Expedited Release and Other Methods of CCN Decertification

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- Water and Environmental Legislative Update presented to the Austin Bar Association Administrative Law Section, June, 2009, Austin, Texas
- Securing Water Supplies for New Development presented to the Austin Bar Association Real Estate Law Section, November, 2008, Austin, Texas
- Unique Water Rights Permitting Issues (The University of Texas School of Law’s 2007 Texas Water Law Institute in Austin, Texas)
A. Introduction.

As urban development expands into more rural areas of the state, the retail water utilities serving those rural areas are vulnerable to having part of their retail water service area decertified in certain circumstances by large landowners (typically, developers) or nearby municipalities. One area in which there has been significant recent developments is in the use of the “expedited release” process established by the Texas Legislature in 2005 through House Bill 2876 (“HB 2876”), which authorizes certain landowners to petition the Texas Commission on Environmental Quality (TCEQ) to have their property removed from the existing retail water provider’s certificate of convenience and necessity (CCN). Decertification is also possible under Section 13.255 of the Texas Water Code, which authorizes a municipality that annexes land within the CCN of certain retail water providers to decertify the area and have certification of the area transferred to the municipality.

B. Expedited Release.

The expedited release process is set forth in Section 13.254(a-1) to the Water Code, which was enacted in 2005 to remedy certain perceived abuses in the CCN process. Section 13.254(a-1) 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 the incumbent retail public utility’s CCN area so that the land may receive service from another retail public utility.

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

1 The views and opinions stated in this paper are solely those of the authors and do not necessarily represent the views or opinions of Jackson Walker LLP or any of its clients.
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. 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. The evaluation of the petition and response by the CCN holder is conducted by TCEQ staff as an informal agency action without any opportunity for a contested case hearing. If a petition is granted, the process then moves to valuation and compensation, if any, to the incumbent utility. 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.

1. Recent Developments.

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

a. 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 Northwest Grayson for a residential resort community that DDI planned to construct in five phases. The area of the development was located outside Northwest Grayson’s district boundaries, but within its CCN. Northwest 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 Northwest 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 Northwest Grayson had conditioned service on the payment of costs not properly allocable directly to DDI’s request.

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5 Id. § 13.254(a-3).
6 See id. § 13.254(a-4).
7 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).
The parties abated the TCEQ processing of the petition in an effort to mediate their differences, which was unsuccessful. The Executive Director (ED) 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 Northwest Grayson.

The ED determined that DDI did not show that Northwest Grayson could not meet DDI’s revised needs, and that because Northwest Grayson had not had an opportunity to revise its original estimate to account for the new timeline, DDI did not demonstrate that Northwest 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 Northwest Grayson.

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

The first successful petition for expedited release 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 ED’s staff. The ED 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 ED’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 ED 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 ED’s staff, and that ex parte communications had not occurred because the communications were not with the decision maker—in this case, the ED—but rather were with his staff. BHP’s motion to overturn was overruled by operation of law, and never heard by the TCEQ commissioners.

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8 *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).*
c. 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.9 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.10 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 ED of the TCEQ granted Jona’s petition for expedited release. Creedmoor filed a motion to overturn the ED’s order, but the TCEQ did not act on it and the motion was overruled by operation of law. Creedmoor 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.11 The TCEQ and Jona filed pleas to the jurisdiction seeking to dismiss the case, each contending, that, among other things, the expedited release statute does not authorize an appeal to district court and that even if there were a right to appeal, Jona filed too late. Section 5.351 of the Water Code, which Creedmoor had cited as providing jurisdiction, requires that an affected person file suit within 30 days of the effective date of the agency’s decision. The ED granted Jona’s petition on August 5, 2008, which the TCEQ and Jona contended was the effective date of the TCEQ’s decision. Creedmoor’s motion to overturn was overruled by operation of law on November 4, 2008, and Jona filed its petition in district court on December 5, 2008. The district court granted the

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9 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).
TCEQ’s and Jona’s pleas to the jurisdiction without stating which ground it relied on, and the case was dismissed. An appeal has been filed and is pending with the Austin Court of Appeals.\(^\text{12}\)

d. **Petition of Jona Acquisition, Inc. for Release from Sewer CCN of Southland Regional Service Corporation.**

Jona also filed a successful expedited release petition to remove an approximately 584-acre tract of land from the sewer CCN of the Southland Regional Service Corporation. Jona’s tract of land comprised the vast majority of the Southland CCN area.\(^\text{13}\) However, according to Jona’s petition, Southland had been an inactive corporation since 1989 and had forfeited its corporate charter, and Jona’s written request for sewer service was returned as undeliverable. The Jona property is wholly surrounded by the City of Austin’s sewer CCN, and the City agreed to provide sewer service to the property. The TCEQ approved Jona’s petition.

