

## **CCN UPDATE**

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Certificates of Convenience and Necessity (“CCN”) are certificates issued by the Texas Commission on Environmental Quality (“TCEQ”) to retail water or sewer providers that grant a defined area to a utility in which it can serve. Some entities, like investor owned utilities, are required to obtain a CCN before service can be provided. Other entities, like municipalities, can operate a retail water or sewer utility without a CCN. For years, the laws relating to CCNs remained static with very little change.

In 2004, this all changed when a group of developers began complaining of the inability of being removed from certain CCNs. When the TCEQ did not initiate a rulemaking, the Texas Water Code was amended in 2005 that provided the developers group with what they were requesting. Developers wanted to make it easier to be removed from a CCN in order to create developer districts (i.e., MUDs, WCIDs, Fresh Water Supply Districts, etc.). This movement has created a whirlwind of changes in CCN laws. In 2007, CCNs laws changed again to become a bit friendlier to cities. This paper will highlight the more salient changes to the law. The portions of the Water Code that have not been changed since 2005 are not addressed in this paper.

HB 2876 in 2005 Legislative Session was filed in direct response to the pleas by the developers community to allow property owners a greater voice in who can provide utility service to a piece of property. As you can imagine, cost was a major factor in the developers' idea of who should provide service. Many of the early bills filed by the pro-development community contained provisions that municipalities could not charge for line extensions, etc. to provide service to a property. Needless to say, such provisions did not make it to the final bill. After some compromise, HB 2876 resulted in the most sweeping changes to the CCN laws in years. Most of the changes created by HB 2876 applied to all utilities equally. However, cities took some hits that other utility providers did not take. Below highlights the most salient changes made by HB 2876 and changes occurring in the 2007 legislative session.

### **Big City v. small city**

HB 2876 made several significant changes and took aim squarely at cities for some alleged abuses. Many of the alleged abuses could not be substantiated. Additionally, no evidence of alleged abuses was provided during any committee hearing. The allegations of abuse were contained solely in anecdotal testimony. Regardless of the slim evidence, HB 2876 created a climate where cities are treated differently than other utilities. Even amongst cities, HB 2876 treated large and small cities differently. Greater protection was provided to cities with populations greater than 500,000.

The protections afforded large municipalities include:

- A municipal consent requirement for a utility to obtain a CCN within the corporate limits or ETJ of the large city.<sup>1</sup>
- A provision that large cities must begin construction of facilities within 1 year and substantially complete the infrastructure within 2 years.<sup>2</sup>
- Property owners within a large city's ETJ may not "opt out" of a CCN application.<sup>3</sup>
- An exemption to the expedited release process, described below, for property within the municipality's corporate limits or ETJ.<sup>4</sup>

The limitation of the "consent" provision means that water and sewer providers can seek CCNs in all municipalities' corporate limits and ETJ without seeking consent, if the municipality has a population of less than 500,000.

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<sup>1</sup> See TEX. WATER CODE § 13.245 (b) and (c). If municipal consent is not provided in 180 days, the TCEQ may grant the CCN upon finding that the municipality cannot provide the service or has failed to provide service on "reasonable terms and conditions."

<sup>2</sup> TEX. WATER CODE § 13.245 (d).

<sup>3</sup> TEX. WATER CODE § 13.246 (i).

<sup>4</sup> TEX. WATER CODE § 13.254 (a-2).

### **Small City Regulation**

The primary manner in which small cities are regulated focus on the ability to obtain a CCN beyond a municipality's corporate limits. CCNs regulations affect smaller cities in the following manner:

- If a municipality does not provide service to an area outside its ETJ after five years, the area may be decertified after notice and hearing.<sup>5</sup>
- A landowner may opt out of a newly filed CCN application if the landowner owns at least 25 acres.<sup>6</sup>

### **Seeking New or Amended CCNs**

Seeking a new or amended CCN became stricter under HB 2876. The primary reason the changes were implemented was to prevent the "land grabs" that had occurred in years past by entities that had no hope of serving its entire service area. The changes are designed to allow a CCN holder to be granted only the area that it can reasonably serve in the near future. The new rules also provide greater say by landowners in whether they are allowed to remain in a CCN or not.

