CERTIFICATES OF CONVENIENCE AND NECESSITY:
THE BASICS AND RECENT DEVELOPMENTS

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CHAPTER 15

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- **Unique Water Rights Permitting Issues** (UTCLE Texas Water Law Institute, 2007)
- **Petitions for Expedited Release – How Are Incumbent Utilities Responding?** (Texas Water Law Institute, 2006)
- **Selected Texas Water Quality and TPDES Permit Issues** (CLE International 13th Annual Conference Texas Water Law, 2003)
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CERTIFICATES OF CONVENIENCE AND NECESSITY: THE BASICS AND RECENT DEVELOPMENTS

I. INTRODUCTION.

Certain retail public utilities are required to obtain a certificate of convenience and necessity (CCN) before they may provide retail water or sewer service. A CCN is a permit issued by the Texas Commission on Environmental Quality (TCEQ) that authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer service to a specified geographic area.¹

This paper discusses some of the basics pertaining to obtaining and amending CCNs, addresses some special matters involving maintaining and providing service to CCNs, and then looks at recent developments impacting CCNs, including how the “expedited release” process has been used since its creation in 2005, and legislation filed during the 2009 Legislative Session that could impact retail public utilities and CCNs.

II. BASICS OF OBTAINING AND AMENDING CCNS.

Typically, a retail public utility with a CCN is the sole, monopoly water or sewer service provider in the territory covered by the CCN, although in some instances, the service areas of two CCNs may overlap, allowing two utilities to serve the same territory (known as “dual certification”). Some entities, such as municipalities and water districts, are not required to obtain CCNs to provide service, but they may choose to do so in order to protect their service areas from encroachment by other retail public utilities.

A. Obtaining a CCN.

To obtain a CCN, a retail public utility must file an application with the TCEQ.² Notice of the application and the opportunity to request a hearing must be provided.³ If no hearing is requested, the Executive Director of the TCEQ may, but is not required to, grant the proposed CCN without a hearing.⁴ If a hearing is requested, then any person affected by the application may intervene at the hearing.⁵ “Affected persons” include current customers of the utility, if any; landowners whose property is within the area to be certificated; and any retail public utility that would be affected by the TCEQ’s actions, such as adjacent or competing utilities.⁶ The burden of proof at the hearing is on the entity seeking the CCN.⁷

In determining whether to grant or amend a CCN, the TCEQ must ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.⁸ For water utility service, the applicant must have access to an adequate supply of water and must be capable of providing drinking water that meets both the requirements of Health and Safety Code Chapter 341, and the Water Code.⁹ It is not required that the applicant itself owns the facilities; it is sufficient that the applicant demonstrate it has the capability to provide water service through contracts and interlocal agreements.¹⁰

The TCEQ may grant or amend a CCN only after finding that the CCN or amendment is necessary for the service, accommodation, convenience, or safety of the public.¹¹ If a CCN application is uncontested or if all protests are withdrawn, the Executive Director may act on the application on behalf of the TCEQ.¹² An applicant or other person wishing to overturn the Executive Director’s decision must file a motion to overturn the decision within 23 days (or up to 90 days by written order of the TCEQ or its general counsel upon agreement or motion of the parties) after the TCEQ mails notice of the Executive Director’s action.¹³

If the CCN application is protested, it is sent to the State Office of Administrative Hearings (SOAH) for a preliminary hearing conducted by an administrative law judge. If the parties cannot reach an agreement at the preliminary hearing, the judge will hold an evidentiary hearing. Afterwards, the judge issues a proposal for decision, which is submitted to the TCEQ commissioners for formal consideration.

¹ 30 Tex. Admin. Code § 291.3(10).
² Id. § 291.105
³ Id. § 291.106.
⁴ Id. § 291.107.
⁶ Id. § 13.002(1).
¹¹ 30 Tex. Admin. Code § 291.102(c).
¹² Id. § 291.107(c).
¹³ Id. § 50.139(b), (e).
The TCEQ commissioners then approve, deny, or modify the proposal for decision. A party that is unsatisfied with the commissioners’ decision may file a motion for rehearing with the agency. If the motion is granted, the application may be returned to SOAH to take additional evidence. If the motion is not granted, the decision may be appealed to district court.

