-growth corridors, including a county with a population of at least one million, a county adjacent to a county with a population of at least one million, or a county with a population of more than 200,000 and less than 220,000 that does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more, and not in a county that has a population of more than 45,500 and less than 47,500.<sup>105</sup> This type of petition is processed quickly by the PUC, with a statutory deadline to grant the petition not later than 60 days after it is filed.<sup>106</sup>

The statutory amendments, as originally enacted, also limited cities from expanding their CCN beyond their ETJ absent landowner consent.<sup>107</sup> The legislature amended that requirement in 2007 and 2011, allowing a city to expand beyond its ETJ absent landowner consent, unless a

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> TEX. WATER CODE § 13.254.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> TEX. WATER CODE § 13.246.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> TEX. WATER CODE § 13.2541; 16 TEX. ADMIN. CODE § 24.245.

<sup>105</sup> *Id.*

<sup>106</sup> TEX. WATER CODE § 13.2541.

<sup>107</sup> *Id.*



landowner with 25 or more acres opts out.<sup>108</sup> However, section 13.2451 provides that PUC may, after notice and an opportunity for a hearing, decertify an area outside a city's ETJ if the city does not provide service to the area on or before the fifth anniversary of the date the CCN was granted for the area.<sup>109</sup> This subsection does not apply to a CCN for an area: (1) that was transferred to a municipality on approval of the PUC; and (2) in relation to which the municipality has spent public funds.<sup>110</sup>

Up until the 80<sup>th</sup> Legislature (2018-19), an existing CCN holder, whose CCN was decertified, received compensation only if it could show the PUC that its property was rendered useless or valueless by decertification.<sup>111</sup> That determination would be made at the same time as the PUC's final order on decertification. If PUC determined that no property was rendered useless or valueless, then there would be no compensation proceeding.<sup>112</sup> Otherwise, a proceeding would commence after a notice of intent was filed by the new, prospective utility provider that it intended to serve the decertified area.<sup>113</sup> If compensation were awarded by the PUC, it was the responsibility of the prospective utility to pay it.<sup>114</sup>

Facing an uphill battle to establish that the decertified land resulted in useless or valueless property, retail public utilities pressed for statutory relief allowing for a broader look at compensation. In response, the 80<sup>th</sup> Legislature passed S.B. 2272, which provided some relief to decertified

utilities.<sup>115</sup> Primarily, three things changed: the statute (1) removed the useless and valueless component to assessing whether compensation is owed under both expedited and streamlined proceedings, (2) altered the timing for the compensation determination for streamlined proceedings, and (3) changed who the responsible party is for paying any compensation due in streamlined proceedings—from the prospective utility to the landowner.<sup>116</sup>

By removal of the useless and valueless determination, the compensation review focuses on the preexisting standard of just and adequate compensation.<sup>117</sup> Under this standard, any real property whose value was diminished as a result of decertification would be valued under the standards in eminent domain actions under Texas Property Code Chapter 21. Personal property would be valued according to the following factors in Section 13.254(g):

- the amount of the retail public utility's debt allocable for service to the area in question
- the value of the service facilities of the retail public utility located within the area in question
- the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question
- the amount of the retail public utility's contractual obligations allocable to the area in question

<sup>108</sup> TEX. WATER CODE §§ 13.2451, 13.246 (but see exceptions where certain cities and counties are bracketed).

<sup>109</sup> TEX. WATER CODE § 13.2451(c).

<sup>110</sup> *Id.*

<sup>111</sup> *See*, Act of June 10, 2019, 86th Leg., R.S., ch.688, § 4, 2019 Tex. Gen. Laws 1977, 1927 (amending TEX. WATER CODE § 13.2541(d) to require “just and adequate compensation” prior to rendering retail

public utility service to a decertified property, instead of requiring compensation determined by the PUC to be rendered “useless or valueless”).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Codified at TEX. WATER CODE § 13.2541.

<sup>116</sup> TEX. WATER CODE §§ 13.254, 13.2541.

<sup>117</sup> TEX. WATER CODE §§ 13.254, 13.2541.

