

BILL ANALYSIS

Senate Research Center

C.S.H.B. 2876
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Natural Resources
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Committee Report (Substituted)

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

Subchapter G, Chapter 13, Water Code, provides the statutory framework for the issuance of certificates of convenience and necessity (CCN) for water and sewer service by the Texas Commission on Environmental Quality (TCEQ). In general, a utility may not render retail water or sewer utility service to the public without first having obtained a CCN. In general, a CCN entitles a utility to be the sole, monopoly water or sewer utility provider in a certain area.

Under current law, landowners have very little rights in the process of TCEQ granting a CCN over their property. Landowners are not required to consent to a CCN over their property. The CCN applicant does not need to show that any landowners actually requested utility service from the utility. Landowners are not given adequate or direct notice; the only statutorily required notice is one newspaper publication. A CCN is an encumbrance on land in as much as it dictates how, when, and by whom utilities will be provided to that land.

In some cases, the inability of landowners to participate in the CCN process has led to abuses. CCNs have been granted over tracts of undeveloped land without the ability to provide service to the entire area. Once landowners are included in a CCN, without notice or consent or request for service, they cannot remove their land from the CCN without going through a time-consuming and costly administrative process at TCEQ.

Some CCN holders have demanded payment of exorbitant sums to release property from a CCN. These payments often bear no relation to investments in utility infrastructure or capacity to serve the land, because no such investment has been made.

In addition, of particular importance in urban and suburban areas is a CCN holder's ability to provide adequate fire suppression service. Issues of service quality predominate in areas where a non-municipal utility operates inside the corporate limits of a municipality. In these situations, many residents would prefer to receive higher quality utility service from the municipality.

C.S.H.B. 2876 amends Chapter 13, Water Code, to reform the process by which CCNs are created and maintained. The bill grants TCEQ meaningful discretion with regard to its evaluation of CCN applications while giving affected landowners greater latitude in deciding whether or not their land will be included in a certificated area. C.S.H.B. 2876 also empowers certain landowners to petition TCEQ to have their land decertified from a CCN in instances where the water or sewer service that they have been provided is either nonexistent or shoddy.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Commission on Environmental Quality in SECTION 9 (Section 13.254, Water Code), SECTION 10 (13.255, Water Code), and SECTION 16 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 13.002, Water Code, by amending Subdivision (1) and adding Subdivision (10-a)[sic], to redefine "affected person" and define "landowner," "owner of a tract of land," and "owners of each tract of land."

SECTION 2. Amends Section 13.241(a), Water Code, to require the Texas Commission on Environmental Quality (TCEQ), in determining whether to grant or amend a certificate of public

convenience and necessity, to ensure that the applicant possesses certain qualities. Makes a conforming change.

SECTION 3. Amend Section 13.242, Water Code, by adding Subsection (d), to prohibit a supplier of wholesale water or sewer service from requiring a purchaser to obtain a certificate of public convenience and necessity if the purchaser is not otherwise required by this chapter to obtain the certificate.

SECTION 4. Amends Section 13.244, Water Code, as follows:

Sec. 13.244. New heading: APPLICATION; MAPS AND OTHER INFORMATION; EVIDENCE AND CONSENT. (a) Requires a public utility or water supply or sewer service corporation, to obtain a certificate of public convenience and necessity or an amendment to a certificate, to submit to TCEQ an application for a certificate or for an amendment as provided by this section. Makes conforming changes.

(b) Deletes existing text relating to the actions taken under this section occurring as a result of a request by TCEQ.

(c) Makes a conforming change.

(d) Requires an application for a certificate of public convenience and necessity or for an amendment to a certificate to contain certain information relating to the proposed service area.

SECTION 5. Amends Subchapter G, Chapter 13, Water Code, by adding Sections 13.245 and 13.2451, as follows:

Sec. 13.245. MUNICIPAL BOUNDARIES OR EXTRATERRITORIAL JURISDICTION OF CERTAIN MUNICIPALITIES. (a) Provides that this section applies only to a municipality with a population of 500,000 or more.

