

By: Callegari, Gattis, et al.

H.B. No. 2876

Substitute the following for H.B. No. 2876:

By: Puente

C.S.H.B. No. 2876

A BILL TO BE ENTITLED

AN ACT

relating to certificates of public convenience and necessity for water service and sewer service.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 13.002(1), Water Code, is amended to read as follows:

(1) "Affected person" means any landowner within an area for which a certificate of public convenience and necessity is filed, any retail public utility affected by any action of the regulatory authority, any person or corporation whose utility service or rates are affected by any proceeding before the regulatory authority, or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

SECTION 2. Section 13.241(a), Water Code, is amended to read as follows:

(a) In determining whether to grant or amend a certificate of public convenience and necessity, the commission shall ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.

SECTION 3. Section 13.242, Water Code, is amended by adding Subsection (d) to read as follows:

(d) A supplier of wholesale water or sewer service may not

1 require a purchaser to obtain a certificate of public convenience
2 and necessity if the purchaser is not otherwise required by this
3 chapter to obtain the certificate.

4 SECTION 4. Section 13.244, Water Code, is amended to read as
5 follows:

6 Sec. 13.244. APPLICATION; MAPS AND OTHER INFORMATION;
7 EVIDENCE AND CONSENT. (a) To obtain a certificate of public
8 convenience and necessity or an amendment to a certificate, a [A]
9 public utility or water supply or sewer service corporation shall
10 submit to the commission an application for [~~to obtain~~] a
11 certificate [~~of public convenience and necessity~~] or for an
12 amendment as provided by this section [~~of a certificate~~].

13 (b) Each [~~On request by the commission, each~~] public utility
14 and water supply or sewer service corporation shall file with the
15 commission a map or maps showing all its facilities and
16 illustrating separately facilities for production, transmission,
17 and distribution of its services, and each certificated retail
18 public utility shall file with the commission a map or maps showing
19 any facilities, customers, or area currently being served outside
20 its certificated areas.

21 (c) Each applicant for a certificate or for an amendment
22 shall file with the commission evidence required by the commission
23 to show that the applicant has received the required consent,
24 franchise, or permit of the proper municipality or other public
25 authority.

26 (d) An application for a certificate of public convenience
27 and necessity or for an amendment to a certificate must contain:

1 (1) a description of the proposed service area by:

2 (A) a metes and bounds survey certified by a
3 licensed state land surveyor or a registered professional land
4 surveyor;

5 (B) the Texas State Plane Coordinate System;

6 (C) verifiable landmarks, including a road,
7 creek, or railroad line; or

8 (D) if a recorded plat of the area exists, lot and
9 block number;

10 (2) a description of any requests for service in the
11 proposed service area;

12 (3) a capital improvements plan, including a budget
13 and estimated timeline for construction of all facilities necessary
14 to provide full service to the entire proposed service area;

15 (4) a description of the sources of funding for all
16 facilities;

17 (5) to the extent known, a description of current and
18 projected land uses, including densities;

19 (6) a current financial statement of the applicant;

20 (7) according to the tax roll of the central appraisal
21 district for each county in which the proposed service area is
22 located, a list of the owners of each tract of land that is:

23 (A) at least 50 acres; and

24 (B) wholly or partially located within the
25 proposed service area; and

26 (8) any other item required by the commission.

27 SECTION 5. Subchapter G, Chapter 13, Water Code, is amended

1 by adding Sections 13.245 and 13.2451 to read as follows:

2 Sec. 13.245. MUNICIPAL BOUNDARIES OR EXTRATERRITORIAL
3 JURISDICTION OF CERTAIN MUNICIPALITIES. (a) This section applies
4 only to a municipality with a population of 650,000 or more.

5 (b) Except as provided by Subsection (c), the commission may
6 not grant to a retail public utility a certificate of public
7 convenience and necessity for a service area within the boundaries
8 or extraterritorial jurisdiction of a municipality without the
9 consent of the municipality. The municipality may not unreasonably
10 withhold the consent. As a condition of the consent, a municipality
11 may require that all water and sewer facilities be designed and
12 constructed in accordance with the municipality's standards for
13 facilities.