B. Regionalization.

To obtain a CCN for an area that would require the construction of a physically separate water and sewer system, an applicant must first demonstrate that regionalization is not economically feasible.14 Regionalization is the consolidation of operations and/or physical systems of two or more existing or proposed water or domestic wastewater systems to achieve the best service at rates which will ensure that the system is maintained for the long term. The TCEQ is required by the Texas Health and Safety Code to encourage and promote the development and use of regional and areawide drinking water supply systems.15

To implement these requirements, the TCEQ has adopted rules that require applicants for new CCNs and for CCN amendments to provide notice to all cities and neighboring retail public utilities providing the same utility service within five miles of the proposed CCN boundary for a new CCN and within two miles of the proposed boundary for a CCN amendment.16 In addition, the applicant must list all the public drinking water systems within a two-mile radius, submit copies of written requests for service and the responses, and explain why connecting to neighboring facilities is not economically feasible.17 Even if an entity is not required to obtain a CCN, it is still required to satisfy the TCEQ’s regionalization requirements in order to operate as a public water system.18

The TCEQ’s policy is that regionalization is feasible unless: (1) no other systems are reasonably close to the proposed system; (2) requests for service from neighboring systems have been denied; or (3) an exception applies based on costs, affordable rates, and financial, managerial, and technical capabilities of the existing system.19

C. Decertification of CCNs.

Acquiring a CCN does not protect the CCN holder from later decertification of all or part of the territory covered by the CCN. Challenges to a CCN can come from various directions. The TCEQ can revoke or amend a CCN if it makes one of the following four findings:

- The CCN holder is not providing continuous and adequate service to all or part of the area covered by the CCN, as required by Section 13.250, Texas Water Code;
- In counties with certain economically distressed areas, the cost of providing service by the CCN holder is so prohibitively expensive as to constitute denial of service;
- The CCN holder has agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its CCN; or
- The CCN holder has failed to file a cease and desist action within 180 days of becoming aware that another retail public utility was providing service within its service area.20

The TCEQ may make findings relevant to decertification on its own motion; however, decertification is most often used by other retail public utilities seeking to obtain a CCN for territory that is already certificated to another retail public utility.

CCNs may also be decertified through the “expedited release” process, discussed in Section IV below, which allows developers of large tracts of property to petition the TCEQ to have their property removed from a CCN.21 Decertification may also occur when cities annex part of the territory in a CCN held by a non-profit water supply corporation, special utility district or fresh water supply district and then effectively “condemn” the CCN and facilities. A city may take the annexed area for itself, with or without the consent of the incumbent utility, but must pay compensation to the CCN holder.22

III. MAINTAINING AND PROVIDING SERVICE TO CCNs.

Separate from obtaining or amending a CCN, several issues arise in maintaining and providing service to a CCN. Some of these issues are discussed below, including the ability to extend service outside the boundaries of a CCN, modifying CCN boundaries

17 Id. § 291.102(b).
18 Id. § 290.39(c).
21 Id. § 13.254(a-1).
22 Id. § 13.255.
by contractual agreement between retail public utilities, transferring and cancelling CCNs, and obtaining cease and desist orders to prevent others from serving within the CCN area. Also discussed are protections from encroachment afforded to retail public utilities with federal debt, and the extent to which providers of retail water service must also provide fireflows.

A. Providing retail water utility service outside the boundaries of a CCN.

Certain entities, including investor-owned utilities (IOUs) and water supply or sewer service corporations (WSCs), cannot render retail water or sewer utility service in any way unless they obtain a CCN.23 Further, once a CCN has been obtained, these entities may extend service outside their CCN to territory contiguous to that already served, so long as the point of ultimate use is within one-quarter mile of the CCN area and not receiving similar service from another retail public utility.24 Municipalities and districts are not generally required to obtain a CCN, although they may choose to do so to protect their service areas and investment in facilities and customers. Regardless of whether a retail public utility is generally required to obtain a CCN for service, all retail public utilities, with few exceptions, must obtain a CCN in order to provide service to an area where another retail public utility is already lawfully furnishing service.