A list of the major changes to seeking a new or amended CCN are listed below:

- Notice of the application must be provided to all landowners owning 25 acres or more of land, either wholly or partially, within the proposed service area.<sup>7</sup>
- Requires a capital improvements plan, including a timeline for construction of all facilities necessary to provide service to the entire proposed service area.<sup>8</sup>
- Description of funding sources.<sup>9</sup>
- Description of projected land uses, including densities, in the proposed service area.<sup>10</sup>

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<sup>5</sup> See TEX. WATER CODE § 13.2451 (c). The restriction on providing services within five years does not apply to transfers of CCNs the TCEQ approved and for which the city has expended public funds.

<sup>6</sup> TEX. WATER CODE § 13.254.

<sup>7</sup> TEX. WATER CODE § 13.246 (a-1).

<sup>8</sup> TEX. WATER CODE § 13.244(d)(3).

<sup>9</sup> TEX. WATER CODE § 13.244(d)(4).

<sup>10</sup> TEX. WATER CODE § 13.244(d)(5).

- Adds new criteria to be considered in whether to grant a new or amended CCN. Such new criteria are:
  - Whether landowners have expressed the need for new service.<sup>11</sup>
  - The effect of the CCN on landowners.<sup>12</sup>
  - The effect on the land to be included.<sup>13</sup>
- Grants landowners that own 25 acres or more to “opt out” of the proposed CCN, unless the property is located within the corporate limits or ETJ of a city with a population over 500,000.<sup>14</sup>

### **Revocation or Decertification of an Existing CCN**

One of the main complaints of developers was that once placed in a CCN, it was very difficult to be removed from it. There had been instances in which water supply corporations or other CCN holders had required developers to pay substantial sums of money to be removed from a CCN. In one instance, a developer paid over \$2,000 per acre of property to be removed from a water supply corporation’s CCN in order to be served by a city. Developers wanted an easier, quicker process to be removed from a CCN, although a process already existed.

The Expedited Release or Expedited Decertification was born out of this desire. A property owner of at least 50 acres of land, that is not in a platted subdivision actually receiving service, may petition the TCEQ for release from a CCN.<sup>15</sup> In order to petition the TCEQ, the petitioner must first seek service from the CCN holder. The CCN holder has 90 days in which to respond to a valid service request from the petitioner.<sup>16</sup> The petitioner may seek to be decertified from the CCN, if the CCN holder:

- Refuses to provide service to the property;
- Is not capable of providing service to the property within the timeframe, at the level, or in the manner needed or requested by current or projected service demands; or
- Conditions the provision of service on the payment of costs not properly allocable directly to the petitioner’s service request.

After making its prima facie case, the TCEQ has 90 days in which to determine whether it will grant or deny the petition for release. The CCN holder can submit whatever information it deems necessary to the TCEQ to refute any claims made by the petitioner. As the process is intended to be “expedited”, the contested case procedures of

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<sup>11</sup> TEX. WATER CODE § 13.246(c)(2).  
<sup>12</sup> TEX. WATER CODE § 13.246(c)(3).  
<sup>13</sup> TEX. WATER CODE § 13.246(c)(9).  
<sup>14</sup> TEX. WATER CODE § 13.246(h).  
<sup>15</sup> TEX. WATER CODE § 13.254 (a-1).  
<sup>16</sup> TEX. WATER CODE § 13.254(a-3).

the Administrative Procedures Act do not apply.<sup>17</sup> Thus, the rules of discovery and evidence, including authenticating documents, hearsay, competency of expert reports, etc. are not followed in this process. This creates a problem when some professionals submit reports regarding the CCN and the opposing party has no opportunity to cross-examine the person regarding the report.

If the petitioner can make these demonstrations, then the TCEQ is obligated to decertify the CCN holder.<sup>18</sup> The petitioner must demonstrate that it has an alternate provider that can provide the same level of service in the same time frame as requested by the petitioner.