14 (c) If a municipality has not consented under Subsection (b)
15 before the 180th day after the date the municipality receives the
16 retail public utility's application, the commission shall grant the
17 certificate of public convenience and necessity without the consent
18 of the municipality if the commission finds that the municipality:

19 (1) does not have the ability to provide service; or
20 (2) has failed to make a legally binding commitment
21 with landowners of sufficient available funds to provide service on
22 reasonable terms and conditions.

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

1 (e) If the commission makes a decision under Subsection (d)
2 regarding the grant of a certificate of public convenience and
3 necessity without the consent of the municipality, the municipality
4 or the retail public utility may appeal the decision to the
5 appropriate state district court. The court shall hear the petition
6 within 120 days after the date the petition is filed. On final
7 disposition, the court may award damages, including reasonable
8 fees, to the prevailing party.

9 Sec. 13.2451. EXTENSION BEYOND EXTRATERRITORIAL
10 JURISDICTION. (a) Except as provided by Subsection (b), if a
11 municipality extends its extraterritorial jurisdiction to include
12 an area certificated to a retail public utility, the retail public
13 utility may continue and extend service in its area of public
14 convenience and necessity under the rights granted by its
15 certificate and this chapter.

16 (b) The commission may not extend a municipality's
17 certificate of public convenience and necessity beyond its
18 extraterritorial jurisdiction without the written consent of the
19 landowner who owns the property in which the certificate is to be
20 extended. The portion of any certificate of public convenience and
21 necessity that extends beyond the extraterritorial jurisdiction of
22 the municipality without the consent of the landowner is void.

23 SECTION 6. Section 13.246, Water Code, is amended by
24 amending Subsections (a), (b), (c), and (d) and adding Subsections
25 (a-1), (h), and (i) to read as follows:

26 (a) If an application for a certificate of
27 public convenience and necessity or for an amendment to a

1 certificate is filed, the commission shall cause notice of the
2 application to be given to affected parties and, if requested,
3 shall fix a time and place for a hearing and give notice of the
4 hearing. Any person affected by the application may intervene at
5 the hearing.

6 (a-1) Except as otherwise provided by this subsection, in
7 addition to the notice required by Subsection (a), the commission
8 shall require notice to be mailed to each owner of a tract of land
9 that is at least 50 acres and is wholly or partially included in the
10 area proposed to be certified. Notice required under this
11 subsection must be mailed by first class mail to the owner of the
12 tract according to the most current tax appraisal rolls of the
13 applicable central appraisal district at the time the commission
14 received the application for the certificate or amendment. Good
15 faith efforts to comply with the requirements of this subsection
16 shall be considered adequate notice to landowners. Notice under
17 this subsection is not required for a matter filed with the
18 commission under:

19 (1) Section 13.248 or 13.255; or

20 (2) Chapter 65.

21 (b) The commission may grant applications and issue
22 certificates and amendments to certificates only if the commission
23 finds that a certificate or amendment is necessary for the service,
24 accommodation, convenience, or safety of the public. The
25 commission may issue a certificate or amendment as requested, or
26 refuse to issue it, or issue it for the construction of only a
27 portion of the contemplated system or facility or extension, or for

1 the partial exercise only of the right or privilege and may impose
2 special conditions necessary to ensure that continuous and adequate
3 service is provided.

4 (c) Certificates of public convenience and necessity and
5 amendments to certificates shall be granted on a nondiscriminatory
6 basis after consideration by the commission of:

7 (1) the adequacy of service currently provided to the
8 requested area;

9 (2) [~~7~~] the need for additional service in the
10 requested area, including whether any landowners, prospective
11 landowners, tenants, or residents have requested service;

12 (3) [~~7~~] the effect of the granting of a certificate
13 or of an amendment on the recipient of the certificate or amendment,
14 on the landowners in the area, and on any retail public utility of
15 the same kind already serving the proximate area;

16 (4) [~~7~~] the ability of the applicant to provide
17 adequate service, including meeting the standards of the
18 commission, taking into consideration the current and projected
19 density and land use of the area;

20 (5) the feasibility of obtaining service from an
21 adjacent retail public utility;

22 (6) the financial ability of the applicant to pay for
23 the facilities necessary to provide continuous and adequate service
24 and [~~7~~] the financial stability of the applicant, including, if
25 applicable, the adequacy of the applicant's debt-equity ratio;

26 (7) [~~7~~] environmental integrity;

27 (8) [~~7~~ and] the probable improvement of service or

1 lowering of cost to consumers in that area resulting from the
2 granting of the certificate or amendment; and

3 (9) the effect on the land to be included in the
4 certificated area.