- any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification
- the impact on future revenues lost from existing customers
- necessary and reasonable legal expenses and professional fees
- other relevant factors

With respect to the timing of the valuation proceeding, expedited decertification remains the same: valuation will continue to be considered at the time the prospective utility provide its notice of intent to provide service.<sup>118</sup> But with streamlined proceedings, PUC has determined that valuation proceedings will commence immediately after the PUC's decision to decertify.<sup>119</sup>

In the PUC's proposed compensation phase, the parties can agree on an independent appraiser or present their own, independent appraisals.<sup>120</sup> If competing appraisals are submitted, PUC appoints a qualified third appraiser whose appraisal is binding on the PUC.<sup>121</sup> The third appraiser's valuation cannot not be lower or greater than the parties' appraisals.<sup>122</sup> In both the expedited and streamlined compensation phases, if the former CCN holder fails to file an appraisal, the PUC will enter a final order determining compensation to be zero.<sup>123</sup>

#### **(ii) Chicken and Egg Dynamic of Groundwater Availability Certification**

In 1999, much like today, rapid growth was placing pressure on the state's water resources. Local groundwater wells were going dry in and around high-growth areas

around the state. In several instances, these wells were adjacent to or within new subdivisions that were relying on groundwater as their source for supply. In the land development business, it is common practice to subdivide larger tracts into multiple smaller tracts, sized in a manner that allows each tract to have its own groundwater well. Over time, however, when each of smaller tracts are simultaneously pulling water from the same source aquifer, the cumulative pressure on the aquifer can cause the groundwater level to drop below the well's pump, leaving the household without water and with the costly burden to lower their pump, drill a new well, or attain water by other means.

Citing rapid population growth and groundwater depletion, the 76th Legislature passed S.B. 1323, which empowered, but did not mandate, cities and counties to require a certification of groundwater availability prior to approving a plat application for subdivisions relying on local groundwater as the source of supply. The bill enlisted TCEQ's predecessor, the Texas Natural Resource Conservation Commission, to adopt rules establishing a form for the certification, which would be prepared by a licensed engineer.

The bill was intended to expand city and county platting authority without requiring cities and counties to exercise that authority. It was, in effect, a toothless measure—albeit well-intended. But the bill opened the conversation about the importance of the inextricable marriage between land development and water development.

<sup>118</sup> TEX. WATER CODE § 13.254; *see also* PUC Docket No. 50028 (proposed Rule 24.245).

<sup>119</sup> TEX. WATER CODE § 13.2541; *see, e.g.*, PUC Docket No. 50258 (Petition of Clay Road 628 Development, L.P.)(Order No. 6 issued April 2, 2020).

<sup>120</sup> PUC Docket No. 50028 (proposed Rule 24.245).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

### 36<sup>th</sup> Annual Texas Environmental Superconference

Over the years, the Texas Local Government Code, which codified S.B. 1323, has been updated with minor amendments. But not until the most recent legislative session, has the legislature *required* groundwater availability certification for new plats for which local groundwater is the intended water supply.

In 2023, the legislature passed S.B. 2440, replacing the suggestive wording, “may,” to the more directive wording, “must.” Now, all city and county plat applications for subdivisions relying on groundwater beneath that subdivision’s land as the source of intended supply must include a statement certifying that adequate groundwater is available for the subdivision.<sup>124</sup> The statement must be prepared by an engineer, or a geoscientist licensed in Texas.<sup>125</sup>

While S.B. 2440 prescribes a requirement to certify groundwater availability for new groundwater-supplied subdivisions, it also authorizes the municipal or county authority to waive the requirement if based on “credible evidence” of groundwater availability in the vicinity of the proposed subdivision, the municipal or county authority determines that sufficient groundwater is available to the subdivided tract, and either (a) the entire tract proposed to be subdivided will be supplied with groundwater from the Gulf Coast Aquifer or the Carrizo-Wilcox Aquifer; or (b) the proposed subdivision divides the tract into not more than 10 parts.<sup>126</sup> But if the original subdivided tract won’t be supplied Carrizo-Wilcox or Gulf Coast groundwater, and is further subdivided into more than 10 parts at any point in the future, or if the county or

municipal authority determines the proposed subdivision is part of a series of proposed subdivision from an original tract that collectively includes more than 10 parts, the waiver no longer applies.<sup>127</sup>

For context the Carrizo-Wilcox and Gulf Coast aquifers run parallel to each other, generally covering most of the area from Brownsville northwest toward Maverick County, and swooping northeast toward Texarkana, and due south to the Gulf of Mexico. Notably, the Yegua-Jackson, Queen City, and Sparta aquifers account for some of this area, along with several minor aquifers and alluvium groundwater sources interspersing the region.

S.B. 2440 seems simple on its face, but as with all laws affecting land and water development, the complexities emerge when harmonized with other relevant statutes. In counties where a GCD is located, S.B. 2440 must be harmonized with Chapter 36 of the Texas Water Code.