Some have argued that the Expedited Release process is slanted in favor of decertifying CCN. The Water Code provides that the TCEQ “shall grant the petition unless the [TCEQ] makes an express finding that the petitioner” failed to meet his burden of proof.<sup>19</sup> If the TCEQ grants the decertification, then the CCN holder is entitled to compensation for property that is rendered useless or valueless as a result of the decertification.<sup>20</sup> The entities can agree to a valuation by agreeing on a mutually agreeable appraiser. If the parties cannot agree on a mutually agreeable appraiser, then each shall provide their own appraisals.<sup>21</sup> The property owner may contest the valuation and present his own valuation study. After receiving the two appraisals, the TCEQ must appoint a third appraiser to determine compensation.<sup>22</sup> The independent TCEQ appraisal may not be less than the lowest appraisal or greater than the highest appraisal.

In order to determine compensation for real property, the valuation method used in the eminent domain provisions of the Texas Property Code is used. The factors to determine the value of personal property include: 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; 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; and other relevant factors. No guidance is provided on how to arrive at any of the subjective standards. “Other relevant factors” have not been determined through any rulemaking process.

While the process is relatively new, property owners have availed themselves of the expedited release process. As of this writing, thirteen expedited release applications have been filed with the TCEQ. Of the thirteen, the TCEQ has granted 1 expedited

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<sup>17</sup> TEX. WATER CODE § 13.254(a-4).  
<sup>18</sup> TEX. WATER CODE § 13.254(a-3).  
<sup>19</sup> *Id.*  
<sup>20</sup> TEX. WATER CODE § 13.254(d).  
<sup>21</sup> 30 TEX. ADMIN. CODE §291.113(j).  
<sup>22</sup> 30 TEX. ADMIN. CODE §291.113(j)(1).

release, with two more pending final Commission action to determine compensation. The TCEQ has denied one petition for expedited release. One petition is currently pending. The remainder have either been withdrawn or returned during the administrative review process.

Only one expedited release petition has been granted with compensation determined. In that case, approximately 432 acres were sought to be removed from a water supply corporation's CCN. A city sought to be the alternate provider to the decertified property. The City's appraisal valued the certificate holder's loss at \$0. The decertified water supply corporation valued its loss at just under \$300,000. After taking into consideration the factors discussed above, the TCEQ's appraiser valued the water supply corporation's loss at approximately \$57,000. All three appraisers took different approaches to valuing each factor. The Commissioner's agreed with the TCEQ independent appraisal and granted the decertified water supply corporation the recommended \$57,000 for its lost value.

Our firm represented the only certificate holder who has been allowed to retain its certificate. The certificate holder was able to demonstrate that it had not refused service, in fact welcomed the opportunity to provide service, to the petitioner and had excess capacity to provide services to the property owner. In response to the request for service, the certificate holder provided a cost estimate that related solely to the provision of service to the property. The TCEQ found that the petitioner failed to meet his burden.

CCN laws continue to change. Several bills are currently pending during the 2009 Legislative Session. Attached to this paper are some links to TCEQ documents that you may find to be helpful. If you would like more information on CCNs, please give me or Kerry Russell a call at (512) 930-1317.

## Helpful Links to TCEQ Documents

- Instructions for Completing Application to Obtain or Amend a Water or Sewer Certificate of Convenience and Necessity (CCN): <http://www.tceq.state.tx.us/assets/public/permitting/watersupply/ud/forms/10362ins.pdf>
- Petition to Discontinue (and Cancel) a Certificate of Convenience and Necessity: <http://www.tceq.state.tx.us/assets/public/permitting/watersupply/ud/forms/10419.pdf>
- Who Provides Water or Sewer Service to My Property?: <http://www.tceq.state.tx.us/assets/public/permitting/forms/10427.pdf>
- Preparing a Petition for Expedited Release from a Certificate of Convenience and Necessity: [http://www.tceq.state.tx.us/files/rg-441.pdf\\_4444929.pdf](http://www.tceq.state.tx.us/files/rg-441.pdf_4444929.pdf)



## **FIRM RESUME**

RUSSELL & RODRIGUEZ, L.L.P. practices in the areas of municipal, environmental, water, administrative, oil and gas, and utility law before federal and state agencies, in both federal and state courts, and other regulatory bodies. In addition to the private practice of law, attorneys with R&R have been employed with various municipalities and federal agencies.