5 (d) The commission may require an applicant for a
6 certificate or for an amendment [~~utility~~] to provide a bond or other
7 financial assurance in a form and amount specified by the
8 commission to ensure that continuous and adequate utility service
9 is provided.

10 (h) Except as provided by Subsection (i), a landowner who
11 owns a tract of land that is at least 25 acres and that is wholly or
12 partially located within the proposed service area may elect to
13 exclude some or all of the landowner's property from the proposed
14 service area by providing written notice to the commission before
15 the 30th day after the date the landowner receives notice of a new
16 application for a certificate of public convenience and necessity
17 or for an amendment to an existing certificate of public
18 convenience and necessity. The landowner's election is effective
19 without a further hearing or other process by the commission. If a
20 landowner makes an election under this subsection, the application
21 shall be modified so that the electing landowner's property is not
22 included in the proposed service area.

23 (i) A landowner is not entitled to make an election under
24 Subsection (h) but is entitled to contest the inclusion of the
25 landowner's property in the proposed service area at a hearing held
26 by the commission regarding the application if the proposed service
27 area is located within the boundaries or extraterritorial

1 jurisdiction of a municipality with a population of more than
2 650,000 and the municipality or a utility owned by the municipality
3 is the applicant.

4 SECTION 7. The heading to Section 13.247, Water Code, is
5 amended to read as follows:

6 Sec. 13.247. AREA [~~INCLUDED~~] WITHIN MUNICIPALITY [~~CITY,~~
7 ~~TOWN, OR VILLAGE~~].

8 SECTION 8. Section 13.247, Water Code, is amended by
9 amending Subsections (a) and (c) and adding Subsection (d) to read
10 as follows:

11 (a) If an area [~~has been or~~] is [~~included~~] within the
12 boundaries of a municipality [~~city as the result of annexation,~~
13 ~~incorporation, or otherwise~~], all retail public utilities
14 certified or entitled to certification under this chapter to
15 provide service or operate facilities in that area [~~before the~~
16 ~~inclusion~~] may continue and extend service in its area of public
17 convenience and necessity within the [~~annexed or incorporated~~] area
18 pursuant to the rights granted by its certificate and this chapter,
19 unless the municipality exercises its power of eminent domain to
20 acquire the property of the retail public utility under Subsection
21 (d). Except as provided by Section 13.255 [~~of this code~~], a
22 municipally owned or operated utility may not provide retail water
23 and sewer utility service within the area certificated to another
24 retail public utility without first having obtained from the
25 commission a certificate of public convenience and necessity that
26 includes the areas to be served.

27 (c) This section may not be construed as limiting the power

1 of municipalities [~~cities~~] to incorporate or extend their
2 boundaries by annexation, or as prohibiting any municipality [~~city~~]
3 from levying taxes and other special charges for the use of the
4 streets as are authorized by Section 182.025, Tax Code.

5 (d) In addition to any other rights provided by law, a
6 municipality with a population of more than 650,000 may exercise
7 the power of eminent domain in the manner provided by Chapter 21,
8 Property Code, to acquire a substandard water or sewer system if all
9 the facilities of the system are located entirely within the
10 municipality's boundaries. The municipality shall pay just and
11 adequate compensation for the property. In this subsection,
12 "substandard water or sewer system" means a system that is not in
13 compliance with the municipality's standards for water and
14 wastewater service.