Chapter 36 provides for the creation and management of GCDs. The legislatively assigned purpose of GCDs is to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and to control subsidence.<sup>128</sup> Importantly, GCDs are the state’s preferred method of groundwater management, which entails protecting property rights, balancing conservation and development of groundwater to meet the needs of the state, and using the best available science to do so.<sup>129</sup> GCDs are political subdivisions of the state, governed by a Board of Directors, authorized to adopt rules, and regulate

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<sup>124</sup> TEX. LOC. GOV’T CODE §§ 212.0101(a) and 232.0032(a).

<sup>125</sup> TEX. LOC. GOV’T CODE §§ 212.0101(a)(1) and 232.0032(a)(1).

<sup>126</sup> TEX. LOC. GOV’T CODE §§ 212.0101(a-2) and 232.0032(a-2).

<sup>127</sup> Tex. Loc. Gov’t Code §§ 212.0101(a-2) and 232.0032(a-2).

<sup>128</sup> TEX. WATER CODE § 36.0015.

<sup>129</sup> *Id.*

groundwater production by instituting a permitting framework prescribed by Chapter 36.<sup>130</sup>

Currently, there are 101 GCDs covering roughly two-thirds of the state. From a very high-level perspective, GCDs participate in joint planning with other GCDs, a process that takes place in perpetual five-year cycles and entails the collection of localized data and scientific study to develop metrics and models for planning and managing local groundwater resources.<sup>131</sup> GCDs use the information developed through joint planning and other means to adopt and implement policies, rules, and permitting decisions.<sup>132</sup> It bears noting that certain groundwater wells are statutorily exempt from GCD permitting, including wells used solely for domestic use or for providing water for livestock or poultry if the well is located or to be located on a tract of land larger than 10 acres, and incapable of producing more than 25,000 gallons of groundwater per day.<sup>133</sup>

It follows that in areas throughout the state where a GCD has jurisdiction to regulate groundwater production, the GCD's decision to grant a permit to produce any amount of groundwater from a non-exempt well is statutorily independent from a municipal or county authority's decision to grant a subdivision plat for which groundwater is the intended source of water supply.

Herein lies the chicken or egg quandary. Envision a scenario where a landowner-developer is subdividing a 50-acre tract of land outside of a growing city in a county that is coterminous with a GCD's boundaries. The

developer intends to rely on Trinity Aquifer groundwater from beneath the 50-acre tract as the source of supply for the proposed subdivision and intends to subdivide the 50-acre tract into 25 two-acre tracts (less necessary acreage for roads and community infrastructure).

The proposed subdivision does not qualify for a waiver under S.B. 2440 because the source is neither the Carrizo-Wilcox nor the Gulf Coast Aquifer, and the number of tracts after subdivision exceeds ten. Under S.B. 2440, the developer must include a statement prepared by a licensed engineer or geoscientist certifying that sufficient groundwater is available for the subdivision

In this scenario, the developer contracts a licensed engineer or geoscientist to complete the requisite form certifying groundwater availability. The county approves the subdivision plat, and the developer proceeds with installing roads, water system components, electric utilities, and the like. But, when the developer approaches the GCD for a permit to produce the groundwater needed to supply the subdivision, the GCD's data collected from years of study via joint planning and other means reveals that neighboring wells outside the subdivision would be unreasonably impacted and would over-allocate the resource in manner inconsistent with the modeled available groundwater. In essence, the GCD disagrees with the developer's engineer or geoscientist and the county that sufficient groundwater is available to serve the subdivision. If the GCD grants the requested permit, it will have abandoned its statutory duty. But if the GCD denies the permit, or grants a permit with a reduced

<sup>130</sup> See generally, TEX. WATER CODE §§ 36.051 and 36.114.

<sup>131</sup> TEX. WATER CODE § 36.108.

<sup>132</sup> See generally, TEX. WATER CODE §§ 36.1071-72 (management planning); 36.1083 (adoption of

Desired Future Conditions); 36.1084 (Modeled Available Groundwater); and 36.1132 (permitting based on Modeled Available Groundwater).

<sup>133</sup> TEX. WATER CODE § 36.117(b).

authorized annual production, the GCD could be accused of a regulatory taking—particularly since the developer would have made significant investments with the expectation of realizing a return.