Attorneys with R&R practice in the following areas:

### **GENERAL MUNICIPAL LAW**

**DRAFTING & MONITORING OF MUNICIPAL ORDINANCES**

### **LAND USE LAW**

**PERMITS FOR MUNICIPAL SOLID WASTE LANDFILLS**

**PERMITS FOR WASTEWATER TREATMENT PLANTS,  
WATER TREATMENT PLANTS AND STORM WATER DISCHARGES**

**WATER & WASTEWATER UTILITIES RATES & REGULATION**

**HAZARDOUS & SOLID WASTE, AIR, AND WASTEWATER REGULATION & ENFORCEMENT**

**ENDANGERED SPECIES AND WETLANDS ISSUES**

**ENVIRONMENTAL COMPLIANCE & TRANSACTION AUDITS**

**ENVIRONMENTAL & TOXIC TORT LITIGATION**

**UNDERGROUND & ABOVEGROUND STORAGE TANK  
REGULATION & ENFORCEMENT**

**INJECTION WELL REGULATION**

**ELECTRIC & TELECOMMUNICATION UTILITIES FRANCHISES, RATES & REGULATIONS**

**CREATION & MANAGEMENT OF UTILITY DISTRICTS**

## FIRM BIOGRAPHIES

**KERRY E. RUSSELL**, born Austin, Texas, August 16, 1945; admitted to bar, 1990, Texas; 1994, Colorado; U.S. District Court, Eastern District of Texas, Northern District of Texas, Southern District of Texas, Western District of Texas. Education: University of Texas (B.S.M.E., 1987); University of Wyoming (J.D., 1990). Author: *A Research Guide to Natural Resource Damages Under CERCLA*, Wyoming Land and Water Law Review, reprinted in the Public Land and Resources Digest; *Natural Resource Damage: A Major Expansion of CERCLA Liability*, Vol. 55 St. B. Tex. Env'tl. L.J. 458 (1992); Contributor, *West's Texas Practical Guide on Environmental Law*. Member: American Bar Association; State Bar of Texas; Travis County Bar Association; Williamson County Bar Association; American Society of Mechanical Engineers; Solid Waste Association of North America; Colorado Bar Association; The College of the State Bar of Texas; Water Environment Association of Texas; Texas City Attorneys Association.

**ARTURO D. RODRIGUEZ, JR.**, born San Antonio, Texas, June 5, 1970; admitted to bar, 1994, Texas; 1999, U.S. District Court, Western District of Texas. Education: University of Texas at Austin (B.B.A. with honors, 1991); St. Mary's University (J.D., 1994). Delta Theta Phi. Assistant City Attorney, City of San Antonio, 1995-1998; Assistant City Attorney, City of Georgetown, 1998-2000. Member: International Municipal Lawyers Association; Texas City Attorneys Association; The College of the State Bar of Texas; Williamson County Bar Association; Travis County Bar Association; Hispanic National Bar Association; State Bar of Texas; American Bar Association.

## **PROFESSIONAL EXPERIENCE SUMMARY**

RUSSELL & RODRIGUEZ, L.L.P. practices in the areas of environmental, municipal, water, administrative, oil and gas, and utility law. Attorneys with R&R have extensive experience in these areas, gained in part by working for municipalities and federal agencies.

### **MUNICIPAL LAW**

R&R has broad experience in the representation of municipalities. This experience includes a working knowledge of the state and federal statutes that affect the daily affairs of municipalities and their various departments and activities. This practice area includes many of the individual practice areas noted below, as well as drafting ordinances, drafting and negotiating contracts, and general procedural and legal advice to city councils, planning and zoning commissions, economic development corporations, local government corporations, municipal courts, and code enforcement departments.

### **PUBLIC UTILITIES**

R&R provides expertise in public utility law, including electric, telecommunication, water, and sewer utilities. This practice area includes ratemaking, certification, rulemaking, compliance counseling, environmental regulation, contracts, construction contracts and litigation, and legislative counseling.