(b) Prohibits TCEQ, except as provided by Subsection (c), from granting to a retail public utility a certificate of public convenience and necessity for a service area within the boundaries or extraterritorial jurisdiction of a municipality without the consent of the municipality. Prohibits the municipality from unreasonably withholding the consent. Authorizes a municipality, as a condition of the consent, to require that all water and sewer facilities be designed and constructed in accordance with the municipality's standards for facilities.

(c) Requires TCEQ, if a municipality has not consented under Subsection (b) before the 180th day after the date the municipality receives the retail public utility's application, to grant the certificate of public convenience and necessity without the consent of the municipality if the commission finds that the municipality fails to meet certain criteria.

(d) Requires a commitment described by Subsection (c)(2) to provide that the construction of service facilities will begin within one year and will be substantially completed within two years after the date the retail public utility's application was filed with the municipality.

(e) Authorizes a municipality or a retail public utility, if TCEQ makes a decision under Subsection (d) regarding the grant of a certificate of public convenience and necessity without the consent of the municipality, to appeal the decision to the appropriate state district court. Requires the court to hear the petition within 120 days after the date the petition is filed. Authorizes the court to award reasonable fees to the prevailing party on final disposition.

Sec. 13.2451. EXTENSION BEYOND EXTRATERRITORIAL JURISDICTION. (a) Authorizes the retail public utility, except as provided by Subsection (b), if a municipality extends its extraterritorial jurisdiction to include an area certificated to a retail public

utility, to continue and extend service in its area of public convenience and necessity under the rights granted by its certificate and this chapter.

(b) Prohibits TCEQ from extending a municipality's certificate of public convenience and necessity beyond its extraterritorial jurisdiction without the written consent of the landowner who owns the property in which the certificate is to be extended. Provides that the portion of any certificate of public convenience and necessity that extends beyond the extraterritorial jurisdiction of the municipality without the consent of the landowner is void.

SECTION 6. Amends Section 13.246, Water Code, by amending Subsections (a), (b), (c), and (d) and adding Subsections (a-1), (h), and (i), as follows:

(a) Makes a conforming change.

(a-1) Requires TCEQ, except as otherwise provided by this subsection, in addition to the notice required by Subsection (a), to require notice to be mailed to each owner of a tract of land that is at least 50 acres and is wholly or partially included in the area proposed to be certified. Requires notice required under this subsection to be mailed by first class mail to the owner of the tract according to the most current tax appraisal rolls of the applicable central appraisal district at the time TCEQ received the application for the certificate or amendment. Requires good faith efforts to comply with the requirements of this subsection to be considered adequate notice to landowners. Provides that notice under this subsection is not required for a matter filed with TCEQ under certain statutes.

(b) Makes conforming changes.

(c) Requires certificates of public convenience and necessity and amendments to certificates to be granted on a nondiscriminatory basis after the consideration by TCEQ of certain factors. Makes conforming changes.

(d) Makes a conforming change.

(h) Authorizes, except as provided by Subsection (i), a landowner who owns a tract of land that is at least 25 acres and that is wholly or partially located within the proposed service area to elect to exclude some or all of the landowner's property from the proposed service area by providing written notice to TCEQ before the 30th day after the date the landowner receives notice of a new application for a certificate of public convenience and necessity or for an amendment to an existing certificate of public convenience and necessity. Provides that the landowner's election is effective without a further hearing or other process by TCEQ. Requires the application, if a landowner makes an election under this subsection, to be modified so that the electing landowner's property is not included in the proposed service area.

(i) Provides that a landowner is not entitled to make an election under Subsection (h) but is entitled to contest the inclusion of the landowner's property in the proposed service area at a hearing held by TCEQ regarding the application if the proposed service area is located within the boundaries or extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or a utility owned by the municipality is the applicant.