The situation is further complicated where, for example, the county grants a waiver of the groundwater availability certification requirement on the basis that “credible evidence” suggests sufficient groundwater is available, and the relevant subdivision proposes ten tracts. S.B. 2440 leaves the meaning of the term “credible evidence” to the discretion of the county or municipal authority, which invites conflict with GCD rules and permitting authority. Several GCDs individually, and collectively through the Texas Alliance of Groundwater Districts have asked TCEQ, which is tasked with implementing the law, to define what constitutes “credible evidence” so that counties, municipalities, and GCDs have clearer guidance. TCEQ has published draft rules that do not include any such guidance, but no rules have been adopted as of the date of this article.

These hypothetical scenarios are oversimplified but demonstrate the decision-making conflicts that can arise when the county or municipal authority and the local GCD siloed operations. Realistically, there could be any number of potential solutions available for the developer in these scenarios beyond pursuing litigation with the county and GCD. The developer could connect to a neighboring utility, which brings into play the previously discussed provisions of the Texas Water Code, under Chapter 13 (which also often results in litigation). The developer’s engineer may be able to find a

design solution to accommodate extra storage or identify a nearby wholesale water supplier. Each of these options are likely to increase the cost to the developer.

One solution that some counties, municipalities, and GCDs are pursuing is open communication about regional and localized groundwater availability. The Interlocal Cooperation Act provides a framework for political subdivision to share information and collaborate to mitigate the risk of conflicting decision making. GCDs do not have platting authority, and counties and municipalities do not have groundwater permitting authority. But no law prohibits counties and municipalities from seeking, or GCDs from sharing, critical groundwater availability data. By entering interlocal agreements with one another, counties, municipalities, and GCDs can memorialize a framework whereby the GCD is providing an expert opinion to the county or municipal authority on the availability of groundwater prior to the county or municipal authority taking action on a plat application. Interlocal agreements tend to start the conversation upstream from potential conflict and encourage open and frank conversations with all parties involved, including the developers. While not all conflicts are always avoidable, each conflict can be mitigated with sound planning and open communication and information sharing.

## VI. Federal Law Implications under 7 U.S.C. § 1926(b)

The purpose of this federal statute is to protect a federally indebted utility from curtailment of its service area to ensure that it can repay its federal loan.<sup>134</sup> The statute provides:

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<sup>134</sup> See, e.g., *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); *Crystal Clear Special Util. Dist.*

*v. Marquez*, 316 F. Supp. 3d 965, 967-68 (W.D. Tex. 2018), *appeal docketed*, No. 19-50556 (5th Cir. Jun. 18, 2019). *Crystal Clear* was stayed on Sep. 4, 2019, pending the disposition of *Green Valley*, No. 18-51092. See also *Crystal Clear’s* companion case on

The *service provided or made available* through [a rural water association] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body.<sup>135</sup>

Section 1926(b) lawsuits are typically coupled with 42 U.S.C. §§ 1983 and 1988, which allow a successful plaintiff to recover a mandatory fee award.

The case law generally establishes two elements to secure protection under § 1926(b):

- (1) the utility must be federally indebted and
- (2) in some cases, the utility must show that it is making service available.<sup>136</sup>

The longstanding precedent—recently overturned by the Fifth Circuit<sup>137</sup>—followed the landmark case of *North Alamo Water Supply Corporation v. City of San Juan, Texas*.

There, City of San Juan, which is a home-rule city, owned a municipal water supply system that began providing water service to several subdivision north of the City, some of which lie within or just outside North Alamo Water Supply Corporation’s (“North Alamo’s”) CCN and near its existing infrastructure that was financed by the Farmer’s Home Association (“FmHA”).<sup>138</sup>

In *North Alamo*, the Fifth Circuit considers the legal meaning of “service provided or made available” under the federal statute § 1926(b), and state CCN law.<sup>139</sup> Ultimately, the Fifth Circuit held that “the utility’s state law duty to provide service [under state CCN law] is the legal equivalent to the utility’s ‘*making service available*’ under § 1926(b).”<sup>140</sup> Because the utility held a CCN over the area in dispute, and because the utility continued to be indebted to FmHA, the court concluded that the city had violated § 1926(b) by encroaching North Alamo Water Supply Corporation’s CCN.<sup>141</sup>

In 2020, however, the Fifth Circuit overturned *North Alamo*.<sup>142</sup> Recognizing that no other circuit court in the country follows the logic of *North Alamo*—which relied heavily on state CCN law principles granting CCN holders the exclusive right and duty to serve—the Fifth Circuit replaced North Alamo with the so-called “pipes in the ground test” or “physical availability test.”<sup>143</sup>

In *Green Valley Special Utility District v. City of Schertz*, the Fifth Circuit considered whether Green Valley Special Utility District’s (“Green Valley’s”) *wastewater* CCN, was lawfully decertified by Schertz, where Green Valley had federal debt, but had not “committed facilities or lines providing sewer service” or “performed acts or supplied anything” to the property.