R&R attorneys represent or have represented numerous water and sewer utility clients, including municipalities, districts, non-profit supply corporations, and corporations. R&R attorneys are well qualified to provide a wide range of services to water and sewer utilities, including formation of the utility, assistance in obtaining funding from various state and federal agencies, and representation before regulatory agencies concerning rates, certificates, and compliance. Also, because of its broad experience in environmental law, R&R is able to serve water and sewer utility clients in various environmental matters affecting their businesses.

R&R attorneys were instrumental in the drafting and commenting on legislation relating to water and sewer utility service territory (certificates of convenience and necessity or CCNs). R&R worked with a coalition of cities to affect the manner in which the CCN rules would be applied to cities.

## **WATER DISTRICTS**

Conservation and reclamation districts may be utilized to facilitate development of land for residential or commercial use by providing a flexible conduit to finance and construct necessary water, sewer, and drainage facilities through the issuance of tax and/or revenue bonds. The use of districts can provide for relatively long-term, low interest financing of utility development.

The water district creation process is stringently regulated by statute, TCEQ rules, and Attorney General regulation. Therefore, this process requires experienced legal and engineering assistance to ensure compliance with all necessary steps. Attorneys with R&R have actively participated in all areas of water district representation as general counsel during the creation of districts.

## **WATER QUALITY**

R&R attorneys represent a variety of clients in wastewater discharge permitting and enforcement matters before the TCEQ and EPA. Attorneys with R&R have successfully represented municipal, industrial, and developer clients in securing authorization for wastewater discharges from these agencies. These projects have ranged from very small plants to regional treatment facilities. This representation typically calls for firm attorneys to assist in the preparation of applications for wastewater discharge permits as well as preparation of client responses to enforcement actions. In addition, R&R attorneys assist clients with the development and implementation of pretreatment programs.

R&R attorneys also represent affected clientele by participating in rulemaking proceedings before TCEQ. In many instances, such proceedings involve proposals for the adoption of water quality standards for particular water bodies. In representing its clients in such matters, R&R attorneys are called upon to address both legal and technical issues associated with water quality modeling and waste load allocations.

R&R attorneys represent a number of clients requiring storm water permit coverage. This practice area involves consultation with clients and their technical consultants concerning best management practices to minimize the impact of storm water runoff on receiving streams, as well as assisting with the preparation of applications and negotiations with TCEQ staff concerning implementation of permit conditions. Attorneys with R&R have been active in the development of State storm water permits affecting municipal, industrial, and construction storm water discharges.

## **HAZARDOUS AND SOLID WASTE**

R&R provides permitting and enforcement services in the areas of municipal solid waste and industrial and hazardous solid waste, and is routinely involved in representing clients in proceedings before TCEQ, EPA, and in state and federal courts.

R&R attorneys have represented clients in obtaining initial permits, renewals, and amendments before all major environmental agencies in Texas, including TCEQ and EPA. This representation includes assistance in the strategy planning process, preparation and editing of permit applications, and legal representation in contested case hearings before these agencies. Some of R&R's recent clients have been the North Texas Municipal Water District and the Texoma Area Solid Waste Authority, Inc., both of which received municipal solid waste permits after lengthy contested case hearings.

Other areas of R&R's solid waste practice relate to enforcement activities. The firm has represented numerous clients in negotiating and litigating both the amount of civil penalties and injunctive relief sought by the Texas Attorney General's Office, the EPA, and the United States Department of Justice. R&R attorneys have negotiated administrative penalties and technical requirements with staff of TCEQ and have participated in agency enforcement hearings. These negotiations and hearings typically include resolution of technical issues relating to closure and/or remedial activities.

## **ADDITIONAL REGULATORY PRACTICE**

Attorneys at R&R routinely receive notice and review copies of new regulations and statutes and have a practice of advising affected clients of these changes. Our attorneys also maintain files of recent agency enforcement orders.

R&R assists clients in drafting model rules for adoption by state agencies. With the recent enactment of significant amendments to several of the major environmental statutes, new regulations and administrative changes occur at the agencies with increasing frequency. R&R attorneys keep abreast of these regulatory activities by attending and speaking at relevant short courses and conferences on a regular basis and by making contributions to legal and technical environmental journals.