SECTION 7. Amends the heading to Section 13.247, Water Code, to read as follows:

Sec. 13.247. AREA WITHIN MUNICIPALITY.

SECTION 8. Amends Section 13.247, Water Code, by amending Subsections (a) and (c) and adding Subsection (d), as follows:

(a) Authorizes, if an area is within the boundaries of a municipality, rather than the city as the result of annexation, incorporation, or otherwise, all retail public utilities certified or entitled to certification under this chapter to provide service or operate facilities in that

area to continue and extend service in its area of public convenience and necessity within the area pursuant to the rights granted by its certificate and this chapter, unless the municipality exercises its power of eminent domain to acquire the property of the retail public utility under Subsection (d). Makes conforming changes.

(c) Makes conforming changes.

(d) Authorizes, in addition to any other rights provided by law, a municipality with a population of more than 500,000 to exercise the power of eminent domain in the manner provided by Chapter 21 (Eminent Domain), Property Code, to acquire a substandard water or sewer system if all the facilities of the system are located entirely within the municipality's boundaries. Requires the municipality to pay just and adequate compensation for the property. Defines "substandard water or sewer system."

SECTION 9. Amends Section 13.254, Water Code, by amending Subsections (a), (e), and (g), and adding Subsections (a-1) through (a-4) and (g-1), as follows:

(a) Authorizes TCEQ at any time after notice and hearing, on its own motion or on receipt of a petition described by Subsections (a-1), revoke or amend any certificate of public convenience and necessity with the written consent of the certificate holder or if it makes certain other findings.

(a-1) Authorizes, as an alternative to decertification under Subsection (a), the owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water or sewer service to petition the TCEQ under this subsection for expedited release of the area from a certificate of public convenience and necessity so that the area may receive service from another retail public utility. Requires the petitioner to deliver, via certified mail, a copy of the petition to the certificate holder, who is authorized to submit information to TCEQ to controvert information submitted by the petitioner. Requires the petitioner to demonstrate that certain actions have been taken relating to the certificate holder.

(a-2) Provides that a landowner is not entitled to make the election described in Subsection (a-1) but is entitled to contest the involuntary certification of its property in a hearing held by the TCEQ if the landowner's property is located in a certain area.

(a-3) Requires TCEQ, within 90 calendar days from the date TCEQ determines the petition filed pursuant to Subsection (a-1) to be administratively complete, to grant the petition unless it makes an express finding that the petitioner failed to satisfy the elements required in Subsection (a-1) and supports its finding with separate findings and conclusions for each element based solely on the information provided by the petitioner and the certificate holder. Authorizes TCEQ to grant or deny a petition subject to terms and conditions specifically related to the service request of the petitioner and all relevant information submitted by the petitioner and the certificate holder. Authorizes TCEQ, in addition, to require an award of compensation as otherwise provided by this section.

(a-4) Provides that Chapter 2001 (Administrative Procedure), Government Code, does not apply to any petition filed under Subsection (a-1). Provides that the decision of TCEQ on the petition is final after any reconsideration authorized by TCEQ'S rules and may not be appealed.

(e) Requires TCEQ to ensure that the monetary amount of compensation is determined not later than the 90th calendar day after the date on which a retail public utility notifies TCEQ of its intent to provide service to the decertified area.

(g) Requires the value of personal property to be determined according to certain factors, including the amount of the retail public utility's debt allocable for service to the area in question. Deletes the impact on the existing indebtedness of the retail public utility and its ability to repay that debt and factors relevant to maintaining the current financial integrity of the retail public utility as factors. Requires TCEQ to adopt rules governing the evaluation of these factors. Makes conforming changes.