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

A petition for expedited release was also filed by Davis-McCrary Property Trust, which was seeking decertification of its property from the CCN of the Forest Glen Utility Co., an investor-owned utility company.\(^\text{14}\) 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.\(^\text{15}\)

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 ED. To support their positions, the parties supplemented their original filings with additional factual information, including affidavits from the individuals involved and copies of correspondence.

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\(^{13}\) *Petition from Jona Acquisition, Inc. for an Expedited Release from Water Certificate of Convenience and Necessity (CCN) No. 20663 of Southland Regional Service Corp., in Travis County, Texas; Application No. 36303-D (TCEQ Order Issued June 15, 2009).*

\(^{14}\) *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).*

\(^{15}\) 30 Tex. Admin. Code § 291.85(b).
The ED ultimately granted Davis-McCrary’s petition. Forest Glen filed a motion to overturn the ED’s order, but it was overruled by operation of law.

2. 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. 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.

a. 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.

b. 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.

• The incumbent utility’s written response to a service request should be carefully prepared to ensure it properly charges costs that are specific to the applicant’s request and needs, without including extraneous costs, such as payment for facility oversizing to benefit other utility customers.

• 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 factual 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 ED regarding the expedited release petition.

C. Decertification Resulting from Municipal Annexation.

In addition to the expedited release process, in certain circumstances a retail public utility’s CCN may be decertified by a municipality that annexes part of the CCN. A municipality’s annexation of land within an existing CCN does not automatically affect the authority of the existing CCN holder to continue providing service to the area, however, if a municipality incorporates or annexes territory that is currently certificated to a water supply corporation, a special utility district, or a fresh water supply district, then the municipality has a couple of alternatives if it desires to be the retail water or sewer service provider for the area.

One option is to enter into an agreement with the incumbent utility, after annexation, to determine which entity will provide service to the annexed territory—the incumbent utility, a municipally owned utility, or a retail public utility that has been granted a franchise by the municipality (a “franchised utility”). The agreement may grant the exclusive right for one of these entities to serve all or part of the area (“single certification”) or may permit more than one entity to serve all or part of the area (“dual certification”). The agreement also may provide for the purchase of facilities or property. The executed agreement must be filed with the TCEQ, which will incorporate the terms of the agreement into the respective CCNs of the parties. No notice or hearing is required.

If an agreement cannot be reached, a mechanism similar to condemnation exists that allows a municipality to purchase the right to serve the annexed territory without the incumbent utility’s consent. Prior to providing service to the area, the municipality must file an application with the TCEQ seeking single certification of the area to a municipally owned utility or a franchised utility. The application may include a request to transfer specified property of the incumbent utility to the municipality. The TCEQ must grant the application for single certification unless the municipality fails to demonstrate compliance with the TCEQ’s minimum requirements for public drinking water systems. The municipality must pay adequate and just compensation, as determined by the TCEQ, to the incumbent utility for any property that is rendered useless or valueless or that will be transferred to the municipality. Any party that is aggrieved by the TCEQ’s final order may file an appeal in Travis County district court. Although the Water Code has authorized this process for at least 20 years, the authors are unaware of any municipality that has actually completed the process, and we have been unable to find any agency order granting a municipality’s application under this statute.

One limitation on a municipality’s ability to use Section 13.255 applies when a rural water system is indebted to the U.S. Department of Agriculture, Rural Development, under 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

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the lien is to accord federal protection to the CCN area from encroachment by competing utilities.\textsuperscript{19}

D.\hspace{1em}\textbf{Compensation.}

Once an area is decertified through expedited release or Section 13.255, 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.\textsuperscript{20} 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.\textsuperscript{21} 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.

The Jona/Southland expedited release petition presented a unique situation for compensation purposes because Southland was a defunct corporation with no facilities or customers. In that case, the TCEQ determined that the City of Austin, as the alternate provider, was not required to pay any compensation to Southland.

E.\hspace{1em}\textbf{Conclusion.}

Processes for decertification, such as expedited release, allow retail water providers to adapt to changes in the makeup of the community. Water providers located in rural areas that are experiencing strong population growth can expect that issues of decertification will arise. The creation of the expedited release process presents a relatively new method for obtaining decertification. However, examples of recent expedited release petitions now provide some

\textsuperscript{19} 7 U.S.C. § 1926(b); 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).

\textsuperscript{20} Tex. Water Code §§ 13.254(d), 13.255(c).

\textsuperscript{21} Tex. Water Code §§ 13.254(g), 13.255(g).
guidance on how the TCEQ will handle these requests. While rural providers are most likely to be affected by decertification, the compensation required by the Water Code may help offset the adverse impact of loss of a CCN area.