The absence of CCN protection can be significant. If a retail public utility that is not required to obtain a CCN serves an area without a CCN, it will not benefit from the protections a CCN can afford. For instance, a municipality serving outside its corporate limits without a CCN could lose customers due to competition from other nearby retail public utilities. Special utility districts (SUDs) especially should carefully consider whether to provide service to areas without obtaining a CCN. Unlike a municipal utility district, which generally must be annexed by a municipality as a whole, the service area of a SUD may be annexed piecemeal.25 As a result, a SUD without a CCN is particularly vulnerable to a neighboring municipality chipping away at the SUD’s service territory and associated customers.

B. Contractual agreements.

The territory covered by a CCN may be altered through contractual agreement. Retail public utilities are authorized to enter into contracts with each other to designate the areas and customers they will serve. Such contracts, when approved by the TCEQ, are valid and enforceable and are incorporated into the appropriate CCN records of the TCEQ.26 To obtain TCEQ approval, the retail public utilities must file a written request complying with 30 Tex. Admin. Code § 291.117(b), and the agency will issue notice of the agreement prior to taking action to approve the terms.

C. Transfers and cancellations of CCNs.

Methods also exist for transferring or cancelling a CCN. One way a retail public utility can transfer all or part of a CCN is by entering into a contractual agreement with another retail public utility, as discussed above. In addition, utilities and water supply corporations may sell, assign or lease their CCNs or any rights obtained under their CCNs, contingent upon the TCEQ first determining that the purchaser, assignee, or lessee is capable of rendering adequate and continuous service to every consumer within the certified area.27

A utility or WSC is required to notify the TCEQ at least 120 days prior to the date of a proposed sale, acquisition, lease, rental or merger of a water or sewer system. A transaction which is subject to this notice requirement, and which is not completed pursuant to the provisions of the Water Code is void.28 A person purchasing or acquiring a water or sewer system must demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to both the requested area and any areas currently certificated to the entity. If the person cannot, the TCEQ may require that a bond or other financial assurance be provided. The TCEQ is required to investigate the proposed transaction to determine whether it will serve the public interest.

D. Cease and Desist Orders.

A retail public utility may seek a cease and desist order from the TCEQ to protect its infrastructure and service area from competing retail public utilities. Specifically, the TCEQ may issue a cease and desist order if “a retail public utility in constructing or extending a line, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other retail public utility, or furnishes, makes available, renders, or extends retail water or sewer utility service to any portion of the service area of another retail public utility that has been granted or is not required to possess a [CCN].”29 A cease and

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23 Id. § 13.242(a).
24 Id. § 13.243(1).
25 See Tex. Loc. Gov’t Code § 43.071(e)(3).
27 Id. § 13.251.
desist order may prohibit the construction, extension, or provision of service or may prescribe terms and conditions for providing service or for locating the line, plant, or system affected.

In some circumstances, a CCN holder will be required to seek a cease and desist order to protect its service area. If a CCN holder becomes aware that another retail public utility is providing service within its service area, the CCN holder has 180 days in which to seek a cease and desist order from the TCEQ or else it risks the amendment or revocation of its CCN.30

E. Federal Debt Protection.

Many rural water systems, including water supply corporations and special utility districts, as well as some small cities, are indebted to the U.S. Department of Agriculture, Rural Development (USDA RD) (formerly the Farmers Home Administration (FmHA)) through loans made pursuant to 7 U.S.C. § 1926. The CCN areas of these federally indebted utilities, along with most other assets of the utility, are subject to a federal lien imposed to ensure repayment of the debt. The effect of the lien is to accord federal protection to the CCN area from encroachment by competing utilities.31 This federal protection is sometimes at odds with Texas Water Code provisions, such as Section 13.255, which would otherwise permit a municipality to annex an area, pay compensation to the existing water provider, and acquire single certification of the area.

Section 1926(b) is clear and unambiguous as to the protection afforded the federally indebted utility:

The service provided or made available through any [indebted 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, or by the granting of any private franchise for similar service within such area during the term of such loan. . .