15 SECTION 9. Section 13.254, Water Code, is amended by
16 amending Subsections (a), (e), and (g) and adding Subsections (a-1)
17 through (a-4) and (g-1) to read as follows:

18 (a) The commission at any time after notice and hearing may,
19 on its own motion or on receipt of a petition described by
20 Subsections (a-1), revoke or amend any certificate of public
21 convenience and necessity with the written consent of the
22 certificate holder or if it finds that:

23 (1) the certificate holder has never provided, is no
24 longer providing, is incapable of providing, or has failed to
25 provide continuous and adequate service in the area, or part of the
26 area, covered by the certificate;

27 (2) in an affected county as defined in Section

1 16.341, the cost of providing service by the certificate holder is
2 so prohibitively expensive as to constitute denial of service,
3 provided that, for commercial developments or for residential
4 developments started after September 1, 1997, in an affected county
5 as defined in Section 16.341, the fact that the cost of obtaining
6 service from the currently certificated retail public utility makes
7 the development economically unfeasible does not render such cost
8 prohibitively expensive in the absence of other relevant factors;

9 (3) the certificate holder has agreed in writing to
10 allow another retail public utility to provide service within its
11 service area, except for an interim period, without amending its
12 certificate; or

13 (4) the certificate holder has failed to file a cease
14 and desist action pursuant to Section 13.252 within 180 days of the
15 date that it became aware that another retail public utility was
16 providing service within its service area, unless the certificate
17 holder demonstrates good cause for its failure to file such action
18 within the 180 days.

19 (a-1) As an alternative to decertification under Subsection
20 (a), the owner of a tract of land that is at least 100 acres and that
21 is not in a platted subdivision actually receiving water or sewer
22 service may petition the commission under this subsection for
23 expedited release of the area from a certificate of public
24 convenience and necessity so that the area may receive service from
25 another retail public utility. The petitioner shall deliver, via
26 certified mail, a copy of the petition to the certificate holder,
27 who may submit information to the commission to controvert

1 information submitted by the petitioner. The petitioner must
2 demonstrate that:

3 (1) a written request for service, other than a
4 request for standard residential or commercial service, has been
5 submitted to the certificate holder, identifying:

6 (A) the area for which service is sought;

7 (B) the timeframe within which service is needed
8 for current and projected service demands in the area;

9 (C) the level and manner of service needed for
10 current and projected service demands in the area; and

11 (D) any additional information requested by the
12 certificate holder that is reasonably related to determination of
13 the capacity or cost for providing the service;

14 (2) the certificate holder has been allowed at least
15 90 calendar days to review and respond to the written request and
16 the information it contains;

17 (3) the certificate holder:

18 (A) has refused to provide the service;

19 (B) is not capable of providing the service on a
20 continuous and adequate basis within the timeframe, at the level,
21 or in the manner reasonably needed or requested by current and
22 projected service demands in the area; or

23 (C) conditions the provision of service on the
24 payment of costs not properly allocable directly to the
25 petitioner's service request, as determined by the commission; and

26 (4) the alternate retail public utility from which the
27 petitioner will be requesting service is capable of providing

1 continuous and adequate service within the timeframe, at the level,
2 and in the manner reasonably needed or requested by current and
3 projected service demands in the area.

4 (a-2) A landowner is not entitled to make the election
5 described in Subsection (a-1) but is entitled to contest the
6 involuntary certification of its property in a hearing held by the
7 commission if the landowner's property is located:

8 (1) within the boundaries of any municipality or the
9 extraterritorial jurisdiction of a municipality with a population
10 of more than 650,000 and the municipality or retail public utility
11 owned by the municipality is the holder of the certificate; or

12 (2) in a platted subdivision actually receiving water
13 or sewer service.

14 (a-3) Within 90 calendar days from the date the commission
15 determines the petition filed pursuant to Subsection (a-1) to be
16 administratively complete, the commission shall grant the petition
17 unless the commission makes an express finding that the petitioner
18 failed to satisfy the elements required in Subsection (a-1) and
19 supports its finding with separate findings and conclusions for
20 each element based solely on the information provided by the
21 petitioner and the certificate holder. The commission may grant or
22 deny a petition subject to terms and conditions specifically
23 related to the service request of the petitioner and all relevant
24 information submitted by the petitioner and the certificate holder.
25 In addition, the commission may require an award of compensation as
26 otherwise provided by this section.