Looking to the plain meaning of § 1926(b), the Fifth Circuit reasoned that “[i]nherent in the concept of providing service or making service available is the

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an attorney fee award in *Crystal Clear v. Walker*, 2019 WL 6464005 (W.D. Tex. 2019), *appeal docketed*, No. 20-50043 (5th Cir. Jan. 16, 2020).

<sup>135</sup> 7 U.S.C. 1926(b)(emphasis added).

<sup>136</sup> See, e.g., *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996); *Green Valley Special Util. Dist. v. City of Cibolo*, 866 F.3d 339, 341 (5th Cir. 2017).

<sup>137</sup> See *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460 (5th Cir. 2020).

<sup>138</sup> *North Alamo Water Supply Corp.*, 90 F.3d at 920.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 916 (emphasis added).

<sup>141</sup> *Id.*

<sup>142</sup> *Green Valley*, 969 F.3d 460.

<sup>143</sup> *Green Valley*, 969 F.3d at 476.

capability of providing service, or, at a minimum, of providing service within a reasonable time.”<sup>144</sup>

Under *Green Valley v. Schertz*, the “physical availability test” as prescribed by the Fifth Circuit requires a utility seeking the protection of §1926(b) to show that it has (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made; and (2) the legal right to provide service.<sup>145</sup> Further, having nearby infrastructure is prerequisite to satisfying the test, though “pipes in the ground” is not a strict requirement.<sup>146</sup>

One other related 1926(b) case deserves mention, *City of Schertz v. United States Dept. of Agriculture, Green Valley Special Util. Dist., et al.*, which involves some of the same parties in *Green Valley v. Schertz*.<sup>147</sup> In this case, Schertz sought to block Green Valley from securing an additional \$5.4 million federal loan for *wastewater* utility purposes during the pending appeal regarding whether Green Valley could rely on its *water*-related federal loan to protect its *wastewater* CCN. The trial court denied the City’s standings on grounds that the loan had not yet been awarded, and therefore the City could not demonstrate a sufficiently particularized, imminent harm required to establish standing.

With respect to the landowner’s fast-track decertification under Texas Water Code § 13.254, the trial court held that although the PUC’s *findings* provided that Green Valley had neither committed facilities nor lines nor performed acts or supplied anything—and had in fact demanded \$3.6 million from the landowner to pay for the required

infrastructure in order to serve—the PUC had failed to make a determination that Green Valley failed to meet its duty to serve. The trial court expressly stated that its holding leaves open the possibility that a future landowner has a remedy for decertification under Texas Water Code § 13.254, and that even under § 13.255 a city has a remedy to secure single certification, albeit through first establishing that the utility has failed to provide adequate service. The Fifth Circuit agreed with the trial court in a brief opinion, that Schertz lacked standing because under an earlier (2017) case involving Green Valley’s CCN and § 1926(b), the Fifth Circuit held that Green Valley’s federal debt against its wastewater facilities also protects its water facilities.<sup>148</sup>

## VII. CONCLUDING REMARKS

The title of this article posits the question: is water planning and development in Texas a collaborative regional effort, or a territorial chess match? Both are correct. The ever-evolving laws governing water and land development in this state are like a weather vane shifting with the political winds. Every legislative session brings with it new gusts, pointing the state in a different direction.

The struggle to control water and land development are inextricably linked, yet governed by different chapters of law. But one constant remains true. The legislature tends to favor creative collaborative solutions by local stakeholders over risky brightline rules. It is the difficult task water utilities, regulators, and developers to identify lasting solutions through collaboration and compromise. It will be important to track and perhaps participate in the developments

<sup>144</sup> *Id.*, citing *Sequoyah Cty. Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1203 (10th Cir. 1999).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *City of Schertz v. United States Dept. of Agriculture, Green Valley Special Util. Dist., et al.*, 2019 WL 5579541 (W.D. Tex. 2018), *appeal docketed*, No. 19-51056 (5th Cir. Nov. 15, 2019).

<sup>148</sup> *Id.*

*36<sup>th</sup> Annual Texas Environmental Superconference*

affecting these laws, and to thoughtfully consider how best clients can navigate new law and the likelihood of further developments in the law.

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