Disputes involving Section 1926(b) typically involve the issue of whether the federally indebted rural utility has “made service available” to the area in question. In cases outside of Texas, where there may be no certificated service right by state law, the issue of whether service is “available” is a factual determination that considers whether the utility has “pipes in the ground” or the ability to serve the subject area within a reasonable period of time. Because a CCN obligates a utility in Texas to render continuous and adequate service to every customer within the CCN area, the Fifth Circuit has held that this state law duty is the legal equivalent of “making service available.”32 In Texas, a federally indebted utility protects its entire CCN area from encroachment.

F. Role of “fireflow” capabilities.

As rural areas have become increasingly urbanized, a growing concern has been the provision of water service of sufficient quantity and pressure to adequately fight fires, known as “fireflow.” Texas Water Code chapter 13 does not mandate fireflow as a condition for holding a CCN. Retail water service is defined merely as “potable water service . . . provided by a retail public utility to the ultimate consumer for compensation.” Tex. Water Code § 13.002(20). This definition does not encompass fireflow, as the TCEQ made clear in its rulemaking following House Bill 2876 (2005): “The commission does not have statutory authority to require CCN holders to have the ability to provide fireflows.”33 This rulemaking concerned factors to be evaluated in deciding whether to grant a CCN in the first instance. It is unclear how the TCEQ would decide this issue in the event of a petition for expedited release from an existing CCN if the developer claims that “the level and manner of service” identified at section 13.254(a-1)(1)(C) requires fireflow for a proposed high-density urban development and the incumbent utility refuses to provide the service.

IV. EXPEDITED RELEASE.

A. Background.

One area in which there have been significant recent developments related to CCNs is in the use of the “expedited release” process established by the Texas Legislature in 2005 through House Bill 2876 (“HB 2876”), which was enacted to remedy certain perceived abuses in the CCN process.34 HB 2876 added Section 13.254(a-1) to the Texas Water Code, which authorizes a landowner with at least 50 acres that is not in a platted subdivision and not currently receiving water or sewer service to petition the TCEQ for expedited release of the land from a retail public utility’s CCN area so that the land may receive service.

32 North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 915 (5th Cir. 1995), cert. denied, 519 U.S. 1029 (1996).

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from another retail public utility.35

To use this provision, the landowner must first make a request for service to the incumbent utility, which then has 90 days in which to respond. The landowner may file a petition for expedited release if the incumbent utility: (1) refuses to provide service; (2) is not capable of providing adequate service within the timeframe, at the level, or in the manner reasonably requested by the landowner; or (3) conditions the provision of service on a payment of costs not properly allocable directly to the petitioner’s service request.36 In addition, the petitioner must demonstrate that an alternate retail public utility from which the petitioner will be requesting service is capable of providing continuous and adequate service within the timeframe, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area.

After a petition for expedited release is deemed administratively complete, the TCEQ must grant the petition within 90 days unless it finds that the petitioner has failed to satisfy the elements required by statute. If a petition is granted, the process then moves to valuation and compensation, if any, to the incumbent utility.37 A party aggrieved by the decision of the TCEQ on an expedited release petition (whether the landowner or the incumbent utility) only has a right to seek reconsideration of the action within the agency but may not appeal the decision to district court.38

B. Recent Developments.

Since its passage in 2005, the expedited release process has been completed four times, with three petitions being granted and one petition denied. Many other petitions have been returned during administrative review as incomplete or withdrawn by the petitioner. The four petitions that made it through the process, which are discussed below, provide some insight into how the TCEQ is deciding requests for expedited release.

1. Petition of Double Diamond, Inc. for Release from the CCN of Northwest Grayson County WCID No. 1.

The first petition to complete the expedited release process was filed December 13, 2006, by Double Diamond, Inc. (DDI), which sought to decertify a portion of the retail water CCN held by Northwest Grayson County Water Control and Improvement District No. 1. Prior to filing the petition, DDI had requested water service from North Grayson for a residential resort community that DDI planned to construct in five phases.39 The area of the development was located outside North Grayson’s district boundaries, but within its CCN. North Grayson responded to DDI’s request for service and provided cost estimates, which DDI found unacceptable.

DDI filed a petition for expedited release, alleging that North Grayson did not have sufficient capacity to provide continuous and adequate water service within the timeframe, at the level, or in the manner reasonably needed or requested, and that North Grayson had conditioned service on the payment of costs not properly allocable directly to DDI’s request.