27 (a-4) Chapter 2001, Government Code, does not apply to any

1 petition filed under Subsection (a-1). The decision of the
2 commission on the petition is final after any reconsideration
3 authorized by the commission's rules.

4 (e) The determination of the monetary amount of
5 compensation, if any, shall be determined at the time another
6 retail public utility seeks to provide service in the previously
7 decertified area and before service is actually provided. The
8 commission shall ensure that the monetary amount of compensation is
9 determined not later than the 90th calendar day after the date on
10 which a retail public utility notifies the commission of its intent
11 to provide service to the decertified area.

12 (g) For the purpose of implementing this section, the value
13 of real property owned and utilized by the retail public utility for
14 its facilities shall be determined according to the standards set
15 forth in Chapter 21, Property Code, governing actions in eminent
16 domain and the value of personal property shall be determined
17 according to the factors in this subsection. The factors ensuring
18 that the compensation to a retail public utility [~~for the taking,~~
19 ~~damaging, or loss of personal property, including the retail public~~
20 ~~utility's business,~~] is just and adequate shall at a minimum
21 include: the impact on the existing indebtedness of the retail
22 public utility and its ability to repay that debt; the value of the
23 service facilities of the retail public utility located within the
24 area in question; the amount of any expenditures for planning,
25 design, or construction of service facilities that are allocable to
26 service to the area in question; the amount of the retail public
27 utility's contractual obligations allocable to the area in

1 question; any demonstrated impairment of service or increase of
2 cost to consumers of the retail public utility remaining after the
3 decertification; the impact on future revenues lost from existing
4 customers [~~and expenses of the retail public utility~~]; necessary
5 and reasonable legal expenses and professional fees; factors
6 relevant to maintaining the current financial integrity of the
7 retail public utility; and other relevant factors. The commission
8 shall adopt rules governing the evaluation of these factors.

9 (g-1) If the retail public utilities cannot agree on an
10 independent appraiser within 10 calendar days after the date on
11 which the retail public utility notifies the commission of its
12 intent to provide service to the decertified area, each retail
13 public utility shall engage its own appraiser at its own expense,
14 and each appraisal shall be submitted to the commission within 60
15 calendar days. After receiving the appraisals, the commission
16 shall appoint a third appraiser who shall make a determination of
17 the compensation within 30 days. The determination may not be less
18 than the lower appraisal or more than the higher appraisal. Each
19 retail public utility shall pay half the cost of the third
20 appraisal.

21 SECTION 10. Section 13.255, Water Code, is amended by
22 amending Subsection (g) and by adding Subsection (g-1) to read as
23 follows:

24 (g) For the purpose of implementing this section, the value
25 of real property owned and utilized by the retail public utility for
26 its facilities shall be determined according to the standards set
27 forth in Chapter 21, Property Code, governing actions in eminent

1 domain; the value of personal property shall be determined
2 according to the factors in this subsection. The factors ensuring
3 that the compensation to a retail public utility [~~for the taking,~~
4 ~~damaging, and/or loss of personal property, including the retail~~
5 ~~public utility's business,~~] is just and adequate, shall, at a
6 minimum, include: impact on the existing indebtedness of the
7 retail public utility and its ability to repay that debt, the value
8 of the service facilities of the retail public utility located
9 within the area in question, the amount of any expenditures for
10 planning, design, or construction of service facilities outside the
11 incorporated or annexed area that are allocable to service to the
12 area in question, the amount of the retail public utility's
13 contractual obligations allocable to the area in question, any
14 demonstrated impairment of service or increase of cost to consumers
15 of the retail public utility remaining after the single
16 certification, the impact on future revenues lost from existing
17 customers [~~and expenses of the retail public utility~~], necessary
18 and reasonable legal expenses and professional fees, factors
19 relevant to maintaining the current financial integrity of the
20 retail public utility, and other relevant factors.