(g-1) Requires each retail public utility, if the retail public utilities cannot agree on an independent appraiser within 10 calendar days after the date on which the retail public utility notifies TCEQ of its intent to provide service to the decertified area, to engage its own appraiser at its own expense, and each appraisal to be submitted to TCEQ within 60 calendar days. Requires TCEQ, after receiving the appraisals, to appoint a third appraiser who is required to make a determination of the compensation within 30 days. Prohibits the determination from being less than the lower appraisal or more than the higher appraisal. Requires each retail public utility to pay half the cost of the third appraisal.

SECTION 10. Amends Section 13.255, Water Code, by amending Subsection (g) and by adding Subsection (g-1), as follows:

(g) Makes conforming changes.

(g-1) Requires TCEQ to adopt rules governing the evaluation of the factors to be considered in determining the monetary compensation under Subsection (g). Requires TCEQ by rule to adopt procedures to ensure that the total compensation to be paid to a retail public utility under Subsection (g) is determined not later than the 90th calendar day after the date on which TCEQ determines that the municipality's application is administratively complete.

SECTION 11. Amends Subchapter G, Chapter 13, Water Code, by adding Chapter 13, Water Code, by adding Section 13.2551, as follows:

Sec. 13.2551. COMPLETION OF DECERTIFICATION. (a) Authorizes TCEQ, as a condition to decertification or single certification under Section 13.254 or 13.255, and on request by an affected retail public utility, to order the retail public utility seeking to provide service to a decertified area to serve the entire service area of the retail public utility that is being decertified and the transfer of the entire certificate of public convenience and necessity of a partially decertified retail public utility to the retail public utility seeking to provide service to the decertified area.

(b) Requires TCEQ to order service to the entire area under Subsection (a) if TCEQ finds that the decertified retail public utility will be unable to provide continuous and adequate service at an affordable cost to the remaining customers.

(c) Requires TCEQ to require the retail public utility seeking to provide service to the decertified area to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to its other customers and to establish the terms under which the service must be provided. Authorizes the terms to include certain provisions.

(d) Prohibits the retail public utility seeking decertification from charging the affected customers any transfer fee or other fee to obtain service other than [sic] the retail public utility's usual and customary rates for monthly service or the interim rates set by TCEQ, if applicable.

(e) Prohibits TCEQ from ordering compensation to the decertified retail utility if service to the entire service area is ordered under this section.

SECTION 12. Amends Section 13.257, Water Code, by amending Subsections (a), (b), and (d), and adding Subsections (r) and (s), as follows:

(a) Redefines "utility service provider."

(b) Makes a conforming change.

(d) Amends the text of the notice addressed in this subsection.

(r) Requires a utility service provider to take certain actions relating to recording certain information.

(s) Requires each county to accept and file in its real property records a utility service provider's map presented to the county clerk under this section if the map meets filing requirements, does not exceed 11 inches by 17 inches in size, and is accompanied by the appropriate fee. Requires the recording required by this section to be completed not later than the 31st day after the date a utility service provider receives a final order from the commission granting an application for a new certificate or for an amendment to a certificate that results in a change in the utility service provider's service area.

SECTION 13. Repealer: Sections 13.254(h) (requiring TCEQ to determine the manner in which a compensation payment will be paid) and 13.2541 (Revocation of Certificate When Service Provided to a Municipality), Water Code.

SECTION 14. Requires a holder of a certificate of public convenience and necessity on the effective date of this Act to comply with Section 13.257, Water Code, as amended by this Act, not later than January 1, 2007.

SECTION 15. Provides that the changes in law made by this Act apply only to an application for a certificate of public convenience and necessity or for an amendment to a certificate of public convenience and necessity submitted to TCEQ on or after January 1, 2006, and a proceeding to amend or revoke a certificate of public convenience and necessity initiated on or after January 1, 2006.

SECTION 16. Requires TCEQ to promulgate rules implementing the changes in law effected by this Act by January 1, 2006, or to report to certain officials any failure to comply with this deadline.

SECTION 17. Effective date: September 1, 2005.