The parties abated the TCEQ processing of the petition in an effort to mediate their differences, which was unsuccessful. The Executive Director ultimately denied DDI’s petition, asserting that “DDI did not provide the district with an accurate timeline for which water service would be needed.” After DDI had filed its petition, it amended its timeline and submitted plans to the TCEQ for a water plant that varied from the level and manner of service it had requested of North Grayson.

The Executive Director determined that DDI did not show that North Grayson could not meet DDI’s revised needs, and that because North Grayson had not had an opportunity to revise its original estimate to account for the new timeline, DDI did not demonstrate that North Grayson had conditioned service on the payment of costs not properly allocable to DDI’s request. The TCEQ also found that DDI had failed to show that its proposed alternate retail provider was capable of providing service at the level DDI had requested of North Grayson.

2. Petition of Kerala Christian Adult Homes 1, L.P. for Release from the CCN of BHP WSC

The first successful petition for expedited release


38 See id. § 13.254(a-4).

39 In the matter of the Petition from Double Diamond, Inc. for an Expedited Release from Water Certificate of Convenience and Necessity (CCN) No. 12362 of Northwest Grayson County WCID No. 1 in Grayson County; Application No. 35564-C (TCEQ Order Issued July 23, 2007).
was filed by Kerala Christian Adult Homes 1, L.P., which sought to decertify a portion of the retail water CCN held by the BHP Water Supply Corporation. Kerala had requested water service from BHP for an approximately 432-acre tract on which it planned to construct a residential subdivision. BHP responded to the request that it was able to provide water service, but that it would require certain improvements to its water system, including the construction of an elevated water storage tank, and that additional capacity would need to be purchased from the City of Royse City, which supplies BHP with water.

Kerala petitioned the TCEQ for an expedited release. Beyond providing notice to BHP that Kerala had filed its petition, Kerala did not copy BHP on later correspondence with the Executive Director’s staff. The Executive Director issued an order granting Kerala’s expedited release.

BHP filed a motion to overturn the order on the basis that BHP was denied due process because it was not included in several communications between Kerala and the Executive Director’s staff, that such communications were improper ex parte communications, and that Kerala had failed to demonstrate any of the statutory criteria for granting a petition for expedited release.

In response to BHP’s motion, the Executive Director asserted that BHP was not denied the opportunity to participate in the decision process because BHP was never denied access to the file maintained by the Executive Director’s staff, and that ex parte communications had not occurred because the communications were not with the decision maker—in this case, the Executive Director—but rather were with his staff. BHP’s motion to overturn was overruled by operation of law, and never heard by the TCEQ commissioners.

3. Petition of Jona Acquisition, Inc. for Release from the CCN of Creedmoor-Maha WSC.

Another successful petition for expedited release was filed by Jona Acquisition, Inc., which petitioned for decertification of its property from the CCN of the Creedmoor-Maha Water Supply Corporation. Jona had requested water service from Creedmoor sufficient to serve 10,300 living unit equivalents, but according to Jona’s petition, Creedmoor did not have sufficient existing capacity to meet Jona’s needs and had no binding commitments to secure new water supplies.

Creedmoor responded to Jona’s petition by filing a short “motion for summary judgment and dismissal” asserting that (i) Creedmoor was entitled to protection from the involuntary modification of its CCN under 7 U.S.C. § 1926(b) due to the existence of outstanding loans from the U.S. Department of Agriculture, Rural Development, and (ii) Jona was not a “qualified applicant” for service because it had not met all of Creedmoor’s requirements for extending non-standard service.

The TCEQ responded by letter to Creedmoor’s motion for summary judgment and dismissal stating that the provision under which Jona applied for decertification of its property does not provide for a contested case hearing, but rather contemplates processing such applications administratively. Under Section 13.254(a-1), the incumbent utility’s role is “to controvert information submitted by the petitioner.” The agency’s letter concluded that the TCEQ “cannot act on your motion, but we will consider it for purposes of determining whether it controverts the information provided by the petitioner.”