21 (g-1) The commission shall adopt rules governing the
22 evaluation of the factors to be considered in determining the
23 monetary compensation under Subsection (g). The commission by rule
24 shall adopt procedures to ensure that the total compensation to be
25 paid to a retail public utility under Subsection (g) is determined
26 not later than the 90th calendar day after the date on which the
27 commission determines that the municipality's application is

1 administratively complete.

2 SECTION 11. Subchapter G, Chapter 13, Water Code, is
3 amended by adding Section 13.2551 to read as follows:

4 Sec. 13.2551. COMPLETION OF DECERTIFICATION. (a) As a
5 condition to revocation or single certification under Section
6 13.254 or 13.255, and on request by an affected retail public
7 utility, the commission may order:

8 (1) the retail public utility seeking to provide
9 service to a decertified area to serve the entire service area of
10 the retail public utility that is being partially decertified; and

11 (2) the transfer of the entire certificate of public
12 convenience and necessity of a partially decertified retail public
13 utility to the retail public utility seeking to provide service to
14 the decertified area.

15 (b) The commission shall order service to the entire area
16 under Subsection (a) if the commission finds that the decertified
17 retail public utility will be unable to provide continuous and
18 adequate service at an affordable cost to the remaining customers.

19 (c) The commission shall require the retail public utility
20 seeking to provide service to the decertified area to provide
21 continuous and adequate service to the remaining customers at a
22 cost comparable to the cost of that service to its other customers
23 and shall establish the terms under which the service must be
24 provided. The terms may include:

25 (1) transferring debt and other contract obligations;
26 (2) transferring real and personal property;
27 (3) limiting costs to affected customers for transfer

1 of service;

2 (4) establishing rates for affected customers during
3 specified times; and

4 (5) other provisions necessary for the just and
5 reasonable allocation of assets and liabilities.

6 SECTION 12. Section 13.257, Water Code, is amended by
7 amending Subsections (a) and (b) and adding Subsections (r) and (s)
8 to read as follows:

9 (a) In this section, "utility service provider" means a
10 retail public utility~~[, a water supply or sewer service~~
11 ~~corporation, or a special utility district organized and operating~~
12 ~~under Chapter 65]~~.

13 (b) If a person proposes to sell or convey ~~[unimproved]~~ real
14 property located in a certificated service area of a utility
15 service provider, the person must give to the purchaser written
16 notice as prescribed by this section. An executory contract for the
17 purchase and sale of real property that has a performance period of
18 more than six months is considered a sale of real property under
19 this section.

20 (r) A utility service provider shall:

21 (1) record in the real property records of each county
22 in which the service area or a portion of the service area is
23 located a certified copy of the map of the certificate of public
24 convenience and necessity and of any amendment to the certificate
25 as contained in the commission's records, and a boundary
26 description of the service area by:

27 (A) a metes and bounds survey certified by a

1 licensed state land surveyor or a registered professional land
2 surveyor;

3 (B) the Texas State Plane Coordinate System;

4 (C) verifiable landmarks, including a road,
5 creek, or railroad line; or

6 (D) if a recorded plat of the area exists, lot and
7 block number; and

8 (2) submit to the executive director evidence of the
9 recording.

10 (s) Each county shall accept and file in its real property
11 records a utility service provider's map presented to the county
12 clerk under this section. The recording required by this section
13 must be completed not later than the 31st day after the date a
14 utility service provider receives a final order from the commission
15 granting an application for a new certificate or for an amendment to
16 a certificate that results in a change in the utility service
17 provider's service area.

18 SECTION 13. The following provisions of the Water Code are
19 repealed:

20 (1) Section 13.254(h); and

21 (2) Section 13.2541.

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

26 SECTION 15. The changes in law made by this Act apply only
27 to:

1 (1) an application for a certificate of public
2 convenience and necessity or for an amendment to a certificate of
3 public convenience and necessity submitted to the Texas Commission
4 on Environmental Quality on or after January 1, 2006; and

5 (2) a proceeding to amend or revoke a certificate of
6 public convenience and necessity initiated on or after January 1,
7 2006.

8 SECTION 16. This Act takes effect September 1, 2005.