Ultimately, the Executive Director of the TCEQ granted Jona’s petition for expedited release. Creedmoor filed a motion to overturn the Executive Director’s order, but the TCEQ did not act on it and the motion was overruled by operation of law. Creedmoor has since filed an appeal in Travis County district court seeking a reversal of the TCEQ’s final order, asserting the same two grounds included in the motion for summary judgment and dismissal it filed with the TCEQ. The appeal is currently pending.

4. Petition of Davis-McCrary Property Trust for Release from CCN of Forest Glen Utility Co.

The most recent successful petition for expedited release was filed by Davis-McCrary Property Trust, which was seeking decertification of its property from the CCN of the Forest Glen Utility Co., an investor-

40 Petition from Kerala Christian Adult Homes 1, L.P. for an Expedited Release from Water Certificate of Convenience and Necessity No. 10064 of BHP Water Supply Corporation (WSC) in Collin County; Application No. 35724-C (TCEQ Order Issued September 17, 2007).

41 Petition from Jona Acquisition, Inc. for an Expedited Release from Water Certificate of Convenience and Necessity (CCN) No. 11029 of Creedmoor-Maha Water Supply Corporation (WSC) in Travis County, Texas; Application No. 36051-D (TCEQ Order Issued August 5, 2008).


owned utility company. Davis-McCrary planned to develop an 883-acre tract, 206 acres of which were within the Forest Glen service area and the remainder of which were within the San Antonio Water System (SAWS) service area. Davis-McCrary sent a request for water service to Forest Glen for the 206 acres.

Approximately eight months later, Davis-McCrary filed a petition for expedited release, stating that Forest Glen had not responded to its request for service and that the lack of a response constituted a refusal to serve. It supported this assertion by citing Section 291.85(b) of the TCEQ’s rules, which states that, except for good cause, the failure to provide service within 180 days of the date a completed application was accepted may constitute refusal to serve. Forest Glen responded that there had been ongoing communications with Davis-McCrary and that Davis-McCrary failed to show Forest Glen had refused service because it had never affirmatively refused to provide service.

Whether there had been a response from Forest Glen presented a factual issue for the Executive Director. To support their positions, the parties supplemented their original filings with additional factual information, including affidavits from the individuals involved and copies of correspondence. The Executive Director ultimately granted Davis-McCrary’s petition, and Forest Glen filed a motion to overturn the Executive Director’s order, which was pending as of the date of this paper.

C. Compensation

Once an area is decertified through expedited release, the new retail public utility may not begin service in that area without first providing compensation to the incumbent utility for any property the TCEQ determines is rendered useless or valueless. The value of real property owned and utilized by the retail public utility for its facilities is determined using the standards governing actions in eminent domain, while the value of personal property is determined by analyzing certain factors listed in the statute. These factors include:

1. the amount of debt allocable to the lost service area;
2. the value of service facilities in the area;
3. the amount expended by the affected retail utility on planning, design and construction preparatory to service to the area;
4. the amount of any contractual obligations, such as take-or-pay contracts, allocable to the area; any impairment of services or increase in cost to remaining customers;
5. the loss of future revenues from existing customers that are transferred to the acquiring retail utility;
6. legal and other professional fees incurred by the affected retail utility; and
7. other relevant factors.

If the two retail public utilities agree on an independent appraiser, then the compensation amount determined by that appraiser is binding on the TCEQ. If they cannot agree, each must engage its own appraiser at its own expense, and each appraisal must be submitted to the TCEQ. After receiving the appraisals, the TCEQ appoints a third appraiser to make a determination of the compensation, which may not be less than the lower appraisal or more than the higher appraisal.

In the Kerala case discussed above, the two retail public utilities did not agree on an appraiser. The appraisal of Kerala’s alternate provider valued BHP’s loss at $0 because there were no facilities or customers in the area decertified, whereas BHP valued the loss at approximately $300,000. Despite the lack of facilities and customers in the area, the third appraiser valued the area at $63,848.00, concluding that there were debt obligations, expenditures for planning, design and construction, and legal and professional fees allocated to the area. Based on the Executive Director’s recommendation, the TCEQ commissioners adjusted this amount downward to subtract $6,500 paid by BHP for its initial appraisal of the area, resulting in final compensation to BHP of $57,348. As the first expedited release case where valuation was determined by the TCEQ, the Kerala case is likely to serve as a model for future valuations.

D. Practice Tips.

The availability of expedited release has changed the dynamics and the dialogue between CCN holders and landowners by putting incumbent utilities on notice that they need to be responsive to landowner concerns related to the cost and timing of providing retail water and sewer service to new developments.

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44 Petition from Davis-McCrary Property Trust for an Expedited Release from Water Certificate of Convenience and Necessity (CCN) No. 10668 of Forest Glen Utility Co., Inc., in Bexar County, Texas; Application No. 36186-C (TCEQ Order Issued Jan. 9, 2009).
48 Id. § 13.254(f).
49 Id. § 13.254(g-1).
Based on an analysis of the expedited release petitions the TCEQ has considered thus far, the following practice tips may be helpful for landowners considering filing expedited release petitions and for incumbent utilities trying to maintain their service areas.

1. Tips for Landowners.

- Prior to filing a petition for expedited release, the landowner will need to evaluate the advantages and disadvantages of receiving retail service from the incumbent utility.
- At the same time, the landowner will need to determine what alternative service providers are located in proximity to the land and will need to perform due diligence on those alternative providers, including an assessment of their cost of service and their ability to serve. While cost of service is often a major consideration, factors such as reliability, quality, and timing of service should also be important considerations.
- The landowner’s request for service should be complete and based on a realistic estimate of the timeframe, level and manner of service required, and should be on the same terms for which service would be requested from an alternate provider.

2. Tips for Incumbent Utilities.

- After a request for service is received, the incumbent utility should be sure to respond within 90 days. The utility’s response should expressly state whether or not service is being refused and should describe any system improvements that will be necessary.
- In responding to a petition for expedited release, the incumbent utility should describe and provide supporting evidence demonstrating how the petitioner has failed to satisfy the elements required in Section 13.254(a-1), and should otherwise provide information “to controvert information submitted by the petitioner.”
- The incumbent utility should independently monitor the status of the expedited release petition and any additional filings. In the Kerala case discussed above, the Petitioner failed to copy the incumbent utility on all correspondence with the Executive Director regarding the expedited release petition.

V. LEGISLATION.

To date, few bills have been filed during the 2009 Legislative Session addressing water utilities and CCNs. A brief summary of the bills that have been filed is provided below.

- SB 221 requires retail public utilities that are required to possess a CCN, and districts and affected counties that furnish retail water or sewer service, to incorporate and maintain on-site auxiliary generators capable of ensuring the operation of their water and sewer systems during an extended power outage.
- SB 717 prohibits utilities from charging the same rates among individual systems unless those systems are similar. Currently, a utility may be granted the ability to charge a universal rate even when some systems are of significantly less quality.
- SB 718 redefines how a utility may become the exclusive provider for an area. Currently, a landowner of 25 or more acres must actively decline to join a CCN within 30 days or become part of the area by default. All of those who own less than 25 acres would automatically be included in the proposed area. This bill would instead require the utility to get permission from those who own 10 or more acres to join the service area.
- SB 719 allows the TCEQ to set an interim water rate while a proposed rate is challenged. Under current law, a utility can charge its proposed rate before receiving a final ruling from TCEQ.
- SB 720 prohibits a water utility from charging users for legal fees incurred when a utility loses a rate challenge.
- HB 1295 requires for applications for a new or amended CCN that the TCEQ notify each county and groundwater conservation district included in the area to be certified.

VI. CONCLUSION.

CCNs provide a retail public utility with a monopoly over providing water and/or sewer service to a particular area. They are regulated by the TCEQ, which issues, modifies and decertifies CCNs and is often an important player in overseeing how service within a CCN is provided. With the enactment of HB 2876 in 2005, the Texas Legislature created the “expedited release” process, providing a method for certain landowners to remove their property from a CCN in order to receive service from an alternate provider. Now that four petitions for expedited release have completed the process, examples exist showing how the TCEQ is actually deciding requests for expedited release. During the current session, the Legislature may choose to make further changes
affecting CCNs and retail public utilities, although few such bills have been filed to date.